

STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Honorable Doyet A. Early, III Circuit Court Judge

Civil Action No.: 2012-CP-02-02382

Appellate Case Tracking No.: 2015-001115

Prescott and Sons Construction, LLC.....Respondent,

v.

Larry Rogers and Michelle Rogers.....Appellants.

INITIAL BRIEF OF RESPONDENT
PRESCOTT AND SONS CONSTRUCTION, LLC

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

Respondent is satisfied with Appellants' Statement of Issues on Appeal, and hereby adopts and agrees to be bound by Appellants' Statement of Issues on Appeal.

STATEMENT OF THE CASE

Respondent is satisfied with Appellants' Statement of the Case, and hereby adopts and agrees to be bound by Appellants' Statement of the Case.

STATEMENT OF FACTS

Respondent is satisfied with Appellants' Statement of Facts, and hereby adopts and agrees to be bound by Appellants' Statement of Facts, with one exception. In contrast to Appellants' contention that Respondent voluntarily ceased working on the project, Respondent has adamantly asserted that Appellants fired Respondent and prevented Respondent from re-entering Appellants' property and finishing the contracted work.

ARGUMENTS

- I. The trial court did not commit a prejudicial abuse of discretion by admitting emails sent by Mrs. Prescott to Appellants, and the trial court did not fail to properly consider whether exclusion was the appropriate sanction for failure to disclose.**

Appellants misstate when and why Mrs. Prescott produced that email with attachments. Respondent did not introduce the email with attachments during the direct examination of Mrs. Prescott. In fact, Mrs. Prescott stated that the first time that she was made aware of the contention that she had never sent the invoices to Appellants was during cross-examination by counsel for Appellants. (Tr. 146, 155-56). Only after Mrs. Prescott's cross-examination ended, and the court broke for lunch, did she retrieve the email with attachments, as was specifically asked for by attorney for Appellants. (Tr. 145-46, 155-57). Respondent. During re-direct examination, ultimately moved the email with attachments into evidence over Appellants' objections. (Tr. 154). This Court should find that the email with attachments was properly admitted into evidence.

Even if the trial court improperly admitted the email with attachments into evidence, this Court should consider such admission nothing more than merely a harmless error in light of all the other evidence produced by Respondent, as seen above and below, regarding Appellants' breach. Even without the email with attachments, the jury could have easily still found for the Respondent and for the same judgment amount.

- II. The trial court properly denied Defendants' Motion for a Directed Verdict.**

Respondent agrees with Appellants insofar as regarding the Appellants' recitation of the procedural posture of the Appellants' Motion for a directed verdict. At the conclusion of Respondent's case-in-chief, Appellants did move for a directed verdict on all of Respondent's

breach of contract claims, contending that the Certificate of Occupancy was never issued and therefore Respondent was not entitled to the additional \$15,000 in monthly payments for the Builder's Consultation fee, that Respondent only introduced evidence that three invoices were actually paid (Tr. 160-61), that the trial court denied the motion, that following the jury verdict, Appellants filed a motion for JNOV arguing identical grounds as for the directed verdict motion, and that the motion for JNOV was denied by the trial court. However, seen below, Respondents disagree with the Appellants' arguments and contend that the trial court properly denied both the directed verdict and the JNOV motions.

A. Standard of Review

"In ruling on a motion for a directed verdict or JNOV, the trial court must view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions." *Sabb v. S.C. State Univ.*, 350 S.C. 416, 427, 567 S.E.2d 231, 236 (2002). "The trial court must deny either motion when the evidence yields more than one inference or its inference is in doubt." *Id.* "This Court will reverse the trial court only when there is no evidence to support the trial court's ruling." *Id.* "A jury's factual finding will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings." *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976) (citing *Odom v. Weathersbee*, 225 S.C. 253, 260, 81 S.E.2d 788, 792 (1954)).

B. Appellants are not entitled to a directed verdict on Respondent's First and Second Causes of Action (Breach of Contract) because Respondent offered evidence as to every element of its breach of contract claims.

To recover for a breach of contract action, the Plaintiff must allege and prove that (1) a binding contract was entered into by the Parties, (2) the Defendant breached or unjustifiably failed to perform the contract, and (3) that Plaintiff suffered damage as a direct and proximate result of

the breach. *Fuller v. Eastern Fire & Casualty Insurance Co.*, 240 S.C. 75, 124 S.E.2d 602, 610(1962). Respondent contends that, at trial, it submitted evidence on each of the elements of a breach of contract action listed above.

Regarding the element of a binding contract, it is undisputed that the Parties entered into a binding contract. In fact, both Appellants and Respondent admit to entering into two contracts: the first on April 5, 2012 (Tr. 49), and then a second contract on May 1, 2012, which superseded and invalidated the first contract. (Tr. 53).

Next, regarding the element of a breach or unjustifiable failure to perform the contract, Respondent introduced a good deal of evidence as to this element in the form of testimony and exhibits. Mr. and Mrs. Prescott each testified that the eight invoices submitted into evidence by Respondent remained unpaid. (Tr. 74, 148). Further, Mrs. Prescott presented evidence, in the form of testimony and an exhibit of an email with attached invoices, regarding her submission of the eight invoices to the Appellants. (Tr. 150). As seen above, however, Appellants misstate when and why Mrs. Prescott produced that email with attachments. Respondent did not introduce the email with attachments during the direct examination of Mrs. Prescott. In fact, Mrs. Prescott stated that the first time that she was made aware of the contention that she had never sent the invoices to Appellants was during cross-examination by counsel for Appellants. (Tr. 146, 155-56). Only after Mrs. Prescott's cross-examination ended, and the court broke for lunch, did she retrieve the email with attachments, as was specifically asked for by attorney for Appellants. (Tr. 145-46, 155-57). Respondent. During re-direct examination, ultimately moved the email with attachments into evidence over Appellants objections. (Tr. 154). Further, Mr. Prescott testified that Appellants unjustly terminated his services, prevented him from returning to their property to finish the job, and failed to pay him the contractor's supervision fee to which he was entitled. (Tr. 68-70). As

seen above, Respondent clearly submitted evidence as to the element of breach or failure to perform. Even if this Court finds that the email with attachments was admitted into evidence erroneously, Respondent still produced enough evidence through testimony and the introduction of the unpaid invoices to merit submission to the jury.

Finally, regarding the last element of damages and as seen above, Respondent clearly introduced testimonial and documentary evidence to prove that not only was it not paid the remainder of the contractor's supervision legally due, but moreover Respondent submitted evidence that it had to come "out-of-pocket" to pay the eight unpaid invoices representing materials and labor already used to improve Appellants' house. (Tr. 63-69).

Respondents clearly introduced into evidence at least some evidence on each and every element of breach of contract such that submission to the jury was proper. And as neither the trial court nor this Court are charged with determining the weight or creditability of testimony or documentary evidence, this Court should affirm the trial court's denial of both a directed verdict and a JNOV as to the first and second causes of action.

C. Appellants are not entitled to a directed verdict on Respondent's Fourth Cause of Action (Breach of Contract) because Appellants prevented Respondent from completing the work necessary to issue a valid Certificate of Occupancy.

"An owner of a building under construction, under a contract providing for payment of the price of the completion of work, who refuses to permit the contractor to complete the work is liable for the contract price less payments made and cannot counterclaim for the amount paid for finishing the building." *Bensch v. Davidson*, 354 S.C. 173, 580 S.E.2d 128 (S.C. 2003). Because Respondent, as seen above, offered evidence that Appellants unjustly prevented Respondent from finishing the project and being able to issue a Certificate of Occupancy, there was ample evidence to both submit this cause of action to the jury and support its judgment. Moreover, several

subcontractors testify that they would have repaired, fixed, or changed whatever needed to be, but that Appellants would not give them an opportunity. (Tr. 131-32, 139). Accordingly, this Court should not enter a directed verdict on behalf of the Appellants for Respondent's fourth cause of action.

III. The trial court properly denied Defendants' Motion for a New Trial.

"A jury verdict should be upheld when it is possible to do so and carry into effect the jury's clear intention." *Johnson v. Parker*, 279 S.C. 132, 303 S.E.2d 95, 97 (1983). As seen above, the jury's verdict was not only supported by the evidence, but also it was required if the jury believed Respondent was prevented from completing the contract by Appellants.

The jury was not confused when it rendered its verdict. As seen above, Respondent was entitled to \$15,000 once the jury properly determined that Respondent was prevented from completing the contract by the Appellants. Adding in the total unpaid invoices, the total damage would come to \$20,089.92. However, Appellants did introduce evidence that they had to hire another contractor to finish the job once Respondent was no longer allowed to continue work, along with the cost to fix each unfinished portion of the house (Tr. 228). The jury very clearly took the value of the completion of the work and subtracted it from the total amount of damages when it issued its judgment for Respondent in the amount of \$18,166.03.

Because the jury verdict is easily reached and not at all unclear, this Court should not disturb the jury's verdict.

IV. The trial court properly awarded Plaintiff's Motion for Attorney's Fees and Costs, and the trial court properly made findings of fact regarding the reasonableness of the requested Attorney's Fees and Costs.

Unfortunately, due to circumstances beyond the control of either party, there is no record of the post-trial motions and therefore have no definitive, official document by which to reference.

The general rule in the State of South Carolina is that attorney's fees are not recoverable unless authorized by contract or by statute. *Baron Data Sys., Inc. v. Loter*, 297 S.C. 382, 377 S.E.2d 296 (1989); *Hegler v. Gulf Ins. Co.*, 270 S.C. 548, 243 S.E.2d 443 (1978); *Collins v. Collins*, 239 S.C. 170, 122 S.E.2d 1 (1961). When there is a contract, the award of attorney's fees is left to the discretion of the trial judge and will not be disturbed unless an abuse of discretion is shown. *Baron, supra*.

There is no dispute of fact that the contract (herein after "Contract") which governed this Breach of Contract case provided, in Paragraph 17, that attorney's fees be awarded to the prevailing Party in the event that either Party is held to have breached the Contract. Nor is there a dispute that Defendants were held to have breached the Contract. This dispute, rather, centers on whether Plaintiff waived the recovery of attorney's fees by making a post-trial motion for such fees, rather than present evidence of attorney's fees to the jury during the trial phase of this case.

An examination of South Carolina case law reveals a South Carolina Supreme Court decision directly on point with the issue presented, specifically, *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 427 S.E.2d 492 (1993). In *Blumberg*, Blumberg and Nealco executed a lease, in September 1987, which provided for attorney's fees if Nealco failed to comply with its terms. In August 1988, Blumberg filed a complaint seeking monetary damages for past and future rent and an award attorney's fees. The trial court awarded Blumberg past due rent and reasonable attorney's fees. Nealco appealed, among other things, the award of the attorney's fee. *Id* at 660.

“The Court of Appeals reversed and remanded for reconsideration both the award of damages and attorneys' fees. Nealco moved for a rehearing on the issue of remanding the award of attorney's fees claiming that Blumberg had failed to establish any attorney's fees and should not be permitted to "reopen" the record and introduce evidence on remand. The Court of Appeals modified its holding and reversed the award of attorney's fees and remanded for reconsideration only the award of damages. Blumberg then appealed the Court of Appeals' failure to remand the issue of attorney's fees.” *Id.*

The Court went on to discuss that when an award of attorney's fees is requested and such request is supported by contract or by statute, the trial court should make specific findings of fact on the record for each of the six of the *Collins* factors. *Id.* Ultimately, the Court modified the holding of the Court of Appeals and remanded the issue of attorney's fees to the trial court to make specific findings of fact in regards to the *Collins* factors. *Id.* at 661.

In its discussion, the Blumberg Court specifically addressed the question of whether an award of attorney's fees was waived by Blumberg offering no proof of attorney's fees at trial. The Court specifically disagreed with Nealco, and held that a waiver of attorney's fees did not occur when evidence as to attorney's fees was presented to the trial judge, at the conclusion of the trial, rather than to the jury during trial. *Id.* at 660.

Turning to the case at Bar, Plaintiff, like in *Blumberg*, waited until after the jury awarded a judgment in its favor to move for an award of attorney's fees. At the hearing on March 16, 2015, Plaintiff offered evidence to this court to document the fees requested. At that hearing, the trial court made inquiry of counsel for Plaintiffs as to the amount of fees and costs requested, whether the fee was fixed, hourly or contingent, and as to how much time and labor was devoted to

Plaintiff's case prior to and during the trial. Given the precedent set forth in *Blumberg*, the trial court found that Plaintiff did not waive its right for an award of attorney's fees by offering evidence at a post-trial motion instead of at trial, and that the trial court was required to make specific findings as to each *Collins* factor.

There are six factors to consider in determining an award of attorney's 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. *Collins, supra*.

In applying the *Collins* factors to this case and the evidence presented to the court by Plaintiff, the trial court found that:

1. The nature, extent, and difficulty of the legal services rendered in this case are reasonably related to the amount of the attorney's fee requested. Specifically, the trial court found that the \$10,469.13 requested by Plaintiff for Attorney's Fees and Costs was more than reasonable in light of the extensive discovery and numerous depositions over a two year period.
2. The time and labor devoted to this case are reasonably related to the amount of the attorney's fee requested. Specifically, the trial court found that the \$8,000 in attorney's fees was very reasonable due to the more than 100 hours spent by Plaintiff's attorneys over the course of two years prior to trial and the hours spend by Plaintiff's attorney during the course of the trial itself.

3. Plaintiff's counsel of record and Defendants' counsel of record are both in good professional standing, and this case was ably handled on both sides. The trial court used its own knowledge of the attorneys to make this finding.
4. The attorney's fee requested was not contingent upon the outcome of this case. Plaintiff incurred its attorney's fee regardless of the outcome at mediation or at trial. The trial court made specific inquiry of the nature of the attorney fee to Plaintiff's counsel.
5. The fees charged and requested from the trial court were in accordance with fees customarily charged in this locality for similar services. In fact, the trial court noted that the Defendants' attorney's fee, as presented to the court by Defendants' counsel, was actually greater than the Plaintiff's attorney's fee.
6. Beneficial results were clearly obtained on Plaintiff's behalf in the form of a jury verdict in favor of Plaintiff.

Respondent does agree with Appellants' assertion that if this Court reverses on any of the previous issues and enters a directed verdict on behalf of Appellants, then the issue of an attorney's fees and costs award are necessarily moot as Respondent would no longer be the prevailing party. Similarly, Respondent also agrees with Appellants' contention that upon a remand by this Court regarding the issue of attorney's fees and costs, the Respondent would be entitled to seek only those attorney's fees and costs incurred during the litigation below. However, as seen above, the trial court properly fulfilled its duties when awarding Plaintiff its attorney's fees and costs.

CONCLUSION

For the reasons stated above, this Court should affirm the Circuit Court's denial of Defendants' Motion for a Directed Verdict, Order Denying Defendants' Motion for a New Trial,

Order Denying Defendants' Motion for a Judgment Notwithstanding the Verdict, and Order Granting Plaintiff's Motion for Attorney's Fees and Costs. This Court should not grant Appellants' requested relief by specifically declining to enter a directed verdict for Appellants on any breach of contract claim and by specifically declining to grant Appellants a new trial.

Alternatively, should this Court find merit in any of Appellants' arguments, this Court still affirm the Circuit Court's Orders listed above due to harmless error or remand this case back to Circuit Court for further proceedings consistent with this Court's findings. In no case should the relief granted to Appellants be the entering of a directed verdict on behalf of Appellants on any of their claims for breach of contract.

Respectfully submitted,

January 11, 2016



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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below he served counsel for Appellants Larry Rogers and Michelle Rogers with a copy of the Designation of Matters to be Included in the Record on Appeal by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelope this 11th day of January, 2016, addressed as follows:

Mr. M. David Scott
JORDAN, RAUTON & SCOTT, LLC
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By: 
Lir Patrick Derieg