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THE STATE OF SOUTH CAROLINA
In the Supreme Court

NOV 12 2015

SC Court of Appeals

APPEAL FROM LAURENS COUNTY
Eugene C. Griffith, Jr., Circuit Court Judge
2015-001861

Kathleen Lollis and Linda Campbell,
Appellants/Cross-Respondents

v.

Lisa Dutton, Dennis Dutton and Kelsey Dutton,
Respondents/Cross-Appellants

APPELLANTS' INITIAL BRIEF OF
RESPONDENTS/CROSS-APPELLANTS

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Questions on Appeal

I. Did the Court below err in failing to award Respondents/Cross-Appellants costs and disbursements?

II. Did the Court below err in failing to award the Respondents/Cross-Appellants attorney fees?

III. Did the Court below err in failing to find that Appellants/Cross-Respondents wrongfully failed to open an Estate for Frank Lollis to the detriment of Respondents/Cross-Appellants?

Statement of the Case

Lisa and Dennis Dutton, who are the parents of Kelsey Dutton, had known the Lollis family for nearly twenty years when they entered into the transactions which are at the heart of this case. Lisa and Dennis had participated in a number of real estate transactions with the Lollises over the years, and each time they dealt with Frank Lollis, the member of the Lollis family who handled their real estate business.

Not only did Frank handle transactions involving his own property, he also handled transactions for other family members, including his mother, Kathleen Lollis, and his sister, Linda Campbell. The boundary between what property was his and what belonged to other family members was a blurred one, because Frank was in the habit of putting title to his real estate in the names of family members to keep it out of his own name. When it came time to sell his property titled in another's name, his attorney and others testified that he did not hesitate to sign that person's name to the documents. Although the Lollis family attorney confirmed that Frank had a Power of Attorney from his mother to sign for her, in general neither he nor Appellants/Cross-Respondents were particular about legal niceties.

Dennis Dutton and Lisa Dutton each bought one of two adjacent parcels of land from Kathleen Lollis through her son, Frank Lollis. In addition, each bought a trailer directly from Frank. Both received title to their trailers, but Frank died before removing a disputed lien from Lisa's trailer. One trailer was for the use and benefit of Kelsey and Dennis Dutton, and the other was for Lisa Dutton. They paid the purchase prices and moved into their trailers, where they lived without incident for more than a year. There

was no problem until Frank died, having transferred title to neither parcel of land. At that point Appellants/Cross-Respondents began claiming that the Respondents/Cross-Appellants were on the land illegally and that Linda Campbell had a lien on Lisa Dutton's trailer. They were unsuccessful in their Notice to Quit actions in Magistrate's Court and thereafter launched this action.

The honorable trial judge, having carefully considered all the evidence of a four day trial and having weighed the credibility of the witnesses, ruled against Appellants/Cross-Respondents and found for Respondents/Cross-Appellants on the declaratory judgment cause of action . He found that Frank Dutton had been acting as the agent of Kathleen Lollis in selling the property in her name and that she had adopted and ratified the sales, which had been completed. He therefore awarded the disputed property to Respondents/Cross-Appellants. He further determined that there was no basis for the Linda Campbell lien on Lisa Dutton's trailer and ordered that Ms. Dutton be given an unencumbered title to her trailer. He also directed that Appellants/Cross-Respondents return to Respondents/Cross-Appellants an overpayment of \$ 850.96.

Though extensive discovery, trial preparation and a four day trial were extremely expensive for Respondents/Cross-Appellants, the honorable trial judge did not award them either costs and disbursements or attorney fees and did not give any basis for this in either of his orders. This appeal timely followed.

Argument

I. The Court below erred in failing to award Respondents/Cross-Appellants their costs and disbursements. (Issue I)

In the *ad damnum* portion of their Answer and Counterclaims (R. p. >), Defendants sought “a reasonable fee for their attorney and the costs of this action.” Thereafter they prevailed against the Plaintiffs. Under S.C. Code Section 15-37-10

In *every* civil action commenced or prosecuted in the courts of record in this state ... the [prevailing] attorneys for the plaintiff or defendant *shall be entitled* to recover costs and disbursements.... (emphasis supplied)

See also *Shuford v. Shingler*, 30 S.C. 612, 8 S.E. 799 (1888).

The statutory language is mandatory and not discretionary with the judge, so Respondents/Cross-Appellants are absolutely entitled to be reimbursed for the costs and disbursements set forth in their Affidavit of Costs (R. p. >). Prevailing against Appellants’ declaratory judgment cause of action (R. p. >) is a separate ground supporting an award of costs to Respondents/Cross-Appellants. See S.C. Code Section 15-53-100. Equity and the facts of this case (discussed *infra*) support an award of costs and disbursements as well.

II. The Court below erred in failing to award attorneys fees to Respondents/Cross-Appellants. (Issues II and III)

This was an exceedingly difficult case with numerous witnesses and exhibits which consumed four days of trial. Plaintiffs’ expert witness had issued an opinion (R. p. >) that nearly all the documents relied upon by the Defendants were forgeries. The most important witness for the defense died before Plaintiffs filed suit. In an attempt to win summary judgment, Plaintiffs had filed an affidavit (R. p. >) appearing to show that the

Lollises' family attorney agreed that Plaintiff Lollis had not signed a Power of Attorney allowing others to sign for her. In short, the case looked unwinnable.

Turning that around required defense counsel to go to Greenwood to get an affidavit from the land transactions attorney (R. p. >) which undid his misleading affidavit filed by Plaintiffs and to spend a huge amount of time looking at all of Plaintiffs' land transactions in two counties, analyzing those documents, creating exhibits, arguing motions, managing discovery, interviewing numerous witnesses and preparing affidavits, a total of 231.9 hours. See the Defendants' Attorneys Fee Affidavit (R. p. >), which sets forth in greater detail the time and tribulations of handling this case.

All of the time spent was necessary to comprehend and to make comprehensible what had happened. Plaintiffs' trial counsel went out of her way to make the case more difficult and costly, which greatly increased the time and expense of handling it. It would be wrong for this Court not to defend the sanctity of the courts and the rights of the Respondents/Cross-Appellants by abandoning them to bear the full burden of the Appellants/Cross-Respondents' misconduct and mendacity.

Both Justice and Equity require that the Defendants, who exhausted their assets to buy the subject property, not be impoverished by costs and attorney fees because they refused to allow themselves to be defrauded. This is not a case where the Plaintiffs just made an innocent mistake. In his Final Order the judge below stated, "This Court has... had the opportunity to observe each witness who testified at the hearing and to closely pass upon their credibility." (R. p. >) With good reason he concluded in his Findings of Fact (R. p. >) that the Appellants/Cross-Respondents were not credible:

25. The Plaintiffs and Defendants presented positions which are directly opposed to one another, so resolving the differences in evidence required assessing the credibility of the parties. Having observed the parties and the witnesses, I find that the Defendants have greater credibility than the Plaintiffs. (See also Paragraphs 10, 12, 14, and 15 under Findings of Fact, R. p. >.)

Plaintiff Lollis amended her Complaint and added her daughter, Linda Campbell, to the case so that they could assert Ms. Campbell's alleged right to a lien against Defendant Lisa Dutton's trailer, and this pleading was sworn. (R. p. >). Ms. Campbell admitted on cross-examination that she had never done any business with the Duttons (R. p. >) and that she had never paid any money on the trailer (R. p. >). The original title papers did not show any lien to her (R. p. >). When pressed to explain how she acquired a lien on Lisa Dutton's trailer, she had this to say:

Ferguson: How did you get a lien on this trailer?

Campbell: I have no idea. ...

Ferguson: Okay. So this lien just materialized somehow; you don't know how?

Campbell: I do not. (R. p. >)

Having admitted that she had no basis to ask for money to satisfy the lien, she went on to assert impudently that she would not cancel her bogus lien because the Duttons had not paid her anything to satisfy it (R. p. >). Such extortion should not be rewarded.

The trailer title papers (R. p. >), plus Linda Campbell's and Lisa Dutton's testimony (R. p. >), proved that Ms. Campbell's so-called lien was based on a forgery of

Ms. Dutton's signature. The Final Order voided that lien and directed the Plaintiffs to give Ms. Dutton a clean, unencumbered title to her trailer (R. p. >).

This was but one incident in an extensive pattern of fraud upon Lisa Dutton by the Plaintiffs, which came to light when defense counsel analyzed the voluminous land records for this case, including a fraudulent mortgage bearing a forged signature (R. p. >) and a forged signature on a document voiding a contract of sale (R. p. >), accompanied by a refusal to give a refund for payments already made pursuant to that contract of sale (R. p. >). The Plaintiffs also defrauded Dennis Dutton by refusing to pay the \$ 1500 balance (R. p. >) for his riding lawn mower or to return it (R. p. >). The Duttons were easy targets, because of their close personal relationship with Appellants/Cross-Respondents' agent, Frank Lollis, (R. p. >) and because of their limited education (R. p. >). In addition, Dennis Dutton is disabled because of a brain injury and cannot read or write (R. p. >).

Before this case even began, Appellants/Cross-Respondents had wrongfully refused to open a probate estate for Frank Lollis (R. p. >) and vowed a battle if the Duttons tried to open an estate. This was important because they were denying that Frank Lollis had been their agent in his dealings with the Duttons. Had that been true, the Respondents/Cross-Appellants' sole recourse would have been against his Estate. Rather than open an estate, the Appellants/Cross-Respondents simply gave themselves and other family members the Estate property in violation of the Statute of Elizabeth, S.C. Code Sections 27-23-10 and 27-23-20, another badge of their fraud.

The Court below did not find that this was wrongful, because it found that most of Frank Lollis's property had been converted into cash shortly before he died. Although

there was testimony that much of his property was sold, it was not proved that he owned less than the \$ 5000 threshold requirement to open an estate. Instead, the Personal Representative appointed under the will (Linda Campbell) declared that she was just doing what the Probate Judge told her without admitting that that advice was based upon what Ms. Campbell told the judge about Estate assets. There was abundant evidence that Frank Lollis owned more than \$ 5000 worth of property at the time of his death (R. p. >). There was also abundant evidence that Frank Lollis habitually dealt in and kept large quantities of cash (R. p. >), which disappeared after his death.

The Appellants/Cross-Respondents were served with Requests to Admit and either wrongfully denied or avoided all of them and thus obstructed discovery. See the document entitled Plaintiffs' Obstruction of Discovery attached to Defendants' Attorney Fee Affidavit (R. p. >). This forced the Respondents/Cross-Appellants to prove the truth of the requests at trial. Under Rule 37(c), SCRCP, they were entitled to be granted the attorney fees this required them to incur. (Essentially the whole trial was necessary for this.) In their Motion to Alter or Amend and Motion for Attorney Fees (R. p. >) the Duttons directed the attention of the Court to Rule 37, SCRCP, as a means to deal with Appellants/Cross-Respondents' evasive and incomplete answers in discovery; but without comment the trial judge granted no relief.

Appellants/Cross-Respondents sought a declaratory judgment in their favor (R. p. >) and failed. "In regard to the declaratory judgment action brought by the Plaintiffs: I find that the Defendants have valid and enforceable rights under the contracts of sale herein." (Paragraph 32 of the Final Order's Conclusions of Law, R. p. >) Under S.C.

Code Section 15-53-100 and its liberal construction mandated by Section 15-53-130

(“This chapter is declared to be remedial. ...It is to be liberally construed and administered.”), Defendants are entitled to their costs and attorney fees.

The Appellants/Cross-Respondents’ pursuit of this case was both fraudulent and frivolous. Their Reply (R. p. >) was a blanket denial of the Counterclaims in which they fraudulently sought to put some distance between themselves and their agent, Frank Lollis, by denying their kinship with him. (See Paragraphs 52 and 67 of the Answer and Counterclaims at R. p. > where the kinship is alleged.) This multiplied the issues to be resolved at trial and greatly increased the time and expense of the litigation. They also filed a frivolous motion seeking to find out what the undersigned had been paid after having already been denied this privileged information by the Court. (R. p. >)

In addition, the Appellants/Cross-Respondents wrongfully refused to provide a valid response to an important request to admit about the basis of the Linda Campbell lien on Lisa Dutton’s trailer and instead made a sarcastic response (R. p. >):

Request to Admit dated 1/17/14: The lien of Plaintiff Linda Campbell on the mobile home titled in the name of Lisa Juanita Dutton is not valid or supported by consideration.

Response: The Plaintiffs deny that the lien “is not valid”. The Plaintiffs admit that the lien “is not supported by consideration” to Plaintiffs’ knowledge and information insofar as Plaintiff Linda Campbell has not received any consideration from Defendant Lisa Juanita Dutton.

This response was did not “fairly meet the substance of the requested admission”

and was therefore contrary to Rule 36(a), SCRPC. This required the Duttons to use a large portion of the cross-examination of Linda Campbell to deal with matters which should not have been contested at a time when defense counsel was ill (R. p. >) and needed to bring the case to a speedy conclusion. The Duttons did not have the means to litigate each discovery outrage and to pay the added attorney fees inflicted upon them by Appellants/Cross-Respondents' misconduct, and so they are dependent on the courts to vindicate both them and the court system.

In order to force Appellants/Cross-Respondents to reveal the numerous instances in the land records where someone else signed Kathleen Lollis's name to a real estate instrument, Respondents/Cross-Appellants had to have the judge compel her response (R. p. >). This was crucial for the judge's understanding of how she and her family did business. See Paragraph 12 of the Final Order's Findings of Fact (R. p. >).

"[W]hen parties fail to cooperate and their behavior prolongs proceedings, this is a basis for holding them responsible for attorney's fees." *Bennett v. Bennett*, 389 S.C. 274, 697 S.E.2d 715 (Ct. App. 2010). See also *Lewin v. Lewin*, 396 S.C. 349, 721 S.E.2d 1 (Ct. App. 2012) and *Spreeuw v. Barker*, 385 S.C. 45, 682 S.E.2d 843 (Ct. App. 2009).

Appellants/Cross-Respondents' discovery games and unreasonable and fraudulent sworn pleadings materially and unfairly increased the cost of the case to Respondents/Cross-Appellants. Appellants/Cross-Respondents should be required to pay attorney fees and costs under the Frivolous Civil Proceedings Sanctions Act (S.C. Code Section 15-36-10 et seq.) as requested in the Motion to Alter or Amend and Motion for Attorney Fees (R. p. >) because they initiated and continued a civil proceeding to intimidate, harass and

impoverish the Respondents/Cross-Appellants with false claims to make them not assert their rights, and Respondents/Cross-Appellants prevailed.

We are left to wonder why the trial judge did not award costs and attorney fees. The Final Order (R. p. >) did not discuss the matter, and the learned trial judge declined Respondents/Cross-Appellants' invitation in their Motion to Alter or Amend and Motion for Attorney Fees (R. p. >) to provide factual and legal bases for the denial (R. p. >). It is the position of Cross-Appellants/Respondents that there is no legal or evidentiary support for this holding, so it is an abuse of discretion. "An abuse of discretion occurs when the decision is controlled by some error of law or is based on findings of fact that are without evidentiary support." *Eason v. Eason*, 384 S.C. 473, 478, 682 S.E.2d 804 (2009).

The evidence permits only one reasonable inference, that fees and costs should have been granted to Respondents/Cross-Appellants. "[W]hen the evidence permits only one reasonable inference, a question of law is presented for the court." *Abrofreka v. Alston Tobacco Co.*, 288 S.C. 122, 127, 341 S.E.2d 622 (1986).

Although it is true that an award of attorney fees is generally in the trial judge's discretion, he must have a factual and a legal basis for his decision. "A decision lacking a discernible reason is arbitrary and constitutes an abuse of discretion." *Johnson v. Johnson*, 296 S.C. 289, 304, 372 S.E.2d 107 (Ct. App. 1988). (This case resulted in a remand to increase the attorney fees.) The omission of the trial judge here to cite any facts or law supporting a denial of attorney fees and the lack of such support in the record show that he simply did not exercise his discretion. "A failure to exercise discretion amounts to an abuse of that discretion. (Citation omitted) When the trial judge is vested

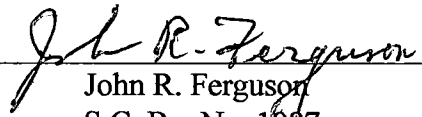
with discretion, but his ruling reveals that no discretion was, in fact, exercised, an error of law has occurred.” *Samples v. Mitchell*, 329 S.C. 105, 112, 495 S.E.2d 213 (1997).

Conclusion

The Cross-Appellants/Respondents are absolutely entitled to their costs and disbursements over the entire case and should be granted a reasonable attorney’s fee, both for the trial and for this appeal. Rather than increasing Respondents/Cross-Appellants’ already substantial attorney fees by remanding the case to the Circuit Court for further action, this court should grant them an award of costs and attorney fees based on the record before it. See *Murray v. Murray*, 271 S.C. 62, 244 S.E.2d 538 (1978). Counsel will submit an affidavit of his time for this appeal and its costs upon request of the Court.

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By: _____


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November 9, 2015

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Respondents.

CERTIFICATE OF SERVICE

The undersigned certifies that she is an employee at Cox Ferguson and Wham LLC and that on the 9 day of November, 2015 she served the Appellants' Initial Brief of Respondents/Cross-Appellants and Designation of Matter to Be Included in the Record on Appeal herein by personally delivering copies of them:

Matthew P. Turner, Esq.
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November 9, 2015

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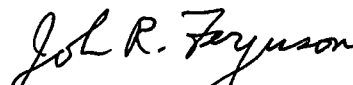
Re: Lollis et al. V. Dutton et al., 2015-001861

Dear Ladies:

With this letter you will find enclosed for filing Respondents/Cross-Appellants' Designation of Matter to be Included in the Record on Appeal and their Initial Brief along with a Certificate of Service for these documents on opposing counsel. I am also enclosing a copy of the Certificate of Service and I ask that you clock it and return it to me in the enclosed envelope.

Thank you for your help.

Sincerely,


John R. Ferguson

JRF/wp
Encl.
CC: Matthew P. Turner, Esq.



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