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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Courtney Clyburn Pope, Circuit Court Judge
Lexington County
Trial Court Case No. Case No. 2020-CP-32-04007

Appellate Case No. 2024-001585

Insurance Office of America, Inc. Respondent,

v.

1221 Bower, LLC Appellant.

FINAL REPLY BRIEF OF APPELLANT

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INTRODUCTION

Respondent Insurance Office of America, Inc. ("Respondent" or "IOA") attempts to obscure the clear legal error committed by the trial court in its attorneys' fee analysis by raising a host of procedural objections and sidestepping the substantive issues. However, this appeal centers on a foundational question of law: Did the trial court properly apply the *Blumberg* factors in determining an award of attorneys' fees? The answer is unequivocally no.

The trial court's Post-Trial Order evidences a fundamental misapplication of South Carolina law through its disproportionate reliance on a single factor—the "beneficial results obtained"—to the near exclusion of proper consideration of the remaining five factors articulated in *Blumberg v. Nealco, Inc.* This is precisely the type of error that the South Carolina Supreme Court reversed in *Baron Data Sys., Inc. v. Loter*, when it found that the Court of Appeals had improperly overemphasized the importance of the monetary judgment in determining a fee award. *Baron Data Sys., Inc. v. Loter,* 297 S.C. 382, 385, 377 S.E.2d 296, 297 (1989).

The trial court's 45% reduction of Appellant 1221 Bower, LLC's ("Appellant" or "Landlord") attorneys' fees was not merely an exercise of discretion; it was an error of law that warrants reversal. As demonstrated below, Respondent's counterarguments fail to address the substance of this error and instead rely on procedural technicalities and mischaracterizations of the record.

ARGUMENT

I. Appellant properly preserved its arguments for appellate review.

Respondent contends that Appellant failed to preserve its arguments for appellate review by not filing a Rule 59(e) motion to alter or amend the trial court's Post-Trial Order. (Initial Br. of Resp't. p. 6-7). This argument misinterprets the purpose of issue preservation rules and overlooks established South Carolina precedent on when such post-trial motions are necessary.

Under South Carolina law, a Rule 59(e) motion is not required to preserve an issue for appellate review when the issue has been properly raised to and ruled upon by the trial court. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (stating that parties need not use a "particular form of words" to preserve an issue and that "[w]hen the trial court rules on an issue before it, the losing party does not need to 'move to reconsider' in order to preserve the issue for appeal").

In this case, the issue of the proper application of the *Blumberg* factors was squarely presented to the trial court through Appellant's Motion for Attorney Fees and Costs, the accompanying Memorandum in Support and Affidavit, and by Appellant's counsel during the Post Trial Motion Hearing on March 4, 2024. *See* (ROA 0142-0148); (ROA 1213-1265). The trial court fully addressed—albeit erroneously—the *Blumberg* factors in its Order. *See* (ROA 0015-0027). Thus, there was no need for Appellant to file a Rule 59(e) motion merely to restate the same arguments that had already been presented and ruled upon.

Respondent's reliance on *I'On, L.L.C. v. Town of Mt. Pleasant,* is misplaced. *I'On* actually supports Appellant's position, as it notes that a losing party must both "present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues

and arguments." *I'On, L.L.C,* 338 S.C. at 422, 526 S.E.2d at 724 [*Emphasis added*]. Here, Appellant presented its arguments regarding the appropriate attorneys' fees award based on a consideration of the same six factors as established in *Blumberg*, and the trial court issued a ruling that explicitly addressed the six *Blumberg* factors. *See* (ROA 0142-0148); (ROA 1213-1265); (0015-0027). The issue is therefore preserved.

Furthermore, a Rule 59(e) motion would have been particularly inappropriate in this case because Appellant's challenge is not to the trial court's factual findings but to its legal error in applying the *Blumberg* factors. A Rule 59(e) motion is primarily designed to bring to the court's attention factual or legal matters that it may have overlooked, not to reargue the legal standard that the court explicitly considered and applied. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (holding that "a party *may* wish to file a Rule 59(e) motion when she believes that the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when the issue or argument has been raised, but not ruled on, in order to preserve it for appellate review."). When a court articulates the correct legal standard but applies it incorrectly, as occurred here, appellate review is the appropriate remedy.

Respondent's assertion that "Landlord did not cite *Blumberg* in its Motion for Attorney Fees, Memorandum in Support of Motion for Attorney Fees, or the Affidavit of Attorney's Fees and Costs" is irrelevant. (Initial Br. of Resp't. p. 7). Appellant's Memorandum in Support of Motion for Attorney Fees specifically stated and addressed each of the six *Blumberg* factors. Although Appellant did not specifically refer to them as the *Blumberg* factors, Appellant cited *Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997), which specifically states the six factors

for reasonable attorneys' fees as set forth in *Blumberg* and cites to *Blumberg*. (ROA 0143). Appellant also cited *Glasscock v. Glasscock*, 304 S.C. 158, 403 S.E.2d 313 (1991) which preceded *Blumberg* but also enumerated the same six factors that are to be considered when determining reasonable attorneys' fees. (ROA 0143). Regardless, Appellant's argument was clearly for reasonable attorneys' fees, which inherently invokes the *Blumberg* factors under South Carolina law. More importantly, the trial court explicitly applied the *Blumberg* factors in its Post-Trial Order, demonstrating that the legal framework was properly before the trial court regardless of whether Appellant specifically cited to *Blumberg* or any other case that quoted *Blumberg*.

Thus, Appellant's arguments regarding the trial court's application of the *Blumberg* factors are properly before this Court and should be addressed on their merits.

II. The Trial Court improperly weighed and applied the *Blumberg* factors, constituting an abuse of discretion.

The trial court abused its discretion when it improperly weighed and applied the *Blumberg* factors. In *Blumberg v. Nealco, Inc.*, the Supreme Court established that trial courts must consider six specific factors when determining an award of attorneys' fees: "(1) nature, extent, and difficulty of the legal services rendered; (2) time and labor devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) fee customarily charged in the locality for similar services; and (6) beneficial results obtained." *Blumberg* v. *Nealco*, *Inc*., 310 S.C. 492, 494, 427 S.E.2d 659, 660 (1993). Critically, the Supreme Court mandated that "the trial court must make specific findings of fact on the record for each factor to be considered." *Griffith v. Griffith*, 332 S.C. 630, 646, 506 S.E.2d 526, 534-535 (Ct. App. 1998) [*Emphasis added*].

A. The Trial Court improperly elevated the "beneficial results obtained" factor above all others.

The trial court committed reversible error by giving disproportionate weight to the "beneficial results obtained" factor while providing only cursory consideration to the remaining five *Blumberg* factors. This approach directly contravenes South Carolina law, which requires balanced consideration of all six factors.

South Carolina precedent explicitly prohibits elevating any single factor above the others. As the Supreme Court reaffirmed in *Taylor v. Medenica*, "consideration should be given to all six factors; none of the factors is controlling. *Taylor v. Medenica*, 331 S.C. 575, 580, 503 S.E.2d 458, 461 (1998). Yet, that is precisely what the trial court did here. A stark comparison of the trial court's Post-Trial Order reveals the disproportionate emphasis placed on the "beneficial results obtained" factor: five full pages were dedicated to analyzing this single factor, while the remaining five factors combined received just over one page of analysis. (ROA 0016, 0018-0021, 0024-0025).

The Supreme Court reversed a similar error in *Baron Data Systems, Inc v. Loter.*, where the Court of Appeals had improperly relied on the amount of monetary judgment as the "critical factor" in determining attorneys' fees. *Baron Data Sys., Inc,* 297 S.C. at 385, 377 S.E.2d at 297. The Supreme Court emphatically stated that "the amount of recovery is but one factor to be considered when determining reasonable attorney's fees," and reversed the Court of Appeals' decision. *Id*. at 385, 377 S.E.2d at 297.

Here, the trial court committed the same error that was reversed in *Baron Data Sys., Inc.*. While claiming that its "analysis and decision to reduce the Landlord's fee request by forty-five

percent (45%) is not limited to Landlord's limited degree of success", the structure and content of the Post-Trial Order clearly demonstrate otherwise. (ROA 0021). The trial court repeatedly emphasized the difference between damages sought and damages awarded, devoting significant portions of the Post-Trial Order to this comparison. This approach mirrors the error in *Baron Data Sys., Inc*. and warrants similar reversal.

Respondent attempts to defend the trial court's analysis by arguing that the language of the Lease Agreement justified the focus on the monetary judgment. (Initial Br. of Resp't. p. 11). This argument fails for two reasons. First, while the Lease Agreement does establish a minimum fee of "fifteen percent (15%) of all sums then owing by Tenant to Landlord," it does not eliminate the trial court's responsibility to conduct a proper *Blumberg* analysis. *See* (ROA 1266-1302). The Lease Agreement language sets a floor for the award, not a methodology for determining reasonableness. Second, the "beneficial results obtained" factor is meant to "merely aid in determining whether an award is appropriate when considering whether the services of a lawyer facilitated a favorable result." *Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991). It is not intended to be used primarily as a mechanism for reducing an otherwise reasonable fee based solely on the amount of damages awarded.

In blatant disregard to this Court's express prohibition on citations to unpublished opinions in S.C. App. Ct. R. 268(d)(2), Respondent improperly cites to and relies on *Randolph v. PowerComm Constr., Inc.*, 780 F. App'x 16, 23 (4th Cir. 2019), an unpublished opinion from the 4th Circuit Court of Appeals, as the basis of support for the trial court's improper comparison of the amount of damages sought to the damages awarded. (Initial Br. of Resp't. p. 13). Not only does this unpublished opinion have no precedential value, but it would completely undermine the

purpose of having courts consider the six *Blumberg* factors if a reasonable fee award could be determined by a mere surface level analysis. [*Emphasis added*].

Likewise, Respondent's argument that the trial court's comparative analysis was justified because "both parties prevailed" is mistaken. The correct approach is not to simply compare the monetary awards granted to each party, but to assess the overall success in the litigation. Here, Appellant prevailed on multiple claims, including both declaratory judgment actions regarding the termination of the Lease and its breach of contract counterclaim. (ROA 0015). The jury's award of $25,000 to Respondent on a single claim for rent reimbursement—when Appellant was awarded $150,000—does not justify the drastic 45% reduction in Appellant's attorneys' fees. (ROA 0015).

Respondent's attempt to distinguish this case from *Baron Data Sys., Inc*. by noting that "Unlike *Baron Data Sys., Inc* where the jury returned a verdict in favor of Baron, there was not a singular prevailing party in this case" distorts the record. (Initial Br. of Resp't. p. 12-13). The jury in this case returned verdicts in favor of Appellant on three of the four claims, including the critical question of whether the Lease Agreement was properly terminated. (ROA 0015). By any reasonable measure, Appellant was the prevailing party in this litigation.

Therefore, the trial court's disproportional consideration given to the "beneficial results obtained" factor in comparison to the remaining *Blumberg* factors constitutes an abuse of discretion that requires reversal.

B. The Trial Court's analysis of the remaining *Blumberg* factors was cursory and inadequate.

Beyond improperly elevating the "beneficial results obtained" factor, the trial court's analysis of the remaining five *Blumberg* factors was woefully inadequate, failing to provide the "specific findings of fact" as required by South Carolina law.

The trial court's cursory treatment of these factors is evident in its Post-Trial Order. For the first factor—"the nature, extent, and difficulty of the legal services rendered"—the trial court offered only a single conclusory sentence: "Although the case was well-litigated, it was a commercial lease dispute that was neither exceptional nor novel." (ROA 0024). This statement fails to acknowledge the substantial complexity involved in the case, which included eleven depositions, twenty-six motions, a mediation, over a dozen rounds of discovery, numerous subpoenas, and a week-long jury trial. (ROA 0145).

Similarly, the trial court's analysis of the "time and labor devoted to the case" factor consisted primarily of dismissive generalizations about the number of timekeepers without any substantive assessment of whether the time spent was reasonable given the complexity and duration of the case. The trial court's reference to "block billing" was made without citing a single specific instance of such billing in the extensive documentation provided by Appellant. (ROA 0025).

For the "professional standing of counsel" factor, the trial court acknowledged that "Landlord's counsel has good professional standing" but then inexplicably used this as a basis for reducing fees because "no information has been provided about the skills, experience, or professional standing of each of the timekeepers." (ROA 0025). This analysis inverts the purpose

of the factor, which is to ensure that counsel's professional standing justifies their rate, not to reduce fees when counsel possesses good professional standing.

The trial court's analysis of the "fee customarily charged in the locality for similar services" factor was similarly deficient. Despite acknowledging that "the hourly rates charged do not appear to be excessive," the trial court failed to make any specific findings about the customary fees in the locality. (ROA 0024-0025). Instead, it used this factor to circle back to concerns about the number of timekeepers, essentially double counting this issue.

These superficial analyses fall far short of the "specific findings of fact on the record for each factor" required by *Blumberg* and *Griffith*. The lack of substantive engagement with these factors demonstrates that the trial court did not give them the weight and consideration required by law.

Respondent argues that the trial court "articulated its findings as to each of the six factors" and that this is sufficient to satisfy *Blumberg*. This argument misunderstands the requirement. Mere articulation is not enough; *Blumberg* requires "specific findings of fact" for each factor. The one-sentence general conclusions offered by the trial court for most factors cannot reasonably be characterized as "specific findings of fact."

Respondent further contends that "to the extent that evidentiary support was lacking, the burden of proving reasonableness is on the fee applicant, not the trial court." (Initial Br. of Resp't. p. 7). In support of this assertion Respondent erroneously relies on *Nutramax Lab'ys, Inc. v. Manna Pro Prods., LLC*, where the South Carolina District Court calculated an award of attorney's fees using the lodestar figure and determined the reasonableness of a fee award based on an analysis of

the twelve *Barber* factors. *Nutramax Lab'ys, Inc. v. Manna Pro Prods., LLC*, 2017 WL 6523616, at *6 (D.S.C. Dec. 21, 2017). While it is true that the fee applicant bears the burden of providing evidence to support the attorneys' fees requested, this does not relieve the trial court of its obligation to make specific factual findings on each *Blumberg* factor to support the reasonableness of the trial court's fee award. Appellant provided extensive documentation supporting its attorneys' fee request, including detailed invoices and an affidavit. *See* (ROA 1449-1593). The trial court's failure to engage meaningfully with this evidence and to make specific factual findings on each *Blumberg* factor constitutes an abuse of discretion.

The inadequate analysis of five of the six *Blumberg* factors, coupled with the overemphasis on the "beneficial results obtained" factor, demonstrates that the trial court did not conduct the balanced, comprehensive analysis required by South Carolina law. This fundamental error warrants reversal.

III. The attorneys' fee reduction based on unsuccessful motions and defenses ignored the intertwined nature of the claims and counterclaims.

The trial court's reduction of attorneys' fees based on "unsuccessful motions, excluded evidence, and duplicative trial preparation" failed to recognize the intertwined nature of the claims and defenses in this case and contradicts established South Carolina precedent.

It has been recognized that attorneys' fees should not be reduced when the facts and issues surrounding the successful and unsuccessful claims are intertwined. In *Charleston Lumber Co. v. Miller Hous. Corp.*, the Court of Appeals upheld an award of the full amount of attorneys' fees requested despite the fact that "a significant amount of the attorneys' fees awarded to Charleston Lumber was for defending counterclaims on which Charleston Lumber was unsuccessful."

Charleston Lumber Co. v. Miller Hous. Corp, 318 S.C. 471, 482, 458 S.E.2d 431, 438 (Ct. App. 1995). The Court of Appeals reasoned that "the facts and issues surrounding the claims upon which Charleston Lumber Co. prevailed were intertwined with those of the counterclaims which required extensive discovery and transformed a normally uncomplicated action into complex litigation." *Id*. at 484, 458 S.E.2d at 439.

The same reasoning applies here. The claims in this case—Respondent's declaratory judgment action regarding termination of the Lease Agreement, Respondent's claim for rent reimbursement, Appellant's counterclaim for declaratory judgment, and Appellant's counterclaim for breach of contract—all arose from the same set of facts and circumstances surrounding the water leak, Landlord's repairs, and the Parties' obligations under the Lease Agreement. These claims were so intertwined that they cannot reasonably be separated for purposes of allocating attorneys' fees.

Moreover, in *Hardaway Concrete Co., Inc. v. Hall Contracting Corp.*, the Court of Appeals affirmed an award of attorneys' fees that included charges for repreparing for trial, rejecting an argument similar to the one made by the trial court here. *Hardaway Concrete Co., Inc. v. Hall Contracting Corp*, 374 S.C. 216, 233, 647 S.E.2d 488, 496 (Ct. App. 2007). The Court of Appeals found that when a trial is postponed, "it was reasonable that counsel would need to refresh himself pending such a period of time." *Id*. at 233, 647 S.E.2d at 497.

In this case, the trial was originally scheduled for October 9, 2023, but was deferred until January 22, 2024—a period of over three months—at the recommendation of the trial court itself. (ROA 0132); (ROA 1245, line 25; 1246, lines 1-2). Under these circumstances, multiple rounds

of trial preparation were entirely reasonable and should not have been characterized as "duplicative."

The trial court's reduction based on "unsuccessful motions" is particularly problematic because many of these motions, while technically unsuccessful, were essential to developing the theories and evidence that ultimately led to Appellant's significant victory on the core issues. For example, the trial court cited the summary judgment motion as a basis for reduction, but the legal theories and evidence developed for that motion directly contributed to Appellant's success at trial.

Respondent attempts to sidestep this issue by claiming it was not preserved for appeal. (Initial Br. of Resp't. p. 15). However, the issue of whether fees for unsuccessful motions should be excluded was directly addressed by the trial court in its Post-Trial Order, which explicitly reduced the fee award based on "unsuccessful motions, excluded evidence, and duplicative trial preparation." (ROA 0021-0022). This issue is therefore properly before this Court.

Respondent's argument that Appellant failed to establish that "the successful and unsuccessful claims and counterclaims were intertwined" ignores the reality of this case. The intertwined nature of the claims is evident from the record itself, which shows that all claims arose from the same Lease Agreement, the same water leak, and the same alleged breaches. This is precisely the type of situation contemplated in *Charleston Lumber Co. v. Miller Hous. Corp.* and as such, does not support a reduction in Appellant's attorneys' fees award.

Therefore, the trial court's reduction of attorneys' fees based on unsuccessful motions, excluded evidence, and multiple rounds of trial preparation constitutes an abuse of discretion that warrants reversal.

IV. The Trial Court erroneously relied on improperly admitted evidence in reducing Appellant's attorneys' fee award.

The trial court's Post-Trial Order explicitly relied on inferences drawn from improperly admitted prejudicial evidence in reducing Appellant's attorneys' fees, constituting a further abuse of discretion. This error is properly before this Court despite Respondent's claims to the contrary.

The trial court stated in its Post-Trial Order that "other equitable considerations arising from the evidence presented at trial" supported the reduction in attorneys' fees, specifically citing "certain actions and inactions on the part of Landlord" that allegedly "contributed to and complicated this dispute." (ROA 0021). However, many of these supposed actions and inactions were established through evidence that should have been excluded under the trial court's own pretrial rulings.

Specifically, the trial court granted Appellant's Motion *in Limine* to exclude evidence of water damage occurring after Respondent vacated the premises in December 2020, as well as to exclude Jessica Colby as a witness due to unfair prejudice under Rule 403, SCRE. *See* (ROA 0089-0103); (ROA 0001-0004); (ROA 0005-0009). Despite these rulings, the emails were improperly admitted as impeachment evidence because they did not directly contradict any statement made by Mr. Leone. Even though Appellant's attorney attempted to clarify that Mr. Leone was not generalizing his statements, that he was not referring to anything post IOA and therefore did not open the door for impeachment evidence, counsel for Respondent kept harping on "he's not immune from impeachment, but he didn't have to say that. **He didn't have to say I'm very reasonable, I always work in good faith, but he did**. **He did**." [*Emphasis added*] (ROA 1002, lines 5-8). The trial court then noted Appellant's attorney's objection but allowed the introduction of the emails into evidence as impeachment evidence despite them being unfairly prejudicial.

Moreover, Mr. Leone explicitly denied using the word "always" in describing his responsiveness to tenants, stating: "You're using the word, 'always,' I'm not certain I used the word 'always,' but I believe we try. And if you had the transcript, I'd request to see where I said always." (ROA 1009, lines 9-13). Despite this clear denial and request to review the transcript, the trial court admitted the prejudicial emails anyway. (ROA 1009, lines 16-19, 24-25; 1010, lines 21-25). If the trial court had acquiesced to Mr. Leone's request or sustained Appellant's attorney's objection, it would have found that they were in fact correct and that there were no sufficient legal grounds to allow any impeachment evidence.

The trial court then compounded this error by relying on these improperly admitted emails to support its reduction of attorneys' fees. This constitutes a classic example of an abuse of discretion: the trial court's ruling was "based on an error of law" (the improper admission of evidence) and then erroneously applied that evidence to reduce the fee award.

Respondent argues that this issue is not preserved for appeal because Appellant did not file a motion for a new trial or a motion for judgment notwithstanding the verdict. (Initial Br. of Resp't. p. 15). This argument misses the mark. Appellant is not seeking to overturn the jury's verdict; it is challenging the trial court's reduction of attorneys' fees based on improperly admitted evidence.

Respondent further contends that Appellant's argument "consists of conclusory statements and arguments of counsel without supporting legal authority." (Initial Br. of Resp't. p. 16). This is simply incorrect. Appellant's brief contains citations to multiple sources that support Appellant's argument. *See Kiriakides v. Sch. Dist. Of Greenville Cnty*., 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009) ("An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions"); *Johnson v. Sam English*

Grading, Inc., 412 S.C. 433, 448, 772 S.E.2d 544, 551 (Ct. App. 2015) (noting that an appellate court will reverse a trial court's evidentiary ruling only if it reflects an abuse of discretion, which occurs when the ruling is based on an error of law or lacks evidentiary support); *Conway v. Charleston Lincoln Mercury, Inc.*, 363 S.C. 301, 307, 609 S.E.2d 838, 842 (Ct. App. 2005) (recognizing that to justify reversal based on the admission of evidence, an appellant must demonstrate both an error of law and resulting prejudice.).

Therefore, the trial court's reliance on improperly admitted evidence to reduce Appellant's attorneys' fees constitutes an abuse of discretion that warrants reversal.

CONCLUSION

The trial court's reduction of Appellant's attorneys' fees was based on multiple errors of law and constituted an abuse of discretion. The trial court improperly elevated the "beneficial results obtained" factor above all others, failed to make specific factual findings on the remaining *Blumberg* factors, ignored the intertwined nature of the claims and counterclaims, and relied on improperly admitted evidence in reducing the attorneys' fee award.

Respondent's attempts to avoid addressing these substantive errors through procedural arguments are unavailing. The issues raised by Appellant were properly preserved for appeal and warrant this Court's full consideration.

For the foregoing reasons, Appellant respectfully requests that this Court reverse the trial court's Post-Trial Order reducing Appellant's attorneys' fees and remand with instructions to award the full amount of attorneys' fees initially sought by Appellant.

[*Signature Page to Follow*]

Respectfully submitted,

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