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**Aug 26 2024**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

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Case No. 2024-000562

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**JUSTIN SHAYNE FULMER,**

**Appellant,**

**v.**

**MELISSA EMERY BUCKHANNON, ESQ.  
FRAZIER LAW FIRM, P.C., SC HOUSE CALLS,  
INC., ANNA COGGESHALL, BRYAN  
COGGESHALL, KATHERINE COGGESHALL,  
LAUREN TRENT FULMER AND THOMAS  
BUCKHANNON,**

**Defendant,**

**Of Whom ANNA COGGESHALL is**

**Respondent.**

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FINAL BRIEF OF APPELLANT

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VON HERRMANN LAW FIRM

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**QUESTIONS PRESENTED**

- I. **DID THE TRIAL COURT ABUSE ITS DISCRETION OR ERR AS A MATTER OF LAW IN AWARDING ATTORNEY FEES TO RESPONDENT?**

## STATEMENT OF THE CASE

This matter is an appeal of an award of attorney fees ordered on April 1, 2024. This action commenced on October 21, 2021, when the Appellant, Justin Fulmer, filed an action for various causes of action. Respondent, Anna Coggeshall, filed an Answer and Counterclaims on December 1, 2021. Certain issues in this case, including the interpretation of the Homeland Security Act, were addressed by the South Carolina Court of Appeals in its Order dated September 2, 2022. **(R.p.1)**

Subsequently, Appellant dismissed his action against Respondent February 14, 2023.

This matter was tried before The Honorable William H. Seals, Jr. over four (4) days from November 27, 2023, to November 30, 2023. During the trial, the issue of attorney fees was raised before the jury by Respondent and her attorney on several occasions **(R. pp. 294-295)**. There was no limiting instruction given by the Court advising the jury that they were not to consider the attorney's fees in an award, if any, they may later deem appropriate. **(R. pp. 368-380)**.

The jury found that Appellant violated the Homeland Security Act and found for Respondent on the Intrusion of Privacy and Trespass to Chattels claims. **(R. p. 269)** They awarded Respondent \$25,214.79 in actual damages and \$50,000.00 in punitive damages. Judge Seals thereafter awarded Respondent attorney fees of \$72,750.00 by Order dated February 16, 2024. **(R. pp. 273-276)**

Appellant filed a Motion to Reconsider the Award of Attorney's Fees on February 29, 2024. **(R. pp. 277-283)** Appellant's motion was denied by Form 4 Order issued by The Honorable William H. Seals, Jr. on April 1, 2024. **(R. p. 287)** Thereafter, Appellant filed his Notice of Appeal on April 8, 2024. **(R. p. 290)**

The award of attorney's fees was based on affidavits attached to this Appeal. **(R. pp. 79-85; 88-124)** Attorney Abrams initially submitted his invoices for fees and costs to the Law Office of Richard G. Whiting. Mr. Abrams filed a Notice of Appearance on November 1, 2021, but then was designated as an expert in Respondent's discovery of May 4, 2022. He then produced to the Court an affidavit which contained time which was clearly spent working as an expert as so designated in discovery. **(R. pp. 79-85; 117-124, 373-378)**

Attorney Richard G. Whiting's affidavit included a request for payment for time that had already been denied by the Court of Appeals after hearing a matter in which the Court of Appeals exercised its original jurisdiction. **(R. pp. 88-124, 369-372) (R. p. 1)**

The Honorable Judge Seals ordered Attorney's Fees to each of the attorneys in an Order. **(R. pp. 273-276)** The Appellant properly and timely made a Motion to Reconsider the Award of Attorney's Fees. **(R. pp. 277-283)**

The Court issued a standard Rule 4 Order denying the Appellant's relief as sought. **(R. p. 287)** This Appeal results from the Appellant's assertion that the Court erred in the award and abusing its discretion, by declining to properly conduct an analysis of the allocation of attorney's fees properly.

The Appellant takes this appeal to address the issues raised in the Trial Court.

## ARGUMENT

### **I. THE TRIAL COURT ABUSED ITS DISCRETION OR ERRED AS A MATTER OF LAW IN AWARDING ATTORNEY FEES TO RESPONDENT.**

#### **A. THE ISSUE OF ATTORNEY FEES WAS ARGUED AND CONSIDERED BY THE JURY IN ITS AWARD OF DAMAGES. THUS, AN AWARD BY THE TRIAL COURT IS DUPLICATIVE.**

The trial court abused its discretion and erred as a matter of law in awarding Respondent attorney fees after that issue was submitted by Respondent during her testimony for the jury's consideration. **(R. pp. 294-295)**

"Attorney's fees are not recoverable unless authorized by contract or statute. *Blumberg v. Neelco, Inc.*, 310 S.C. 492, 427 S.E.2d 659 (1993)." *Jackson v. Speed*, 326 S.C. 289, 307 (S.C. 1997). While S.C. Code §17-30-135(A)(4) holds that a successful Plaintiff may recover reasonable attorney's fees and costs if that person's communications are intercepted under the civil cause of action as set forth in that Chapter, the question then becomes by whom those fees should be awarded- the jury or the Court. The law requires that Judges make this determination; however, multiple studies have shown that jurors do consider attorney fees in awarding damages even if those fees are not directly requested by the Plaintiff. See, Goodman, J., Greene, E., & Loftus, E. (1989). Runaway verdicts or reasoned determinations: Mock juror strategies in awarding damages. *Jurimetrics Journal*, 29, pp. 285-309. Diamond, S. & Vidmar, N. (2001). Jury room ruminations on forbidden topics. *Virginia Law Review*, 87, pp. 1857-1915. Mott, N., Hans, V. & Simpson, L. (2000). What's half a lung

worth? Civil jurors' accounts of their award decision making. *Law and Human Behavior*, 24, pp. 401-419.

During the trial of this matter, Respondent's counsel questioned Respondent before the jury as to the amount of attorney fees she had incurred as part of her damages. **(R. pp. 294-295.)** One such estimate presented to the jury was that the fees were in the hundreds of thousands of dollars. **(R. pp. 294-295)** One could only surmise that the jury then considered those amounts in its award of damages as this line of questioning and argument was repeated several times over. There was no jury instruction advising the jury that attorney fees could not be considered by them and, if appropriate, would be awarded by the Court. The jury was not advised that those "damages" would be inappropriate for them to consider. The Court correctly noted in its Award of Attorney Fees that the awarded attorney fees are "substantially close to the amount of the jury award. . ." This would indicate that the jury considered those attorney fees and awarded that amount to Plaintiff. The issue of attorney fees once presented to the jury was considered by the jury in conjunction with the remaining evidence and given the appropriate weight as reflected by their verdict. In this matter, Respondent received "two bites at the apple" regarding the attorney fees: once from the jury and then, secondly, from the Court. While South Carolina law recognizes that in certain situations attorney's fees are appropriate, it considers them as damages and thus the consideration by the jury would be inconsistent with the law. "The general rule is that attorney's fees are not recoverable unless authorized by contract or statute." *Seabrook Island Prop. Owners' Ass'n v. Berger*, 365 S.C. 234, 238, 616 S.E.2d 431, 434 (Ct. App. 2005).

If the award were to be made by the Court, the Court must determine the reasonable amount of attorney fees based upon the factors as set forth in *Glasscock v. Glasscock*, 304 S.C. 158, 403 S.E. 2d 313 (1991): 1) the nature, extent and difficulty of the case; 2) the time necessarily devoted to the case by counsel; 3) the professional standing of counsel; 4) the customary legal fees for similar services in the community; 5) the contingency of compensation; and 6) the beneficial results obtained. As set forth below, there are inconsistencies in the Respondent's attorneys' billing statements which were not properly considered by the trial court.

**B. RESPONDENT'S ATTORNEYS FAILED TO SUBMIT WRITTEN RETAINER/FEE AGREEMENTS BETWEEN ATTORNEYS AND CLIENT.**

Neither Mr. Abrams nor Mr. Whiting submitted a written fee agreement indicating that the Respondent contracted for their services, pursuant to Rule 1.5 "FEES" of the S.C. Rules of Professional Conduct. Without this documentation, the Court has no way to discern what charges the client is responsible for and if, for instance, travel time is billed at the regular hourly rate, a discount rate, or simply upon mileage. Does the fee agreement, if it exists, anticipate that both attorneys would be allowed to charge for dual appearance at proceedings? These questions are left unanswered, and the Court cannot surmise what the fee arrangement between Respondent and her attorneys might be in this regard. Further, Mr. Abrams served first as an expert and then as an attorney in this matter.

**C. RESPONDENT'S ATTORNEYS' FEE AFFIDAVITS LACK SPECIFICITY AS REQUIRED BY SOUTH CAROLINA CASELAW.**

South Carolina's appellate courts in *Johnson v. Johnson*, 288 S.C. 270, 277-78, 341 S.E.2d 811 (Ct. App 1986) and its progeny, set forth that "vague estimations of time and labor devoted to the case and extent of legal services rendered" will not withstand a challenge to an award of attorney fees. The affidavit and attached invoice must be sufficient enough such that a Court may apply the factors to be considered. In the case at hand, there are numerous entries which simply put forth conclusory statements of what time was billed and for what activity. The billing statements do not allow the Court to discern what time is allocated, for instance, to the Homeland Securities Act cause of action, for which attorney fees are recoverable, and the causes of action for Intrusion of Privacy and Trespass to Chattels, for which attorney fees are not recoverable. *Hawkins v. Multimedia, Inc.*, 288 S.C. 569, 344 S.E.2d 145 (1986). As the affidavits lack specificity, the attorney fees should be modified to that extent. The affidavit furthermore includes speculations or "guestimates" of time spent, and in no way attempted to quantify the actual time spent. Any time spent by Mr. Abrams as an expert should be removed from his affidavit of attorney fees. Based upon the foregoing, Appellant respectfully requests that the Court vacate the Award of Attorney Fees or, in the alternative, amended as set forth below.

**D. THE COURT OF APPEALS PREVIOUSLY DENIED RESPONDENT'S ATTORNEY FEES IN ITS ORDER DATED SEPTEMBER 2, 2022. NEVERTHELESS, RESPONDENT'S ATTORNEYS THEN RESUBMITTED THOSE CHARGES IN THEIR ATTORNEY FEE AFFIDAVITS TO THE TRIAL COURT.**

1. Court of Appeals-Mr. Abrams Fees: The Court of Appeals considered Mr. Abrams' attorney fee affidavit and invoices presented at the time of the

hearing before the Court of Appeals and denied those fees. Despite this, several of these same fees were resubmitted to the trial court to be considered in the trial court's fee award. Those fees are as follows:

- a. Bill for \$425.00- **(R. p. 122)**
- b. Bill for \$5,312.50- **(R. p. 123)**
- c. Bill for \$2,716.88- **(R. p. 124)**

These invoices total \$8,454.38 and were previously denied by the Court of Appeals in their Order dated September 2, 2022. **(R. pp. 1)**. Thus, any attorney fee award should be reduced after taking into account the Court's ordered hourly rate of \$250.00. Thus, the total award to Plaintiff would be reduced by **\$4,988.08**.

2. Court of Appeals-Whiting Fees: The Court of Appeals considered Mr. Whiting's attorney fee affidavit and invoices at the hearing before the Court of Appeals, and denied those fees. Despite this, these same fees were submitted to the trial court and considered in the trial court's fee award. **(R. p. 369-372)** Those fees are as follows:

- a. See attached bill for \$12,231.25- **(R. pp. 88-116)**

Mr. Whiting anticipated 8.0 hours @ \$3,000.00 in this bill but then ultimately submitted a 4.0 hour bill (\$1,700.00) on his affidavit to the trial court. Thus, invoices totaling \$10,931.25 were previously denied by the Court of Appeals in their Order dated September 2, 2022, but were, nevertheless, resubmitted to the trial court and awarded. **(R. pp. 88-116 and R. p. 369-372)** Again, any attorney fee award should be reduced by this amount.

3. Based upon the above, Appellant requests that the Court reduce the attorney fee award by \$19,385.63, adjusted by the \$250 hourly rate to **\$11,437.52**.

**E. THE ATTORNEY FEES BILLED FOR THE DEPOSITION OF JUSTIN FULMER DO NOT COMPORT WITH THE ACTUAL TIME SPENT- MR. ABRAMS BILLED 9 HOURS FOR A 1.08 HOUR DEPOSITION AND MR. WHITING BILLED 9.5 HOURS.**

1. Deposition Fees: Mr. Abrams submitted a bill for 9 hours for a deposition which took 1.08 hours, as is evidenced by the deposition transcript. If one were to estimate travel time at a generous 3.5 hours this should have resulted in 4.58 hours for a total fee of \$1,946.50; however, Mr. Abrams billed \$3,825.00. In addition, Appellant does not believe it is reasonable to charge a full billing rate to travel time. Appellant asserts the Court should reduce the award by a minimum of **\$1,878.50**.
2. Deposition Fees: Mr. Whiting billed 9.5 hours (\$4,037.50) for the same 1.08-hour deposition. This included 1.75 hours of prep and 7.75 hours allocated to the actual deposition. Again, presuming that he billed his full rate for travel time, this should result in a charge of \$2,766.75 (5.43 hours travel plus 1.08 hours deposition time). In addition to billing for the full hourly rate for travel time, Mr. Whiting charged an additional mileage charge of \$180.78. Appellant asserts this charge should be reduced to the actual time of the deposition, plus a

reasonable charge for travel resulting at least in a reduction of  
**\$1,270.75.**

3. Respondent chose to hire attorneys who did not reside in the county in which this action was brought. Defendant should not be responsible for the travel time incurred at the attorneys' full hourly rate and then charged an additional mileage fee.

**F. THE ATTORNEY FEES BILLED FOR THE DEPOSITION OF ANNA COGGESHALL DO NOT COMPORT WITH THE ACTUAL TIME SPENT- MR. ABRAMS BILLED 9 HOURS FOR A 3.7 HOUR DEPOSITION.**

Mr. Abrams submitted a bill for 9 hours for a deposition which took 2.7 hours as is evidenced by the deposition transcript. If one were to estimate travel time at a generous 3.2 hours this should have resulted in a total fee of \$2,890.00; however, Mr. Abrams billed \$3,825.00 for a difference of **\$935.00**. As previously stated, Appellant does not believe it is reasonable to charge a full billing rate for travel time. Appellant asserts the Court should reduce the award to reflect a reasonable billing rate for travel time. **(R. p. 120)**

**G. THE ATTORNEY FEES BILLED FOR MEDIATION DO NOT COMPORT WITH THE ACTUAL TIME SPENT.**

Mr. Abrams submitted a bill for eleven (11) hours for mediation; however, the mediation only took five (5) hours as is evidenced by the attached mediator's report. **(R. p. 86)**. Even if Mr. Abrams included a generous 3.5 hours for travel time, the billed time should have been 8.5 hours. This is the difference between a bill for \$4,675.00 vs \$3,612.50.

Appellant would request the Mr. Abram's fee award be reduced by the difference of \$1,062.50, adjusted to **\$626.88. (R. p. 120)**

Mr. Whiting submitted a bill for eleven (12) hours for mediation; however, the mediation only took five (5) hours as is evidenced by the attached mediator's report. Even if Mr. Whiting included a generous 5.43 hours for travel time, the billed time should have been 10.43 hours. This is the difference between a bill for \$5,100.00 and \$4,432.75. Mr. Whiting also charged \$180.78 in mileage on top of his hourly rate. Defendant would request that Mr. Whiting's fee award be reduced by the difference between \$5,280.78 to \$4,432.75. Provided that a fee agreement (if one exists) allows for both attorneys to bill for the same services, Appellant would request the award be reduced by \$848.03, adjusted to **\$500.34. (R. pp. 112)**

**H. THE AWARD OF ATTORNEY FEES MAY ONLY BE GRANTED UNDER THE  
HOMELAND SECURITIES ACT. NO ATTORNEY FEES MAY BE AWARDED FOR  
HOURLY RATE CHARGES RELATED TO THE INTRUSION OF PRIVACY OR  
TRESPASS TO CHATTELS ACTIONS.**

Respondent's attorneys' affidavits do not separate the hourly rate charges related to the action regarding the Homeland Security Act ( S.C. Code §17-30-10 et seq.) and the actions related to Intrusion of Privacy and Trespass to Chattels. The billing statements provide no mechanism for the Court to separate the time associated with the Homeland Security Act action and the Intrusion of Privacy and Trespass to Chattels actions, although it is clear from the transcript that a substantial portion of Respondent's case was directed toward the latter cause of action and that Respondent recovered under those causes of action. **(R. p. 269)**. The Court cannot assume that none of the fees submitted were generated in relation

to those causes of action and the attorney fee award must be adjusted accordingly, as the Respondent may only recover fees under the Homeland Security Act. Any award of attorney fees should be reduced by the hourly rate charges which the Court believes the attorneys allocated to the pursuit of actions other than the Homeland Securities Act action.

### CONCLUSION

The trial court's award of attorney fees was both an abuse of discretion and an error of law. Based upon the foregoing, Appellant respectfully requests that the Court vacate the Award of Attorney Fees or, in the alternative, amend and reduce the award by a minimum of **\$19,937.07, plus an adjustment for travel time**, as set forth hereinabove.

Respectfully submitted,

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