

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

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

JAN 22 2016

SC Court of Appeals

Kathleen Lollis and Linda Campbell,
Appellants/Respondents

v.

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

INITIAL REPLY BRIEF OF
RESPONDENTS/APPELLANTS

John R. Ferguson
S.C. Bar No. 1987
214 W. Laurens St. - PO Box 286
Laurens, SC 29360
(864) 984-2126

COX FERGUSON & WHAM, LLC
Attorneys for Respondents/ Appellants

TABLE OF CONTENTS

Table of Authorities.

Arguments

I. The trial court improperly denied Respondents/
Appellants' request for costs and disbursements. .

II. The trial court erred in denying Respondents/
Appellants' request for attorney fees.

III. Respondents/Appellants' Motion to Alter or
Amend and Motion for Attorney Fees their Attorney
Fee Affidavit, First Supplement to Attorney Fee
Affidavit and Affidavit of Costs were before the
trial court.

IV. Why Respondents/Appellants are entitled to
attorney fees, costs and disbursements.

Conclusion.

Table of Authorities

Cases

Eason v. Eason, 384 S.C. 473, 682 S.E.2d 804 (2009) . . .
Johnson v. Johnson, 296 S.C. 289, 372 S.E.2d 107
(Ct. App. 1988)
Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 213
(1997)
Solley v. Navy Federal Credit Union, Inc., 397
S.C. 192, 209-10, 723 S.E.2d 597 (2012)

Court Rules

Rule 210(c), SCACR
Rule 37(c), SCRCP

Statutes

S.C. Code Section 15-36-10(C) (1)
S.C. Code Section 15-37-10.

Argument

I. The trial court improperly denied Respondents/Appellants' request for costs and disbursements.

There is no ambiguity in the law. S.C. Code Section 15-37-10 states that the Respondents/Appellants "shall be entitled to recover costs and disbursements".

In their Brief, Appellants/Respondents have as their starting point the assertion that there was no contract between the parties and they did not breach it if it did exist, so Respondents/Appellants are not the prevailing party. This bit of wishful thinking is not in accord with the facts. The court below correctly found that there were valid and enforceable contracts between the parties and that Appellants/Respondents had breached those contracts.

At this late date Appellants/Respondents for the first time claim that Respondents/Appellants' Affidavit of Costs is not clear. They have waived their right to make this argument by not asserting it in a timely fashion by seeking an amendment of the affidavit or a hearing on it, but this Court has the option to make that issue part of a remand if need be.

II. The trial court erred in denying Respondents/Appellants' request for attorney fees.

While a trial court has discretion in deciding the question of attorney fees, it is required to exercise its discretion when asked to do so; and a failure to do that is itself an abuse of discretion. *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (1997). There is no indication here that the trial court exercised its discretion in any way. Without stating why, it denied the request for attorney fees and costs

and then declined to state a reason when asked to do so by a Motion to Alter or Amend and Motion for Attorney Fees. The lack of evidentiary support for the denial of costs and attorney fees makes that denial an abuse of discretion. *Eason v. Eason*, 384 S.C. 473, 682 S.E.2d 804 (2009); *Johnson v. Johnson*, 296 S.C. 289, 372 S.E.2d 107 (Ct. App. 1988).

Again, Appellants/Respondents' starting point is the wishful position that the trial court has not correctly found that they breached valid contracts between the parties. There is abundant evidence in the record supporting the Court's findings on these issues.

They also claim that there is no legal basis for the recovery of attorney fees. The declaratory judgement sought by the Appellants/Respondents in this case necessarily included their cause of action for slander of title (Eighth Cause of Action, R. p. >). (Likewise, Respondents' Brief of Appellants/Respondents at p. 6, para. 3 correctly recognized that Respondents/Appellants' Third Counterclaim was for slander of title, R. p. > and that they sought attorney fees.)

Respondents/Appellants were successful in defeating this cause of action and therefore have a strong basis to recover attorney fees:

The sole way of dispelling another's wrongful assertion of title is by hiring an attorney and litigating. If the defamed party were to simply speak out in denial... he could risk completely losing title by adverse possession. The [defendants] were forced into court by [plaintiffs'] actions. They were required to hire counsel, take depositions, arrange for court reporters, and run up numerous other expenses. These costs, which represented the only possible course of action to clear their title, flow directly and proximately from [plaintiffs'] conduct. But for the [plaintiffs'] actions, the [defendants] would not have incurred these expenses. As such, they represent an actual

pecuniary loss that, if substantiated, should be recoverable as special damages. *Solley v. Navy Federal Credit Union, Inc.*, 397 S.C. 192, 209-10, 723 S.E.2d 597 (2012).

In this regard it is worth noting that Respondents/Appellants pled their entitlement to special damages. See the *ad damnum* of the Answer and Counterclaim, R. p. >.

Respondents/Appellants also asserted a right to attorney fees under the Frivolous Civil Proceedings Sanctions Act (S.C. Code Section 15-36-10(C)(1) and Rule 37(c), SCRCP. Appellants/Respondents contend that these issues were not raised to the trial court, but these grounds were sufficiently raised to the court in Respondents/Appellants' motion for attorney fees and its supporting affidavits. Equity also supports the granting of attorney fees.

III. Respondents/Appellants' Motion to Alter or Amend and Motion for Attorney Fees, their Attorney Fee Affidavit, First Supplement to Attorney Fee Affidavit and Affidavit of Costs were before the trial court.

The *ad damnum* of the Answer and Counterclaims sought attorney fees (R. p. >), and at the close of the trial Judge Griffith granted counsel the opportunity to file attorney fee affidavits. There was no point to filing such affidavits until the judge had ruled who had prevailed, as prevailing is a necessary pre-requisite to the recovery of attorney fees.

In a timely manner, the undersigned filed his Motion to Alter or Amend and Motion for Attorney Fees (R. p.>) and sent a copy to Judge Griffith. The motion for attorney fees was founded on Appellants/Respondents' fraud, Rule 37(c), the Uniform Declaratory Judgments Act and the Frivolous Civil Proceedings Sanctions Act. Simultaneously with the motion,

counsel filed a supporting Defendants' Attorney Fee Affidavit and an Affidavit of Costs (R. pp. >). Four days later the undersigned filed a First Supplement to Defendants' Attorney Fee Affidavit (R. p. >) to respond to allegations in opposing counsel's Motion to Reconsider, Alter or Amend. All of these documents were sent to Judge Griffith in a timely manner and served on opposing counsel, who made no response.

At no time did opposing counsel assert that these documents were improper, invalid or not allowed; and they were before Judge Griffith when he ruled on the motions, though he did not specifically address their arguments. The Appellants/Respondents' objections to these documents are therefore untimely, and they have waived them. Contrary to Appellants/Respondents' contention, Rule 210(c), SCACR, says only, "The Record shall not... include matter which was not presented to the lower court or tribunal." There is no limitation that the record can include only trial exhibits and the trial transcript. The documents in question were presented to the lower court when it still had jurisdiction of the case and are part of the record.

Judge Griffith denied attorney fees, so the issue on appeal is not the proof of the amount due. The judge had pleadings, deposition transcripts and four days of trial before him; so he was not without evidence that defense counsel had expended effort on his clients' behalf even if the affidavits were to be excluded. The judge's error was in his total denial of attorney fees, not in his determination of the amount due. The amount due can be determined on remand by procedures presumably more to the liking of Appellants/Respondents' counsel if this Court declines to determine the amount due.

IV. Why Respondents/Appellants are entitled to attorney fees and costs.

Here without extensive commentary are extracts from the record which speak for themselves to show why Respondents/Appellants had to defend their title and how frivolous the Appellants/Respondents' case against them was:

1. Amended Complaint, Para. 6: "Plaintiff Lollis is the legal owner and title holder of real and personal property.... The property at issue includes two tracts of land... and also includes **two** mobile homes, one currently located on each piece of land....Further, Plaintiff Campbell is the owner of the mobile home situated on said real property, 1032 Cemetery Road [Lisa Dutton's address]... by virtue of a Certificate of Title for same." (Emphasis supplied) (R. p. >) [Neither plaintiff ever had title to either trailer at issue in the case, as can be seen from Defendants' Exhibits Nos. 44, 49, 50, 51, 52 and 58, R. pp. >.]

Amended Complaint, Para. 43: "Defendants have converted property for their own use that is owned by Plaintiffs, located at 1032 Cemetery Road and 1046 Cemetery Road in Ware Shoals, South Carolina, specifically **two** mobile homes...." (Emphasis supplied) (R. p. >)

Amended Complaint, Para. 10: "Further, Plaintiff Campbell is the title holder of the mobile home situated on 1032 Cemetery Road...." (R. p. >)

Amended Complaint, Para. 20: "Further, for an order that Plaintiff Campbell is the sole owner of the mobile home situated on 1032 Cemetery Road...." (R. p. >)

Amended Complaint, Para. 27: "Further Plaintiff Campbell is the sole owner of the mobile home situated at 1032 Cemetery

Road...." (R. p. >)

Appellants' Brief, Statement of the Case, p. 1:
"[Appellants sought] an order declaring Appellant Campbell to be the sole owner of the mobile home situated at 1032 Cemetery Road."

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

L. Campbell: "I have no idea." (Tr. 134/9-11)

Ferguson: "So this lien just materialized somehow, you don't know how?"

L. Campbell: "I do not." (Tr. 134/16-18)

When Lisa Dutton came to discuss with Linda Campbell removing her lien from the Dutton trailer, Ms. Campbell said, "I told her I did not know what she was talking about." (Tr. 160/14-15)

Linda Campbell admitted that she had never done any business with the Duttons, so she could not have acquired a lien from Lisa Dutton on Lisa's trailer. (Tr. 165/10-11)

Final Order, Finding of Fact No. 13: "The title to Defendant Lisa Dutton's trailer has a lien in favor of Linda Campbell. (Defendants' Exhibits 49, 50, 51 and 52 [R. pp. >]). Linda Campbell is nowhere in the chain of its title. Linda Campbell was unable to offer any explanation for the basis for this lien (Defendants' Exhibit 45)." (R. p. >)

Defendants' Exhibit No. 58 (R. p. >) shows that neither Plaintiff ever had title to Dennis Dutton's trailer. See Final Order, Finding of Fact No. 18 (R. p. >).

Even during this appeal, Appellants have continued to claim that Linda Campbell owns Lisa Dutton's trailer. Brief of Appellants, Statement of the Facts, p. 3: "There is a Giles mobile home located on real estate at 1032 Cemetery Road that

is titled in the name of Appellant Linda Campbell...." This blatant fallacy has no evidentiary support and unnecessarily increased Respondents' attorney fees.

2. Amended Complaint, Para. 7: "Plaintiffs have not received any monetary payment of any sort from Defendants, directly or indirectly, related to said property." (R. p. >)

Final Order, Finding of Fact No. 14: "Defendants' Exhibit 21 [R. p. >] is a bank copy of a \$ 700.00 check from Lisa Dutton to Frank Lollis. This check references that it is a payment on the subject land and trailer. Plaintiff Linda Campbell testified that she had no knowledge of Lisa Dutton's claim to be buying the subject property before Frank Lollis died. She endorsed this check below Frank Lollis's endorsement and admits that she deposited it. I find her testimony not credible that she was ignorant of the sale to Lisa Dutton." (R. p. >)

3. Amended Complaint, Para. 16: "Further, Defendants have executed and produced fraudulent documents related to the property at issue, which Plaintiffs will be able to prove were not executed by Plaintiffs or any person authorized to do so on her behalf." (R. p. >)

Final Order, Finding of Fact No. 26: "The Defendants signed valid contracts with Frank Lollis, who was acting as an authorized agent for his mother, Kathleen Lollis." (R. p. >)

Final Order, Finding of Fact No. 19: "Plaintiffs' own expert witness authenticated the signature of Frank Lollis releasing the lien on the trailer title to Dennis Dutton (Plaintiffs' Exhibit 15 [R. p. >])." (R. p. >)

4. Answer and Counterclaims, Para. 37: "Plaintiff Lollis, personally and through her agent, and Defendant Lisa Dutton entered into a Contract of Sale concerning the subject real estate." (R. p. >) Denied in Plaintiffs' Reply, R. p. >.

Answer and Counterclaims, Para. 38: "Plaintiff Lollis personally and through her agent Frank Lollis and Defendant Dennis Dutton entered into a Contract of Sale... concerning the subject real estate." (R. p. >) Denied in Plaintiffs' Reply, R. p. >.

Kathleen Lollis: "I don't know nothing about that, the real estate stuff." (Tr. 101/21-22)

Kathleen Lollis: "I didn't do nothing about it [buying and selling real estate], with it. Don't know what is going on. (Tr. 101/25- 102/1)

Ferguson: "Since you say you weren't monitoring the land records, if Frank had been buying and selling land in your name, would you know about it?"

Kathleen Lollis: "I don't and I didn't." (Tr. 102/9-12)

Ferguson: "So you never paid any money for [Lisa Dutton's] trailer, did you?"

L. Campbell: "I did not." (Tr. 134/13-15)

Ferguson: "But in all this stuff [real estate transactions] going on with, that involves you, ... you don't know anything about it?"

L. Campbell: "I do not." (Tr. 164/21-23)

Ferguson: "Do you know if Frank ever put property in your name?"

L. Campbell: "It's possible, yes." (Tr. 141/4-5)

Final Order, Conclusion of Law No. 29: "Frank Lollis was at all times relevant to this action acting as the authorized

agent for the Plaintiffs in his dealing with the Defendants."
(R. p. >)

5. Amended Answer and Counterclaims, Para. 52: "Frank Lollis was the son of the Plaintiff Lollis and the brother of Plaintiff Campbell...." (R. p. >) Denied in Plaintiffs' Reply, R. p. >. (This is significant because of the issue of whether Frank was acting as Appellants/Respondents' agent.)

Amended Answer and Counterclaims, Para. 67: "Frank Lollis was Plaintiff Lollis's son and the brother of Plaintiff Campbell." (R. p. >). Denied in Plaintiffs' Reply, R. p. >.

Final Order, Finding of Fact No. 3: "Frank Lollis, now deceased, is the child of Kathleen Lollis and sibling of Linda Campbell." (R. p. >) See Tr. 137/15-17.

6. Appellants alleged that Frank Lollis did not have sufficient property when he died to require that they open a probate estate for him to allow potential creditors like Respondents/Appellants to make claims (Defendants' Exhibit No. 16, R. p. >).

The Tax Assessor's records said otherwise (Defendants' Exhibit No. 17, R. p. >).

Kathleen Lollis testified that Frank had tractors, a dump truck, a golf cart and a car. (Tr. 42/19-22, 46/11-12, 47/1-3, 4-7).

Linda Campbell testified he had a septic tank business, hauled gravel and dirt and installed trailers. (Tr. 141/23-142/3).

John Scurry testified Frank had bulldozers, tractors and lots of cash (Tr. 213/11- 214/11).

Charles Thompson testified Frank had trucks, backhoes, a rollback and bulldozers (Tr. 308/23-25).

Dennis Dutton testified to Frank's ownership of a great deal of equipment (Tr. 480/21- 481/6, 522/16- 523/14).

Lisa Dutton testified extensively about what Frank owned. See Defendants' Exhibits Nos. 17, 42 and 43 (R. pp. >) and Tr. 383/17-19.

7. Amended Complaint, Para. 43: "Defendants have converted property for their own use that is owned by Plaintiffs, located at 1032 Cemetery Road and 1046 Cemetery Road..., specifically **two** mobile homes...." (emphasis supplied) (R. p. >)

Neither Plaintiff was ever the title holder to these trailers (Defendants' Exhibits Nos. 44, 49, 50, 51, 52 and 58, R. pp. >), so they could only have received title by inheritance from Frank Lollis. If these trailers had been in Frank's Estate, its value would have greatly exceeded that requiring probate. If Plaintiffs had believed their claim that Frank had not been Plaintiffs' agent and if Defendants' titles had therefore been invalid, Plaintiffs would have defrauded Defendants by not opening an Estate for Frank so that Defendants could make a claim against it for their payments on the subject property.

8. Frank Lollis did not have a Power of Attorney from his mother Kathleen.

Medlin: "Okay. Ms. Lollis, in regard to that particular document, the contract allegedly between you and Lisa Dutton,

did you authorize anyone to sign your name on that contract."

Kathleen Lollis: "No." (Tr. 21/11-15)

Medlin: "Did you have a Power of Attorney that Frank Lollis was allowed to sign Ms. Kathleen Lollis' name?"

Attorney Scurry: "I was under the impression that I had seen such a document." (Tr. 188/24- 189/2)

Attorney Scurry: "But he [Frank] showed me a document which I believed, I believe[d] at the time was a Power of Attorney." (Tr. 211/7-9)

Attorney Scurry: "I saw Frank Lollis sign many documents. Not often in his own name, but I've saw (sic) him sign many documents." (Tr. 203/9-10)

Attorney Scurry: "Kathleen Lollis was fully aware that Frank was buying and selling property in her name." (Tr: 223/19-22. See also Tr. 211/15-16 and 212/1-2 and Final Order, Finding of Fact No. 6., R. p. >)

Final Order, Finding of Fact No. 12: "Plaintiff Kathleen Lollis testified that she did not give her son, Frank Lollis, the power to sign documents on her behalf. ... I do not find Kathleen Lollis' testimony to be credible that she was unaware [of] or objected to Frank Lollis acting as her agent when conveying or receiving title to real property in her name." (R. p. >)

It would offend any concept of fairness to allow the Appellants/Respondents to attempt to cheat Respondents/Appellants out of their homes and escape without consequences for that. Likewise, it is offensive to fairness to require Respondents/Appellants to bear the substantial costs, disbursements and attorney fees which Appellants/Respondents forced them to incur by their fraud.

Conclusion

For the foregoing reasons, this Court should affirm the relief awarded to Respondents/Appellants and grant to them their costs, disbursements and attorney fees. If there are matters which require further consideration by the court below, they can be handled on remand with proper instructions.

COX, FERGUSON & WHAM, LLC
Attorneys for Respondents/Appellants

By: _____

John R. Ferguson

John R. Ferguson

S.C. Bar No. 1987

107 E. Laurens St. - P.O. Box 286

Laurens, S.C. 29360

(864) 984-2126

January 20, 2016

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

RECEIVED

JAN 22 2016

Lisa Dutton, Dennis Dutton and Kelsey Dutton,

SC Court of Appeals
Appellants,

v.

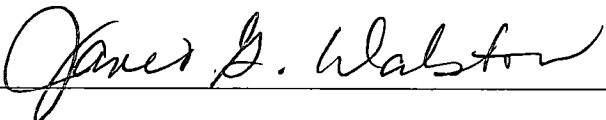
Kathleen Lollis and Linda Campbell,

Respondents.

CERTIFICATE OF SERVICE

The undersigned certifies that she is an employee at Cox Ferguson and Wham LLC and that on the 20th day of January, 2016 she served the Initial Reply Brief of Respondents/Appellants herein by depositing a copy of it in the United States Mail, postage prepaid and addressed to:

Matthew P. Turner, Esq.
Attorney at Law
P.O. Box 668
Laurens, SC 29360.



January 20, 2016

COX, FERGUSON & WHAM

ATTORNEYS AT LAW
107 E. Laurens St.
P.O. Box 286
LAURENS, SOUTH CAROLINA 29360-0286

W. REID COX, JR.
JOHN R. FERGUSON
ALLEN M. WHAM

PHONE: (864) 984-2126
FAX: (864) 984-7372
E-MAIL: jferg@backroads.net

January 20, 2016

Office of the Clerk of Court
S.C. Court of Appeals
1015 Sumter St.
Columbia, SC 29201

RECEIVED

JAN 22 2016

SC Court of Appeals

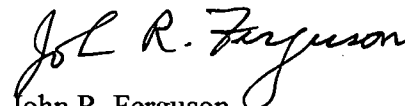
Re: Lollis et al. v. Dutton et al., 2015-001861

Dear Ladies:

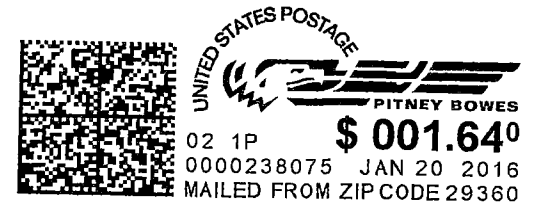
With this letter I am enclosing for filing an original Initial Reply Brief of Respondents/Appellants. I am also enclosing an original Certificate of Service with a copy. Please file the originals and send me a clocked copy of the Certificate of Service in the enclosed self-addressed envelope.

Thank you for your help.

Sincerely,


John R. Ferguson

JRF/wp
Encl.



COX, FERGUSON & WHAM, LLC
ATTORNEYS AT LAW
107 E. LAURENS ST. - PO BOX 286
LAURENS, SC 29360

TO:

Office of the Clerk of court
SC Court of Appeals
1015 Sumter St.
Columbia, SC 29201

RECEIVED
JAN 22 2016
SC Court of Appeals

