

THE STATE OF SOUTH-CAROLINA
In the Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2013-CP-30-3513

RECEIVED

APR 25 2016

SC Court of Appeals

Kathleen Lollis and Linda Campbell Appellants/Respondents,

vs.

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

**RESPONDENTS BRIEF OF
APPELLANTS/RESPONDENTS**

Matthew P. Turner
Turner and Burney, P.C.
S.C. Bar No.: 71719
105 West Public Square
Post Office Box 668
Laurens, South Carolina 29360
(864) 984-6565
Attorney for Appellants/Respondents

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Attorney for Appellants/Respondents

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- I. DID THE TRIAL COURT ERR IN DENYING RESPONDENTS/APPELLANTS' REQUEST FOR COSTS AND DISBURSEMENTS?
- II. DID THE TRIAL COURT ERR IN DENYIN RESPONDENTS/APPELLANTS' REQUEST FOR ATTORNEY'S FEES?
- III. SHOULD THE APPELLATE COURT CONSIDER DOCUMENTS SUBMITTED BY RESPONDENTS/APPELLANTS WHICH WERE NOT PRESENTED TO THE LOWER COURT AT THE TRIAL OF THIS MATTER?

STATEMENT OF THE CASE

On September 11, 2013, Kathleen Lollis and Linda Campbell ("Appellants/Respondents") filed this action in the Court of Common Pleas in Laurens County, South Carolina seeking a restraining order preventing Respondents/Appellants from occupying or using Appellants/Respondents' property located at 1032 Cemetery Road, Ware Shoals, South Carolina and 1046 Cemetery Road, Ware Shoals, South Carolina, for an Order of the Court requiring the Respondents/Appellants to immediately vacate the aforementioned property, for an Order declaring Appellant/Respondent Lollis to be the sole owner of the Cemetery Road property, for an Order declaring Appellant/Respondent Campbell to be the sole owner of the mobile home situated at 1032 Cemetery Road, Ware Shoals, South Carolina, and for an Order granting Appellants/Respondents damages under the theories of trespass, fraud/constructive fraud, civil conspiracy, conversion and intentional affliction of emotional distress. (R. pgs. 15-28) On October 1, 2013, Respondents/Appellants filed an Answer and Counterclaim denying the relief being sought by Appellants/Respondents and seeking an finding that Appellants/Respondents breached their alleged contracts with the Respondents/Appellants, for an Order granting Respondents/Appellants ownership of the real estate and mobile homes located at 1032 Cemetery Road, Ware Shoals, South Carolina and 1046 Cemetery Road, Ware Shoals, South Carolina, for specific performance of the alleged contracts or return of their consideration with prejudgment interest, and for damages under the theories of fraud/ negligent misrepresentation, civil conspiracy, and slander of title. (R. p. 29)

In March of 2014, a hearing was held in front of the Honorable Frank Addy regarding several discovery issues. Pursuant to the Order dated March 14, 2014, the parties were to keep the other side apprised of their legal fees. The Court also found that

Appellants/Respondents had complied with the rules of discovery. In addition, Respondents/Appellants were required to account for the source of the funds which they maintain were used to purchase the Cemetery Road property. The Order further provided that “the Defendants (Respondents/Appellants) shall provide documentation regarding this income or funds – be it via gift, inheritance, wages, disability, government benefits, etc.” (R. p. 13)

A bench trial was held on March 16, 17, 18, and 19, 2015 in front of the Honorable Eugene C. Griffith, Jr. Pursuant to the Final Order filed on July 6, 2015, the Trial Court found that Frank Lollis, son of Appellant/Respondent Lollis, was acting as the authorized agent for Appellant/Respondent Lollis in dealing with the Respondents/Appellants. The Court further found that, Appellants/Respondents and Respondents/Appellants had valid, binding contracts as result of Frank Lollis entering into a contract on behalf of Appellant/Respondent Lollis as her agent, and that Appellant/Respondent Lollis breached her contracts of sale with the Respondents/Appellants. The Court further found that Respondents/Appellants had valid and enforceable right under the contracts of sale. In addition, the Court found that Respondents/Appellants established that they overpaid Appellants/Respondents the amount of \$850.96 and that they were entitled to a refund of this amount. The Court dismissed the remaining causes of action of the Respondents/Appellants, including their causes of action for Abuse of Process, Slander of Title, Civil Conspiracy, and Fraud/Negligent Misrepresentation. (R. pgs. 2-11) The Court also dismissed the Causes of Action filed by Appellants/Respondents.

On July 13, 2015, counsel for Appellants/Respondents filed a Motion to Reconsider, Alter or Amend Pursuant to Rule 59(e) the Court’s Final Order dated July 6, 2015. On July 13, 2015, counsel for Respondents/Appellants filed a Motion to Alter and/or Amend and a Motion for Attorney’s Fees. Pursuant to an Order filed on August 10, 2015, both Motions for Reconsideration were denied. Appellants/Respondents filed this Notice of Appeal with the South Carolina Court of Appeals on September 3, 2015. Respondents/Appellants filed a Notice of Appeal dated September 4, 2015.

ARUGMENT

Standard of Review

“When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal.” Consignment Sales, LLC vs. Tucker Oil Company, 391 S.C. 266, 705 S.E. 2d 73(Ct. App. 2010)

“This Court reviews all questions of law de novo. Review of the trial Court’s factual findings, however, depends on whether the underlying action is an action at law or an action in equity.” Fesmire vs. Digh, 683 S.E. 2d 803, 385 S.C. 296 (Ct. App. 2009) “An action for breach of contract is an action at law.” Consignment Sales, LLC, 391 S.C. at 270. “An action for specific performance is one in equity.” Clardy vs. Bodolosky, 679 S.E. 2d 527, 383 S.C. 418 (Ct. App. 2009). “An action to quiet title to property is an action in equity.” Hollywood’s Association of Residence Owners vs. Hiller, 392 S.C. 172, 708 S.E. 2d 787 (Ct. App. 2011). “In an action at law, the trial Court’s factual findings will not be disturbed upon appeal unless found to be without evidence which reasonably supports the trial Court’s findings. In an action in equity, the Appellate Court may resolve questions of fact in accordance with its own view of the preponderance of the evidence.” Fesmire, 683 S.E. 2d at 807.

I. THE TRIAL COURT PROPERLY DENIED RESPONDENTS/APPELLANTS’ REQUEST FOR COSTS AND DISBURSEMENTS.

First and foremost, Respondents/Appellants are not entitled to any costs or disbursements because the Trial Court erred in finding that Respondents/Appellants had valid and enforceable contracts and further erred in concluding that Appellant Lollis breached the contracts. Therefore, Respondents/Appellants are not the “prevailing party.” Even if it is determined that the Trial Court did not err in finding there were valid and enforceable contracts, Respondents/Appellants are not entitled to costs and disbursements. Respondents/Appellants rely on S.C. Code § 15-37-10 for their claim that they are entitled to costs and disbursements. “An Appellate Court will not overturn a Trial Court’s decision to award costs unless there has been an abuse of discretion.” Peterson vs. National Railroad Passenger Corporation, et al, 365 S.C. 391, 618 S.E. 2d 903, 908 (2005) “A Trial Judge has broad discretion to award costs to the prevailing

party.” Peterson, 618 S.E. 2d at 908 (citing S.C. Code Ann. §15-37-10 and §15-37-20) The Court did not abuse its discretion in denying Respondents/Appellants’ request for costs and disbursements. Even if Respondents/Appellants are entitled to costs under S.C. Code § 15-37-10, they would not be entitled to the full amount of costs requested. § 15-37-40 provides for the allowance of “costs and disbursements as provided by law and the necessary disbursements, including the fees of officers allowed by law, the fees of witnesses, the reasonable compensation of commissioners in taking depositions, the fees of referees and the expense of printing the papers for any hearing when required by a rule of the court.” S.C. Code § 15-37-40 Respondents/Appellants would only be entitled to those categories of cost and disbursements as set forth in the statute. S.C. Code § 15-37-40 further provides that the disbursements shall be stated in detail and verified by Affidavit. The Affidavit of Costs filed by Respondents/Appellants with their Motion to Alter or Amend is not clear as to the types of costs and disbursements incurred, and it is believed that the majority of the costs and disbursements for which Respondents/Appellants seek reimbursement fall outside of the categories allowed pursuant to the statute.

Respondents/Appellants also rely on S.C. Code § 15-53-100 as a basis for their request for costs and disbursements. South Carolina Code § 15-53-100 provides that, “In any proceeding under this chapter the Court **may** make such an award of cost as may seem equitable and just.” (Emphasis added) The statute is clear that it is the Court’s discretion as to whether or not to award costs. Again, the Court did not abuse its discretion in denying an award of costs and disbursements to Respondents/Appellants.

II. THE TRIAL COURT PROPERLY DENIED RESPONDENTS/APPELLANTS’ REQUEST FOR ATTORNEY’S FEES

The Trial Court erred in finding that Respondents/Appellants had valid and enforceable contracts and that Appellant Lollis breached the contracts. As such, Respondents/Appellants are not entitled to an award of attorney’s fees. Even if the Court did not err in finding valid contracts and a breach by Appellant Lollis, Respondents/Appellants must have a valid basis for requesting an award of attorney’s fees. “A party cannot recover attorney’s fees unless authorized by contract or statute.” Cullen vs. McNeil, et al, 390 S.C. 470, 491, 702 S.E. 2d 378 (Ct. App. 2010) “A general

rule is that the attorney's fees are not recoverable unless authorized by contract or statute. In South Carolina, the authority to award attorney's fees can come only from a statute or be provided for in the language of a contract. There is no common law right to recover attorney's fees." Sea Brook Island Property vs. Berger, 616 S.E. 2d 431, 434, 365 S.C. 234 (2005) Respondents/Appellants do not have legal binding contracts with Appellant Lollis. Even if they did, the contracts do not address the issue of attorney's fees and costs. The contracts do not provide that the prevailing party is entitled to fees and costs in the event there is litigation involving a dispute over or the enforcement of the contracts. (R. p. 656; R. p. 659)

Since the Contracts at issue do not provide for an award of fees to the prevailing party, Respondents/Appellants are only entitled to attorney's fees if authorized by statute. Respondents/Appellants rely on the "Uniform Declaratory Judgments Act" in support of their claim that they are entitled to an award of attorney's fees. However, § 15-53-100 of the South Carolina Code provides as follows, "In any proceeding under this chapter the Court may make such an award of **costs** as may seem equitable and just. (Emphasis added) "A Trial Court may award **costs** in declaratory judgment actions as may seem equitable and just." South Carolina Electric and Gas Company vs. Hartough, 654 S.E. 2d 87, 91 (Ct. App. 2007) (Emphasis added) § 15-53-100 of the South Carolina Code allows a Trial Court the discretion to award a litigant costs when it is equitable and just. The statute does not reference attorney's fees. As such, § 15-53-100 of the South Carolina Code does not provide a statutory basis for which Respondents/Appellants are entitled to attorney's fees. In addition, Respondents/Appellants did not argue to the Trial Court that they were entitled to fees under South Carolina Code § 15-53-100 as will be more fully discussed below.

Respondents/Appellants further rely on the Frivolous Civil Proceedings Sanctions Act in support of their claim that they are entitled to attorney's fees. This argument was not plead by Respondents/Appellants in their Answer and Counterclaim, nor was this argument raised to the Trial Court and ruled upon as will be discussed further below. Pursuant to South Carolina Code Ann. § 15-36-10(C)(1), at the conclusion of the trial, and after a verdict was rendered, Respondents/Appellants had to file a motion asking the Court to determine if Appellants/Respondents claims were frivolous. Unless the Court found by the preponderance of the evidence that Appellants/Respondents and/or their

attorney engaged in advancing a frivolous claim; they were not to be sanctioned. S.C. Code Ann. § 53-36-10(C)(2) Respondents/Appellants did not raise this issue to the Trial Court and it was not ruled upon. As such, the Trial Court was not asked to make any finding that Appellants/Respondents or their attorney engaged in any conduct subjecting them to sanctions under the Frivolous Civil Proceedings Act. There was no finding by the Trial Court that Appellants/Respondents engaged in any fraud or that they lied to their attorney as suggested by Respondents/Appellants.

Respondents/Appellants seek an award of attorney's fees under Rule 37(c) of the South Carolina Rules of Civil Procedure. Respondents/Appellants claim that Appellants/Respondents either obstructed discovery and/or did not provide complete answers to discovery. Respondents/Appellants did not raise this issue at trial as will be more fully discussed below. Prior to the trial in this matter, Respondents/Appellants filed a Motion to Compel Answers to certain Requests to Admit. Pursuant to an Order dated January 22, 2015, the motion was granted, conditioned upon Respondents/Appellants being more specific as to some of their Requests (R. p. 12) The Order further provided that Appellants/Respondents had the right to object to the introduction of the evidence at trial on the grounds of relevancy or other grounds (R. p. 12) No fees were awarded as a result of the Motion to Compel.

"In order for an issue to be preserved for Appellate review, it must have been raised to and ruled upon by the Trial Court. The party must present his issues and arguments to the lower Court and obtain a ruling before an Appellate Court will review those issues and arguments." Cullen, 390 S.C. at 492 "It is axiomatic that for an issue to be preserved for appeal, it must have been raised to and ruled upon by the Trial Court." Shirley's Ironworks, Inc. vs. City of Union, et al, 387 S.C. 389, 693 S.E. 2d 1, 6 (Ct. App. 2010)

Respondents/Appellants specifically pled that they were entitled to an award of attorney's fees under their cause of action for "slander of title." (R. p. 35, paragraph 50) Respondents/Appellants did not allege that they were entitled to attorney's fees or costs under any other cause of action. (R. p. 29) As stated above, Respondents/Appellants now allege that they are entitled to an award of attorney's fees and costs pursuant to South Carolina Code § 15-53-100, South Carolina Code § 15-36-10, and Rule 37(C), SCRCP. Respondents/Appellants did not specifically plead that they were entitled to fees based

upon these statutes and Rule 37. Although Respondents/Appellants argue in their Motion to Alter or Amend that they are entitled to fees under these statutes and Rule 37, they did not present these arguments to the Trial Court as a basis for attorney's fees. As such, the matters were not raised to and ruled upon by the Trial Court and cannot be raised for the first time on appeal.

The remainder of Respondents/Appellants' argument that they are entitled to attorney's fees and costs is based upon vague and unsupported claims of fraud, discovery abuse, and misconduct on behalf of Appellants/Respondents. For example, Respondents/Appellants allege that their counsel had to go to Greenwood to get an affidavit from attorney Scurry to "undo" the misleading affidavit filed by Plaintiffs." (Appellants' Initial Brief of Respondents/Appellants, page 7) Respondents/Appellants are referring to an affidavit signed by attorney John Scurry. If the affidavit was misleading or untrue, the attorney should not have signed the same. There are no allegations by Respondents/Appellants that the affidavit was not signed by the attorney or that he was forced into signing the Affidavit. Respondents/Appellants accuse Appellants/Respondents of obstructing discovery. However, there was no finding by the Trial Court that the Appellants/Respondents obstructed discovery. Furthermore, Respondents/Appellants were ordered to provide documentation regarding the income or funds which they maintained were used to purchase the property at issue in this case. (R. p. 13-14) Respondents/Appellants did not provide any information as ordered, yet they complain about the actions Appellants/Respondents. Respondents/Appellants accuse Appellants/Respondents of engaging in fraud and allege they engaged in an "extensive pattern of fraud." Respondents/Appellants sought damages against Appellants/Respondents under the theory of fraud/negligent misrepresentation. (R. p. 29, 36) The Trial Court denied Respondents/Appellants cause of action for fraud/neglect misrepresentation. (R. p. 10, paragraph 37) This ruling was not appealed by Respondents/Appellants.

Respondents/Appellants failed to establish any statutory authority or contractual basis to award them attorney's fees, costs, and disbursements against Appellants/Respondents. The statutes now relied upon by Respondents/Appellants as their basis for an award of attorney's fees were not raised at trial and cannot be addressed

on appeal. As such, the Trial Court's denial of attorney's fees, costs, and disbursements should not be overturned.

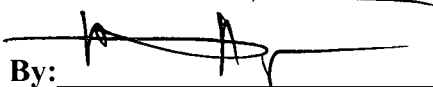
III. THE APPELLATE COURT SHOULD NOT CONSIDER THE DOCUMENTS SUBMITTED BY RESPONDENTS/APPELLANTS WHICH WERE NOT PRESENTED TO THE TRIAL COURT.

Simultaneous with the filing of Respondents/Appellants' Motion to Alter or Amend, Respondents/Appellants filed an Attorney's Fee Affidavit along with numerous attachments. The Attorney's Fee Affidavit is dated July 13, 2015, which is seven (7) days after the Final Order was filed. (R. p. 83) Respondents/Appellants did not file an Attorney Fee Affidavit at trial or in the days following the trial. Attached to the Attorney's Fee Affidavit filed with the Motion to Alter or Amend are eight (8) exhibits. None of these exhibits were presented to the Court or introduced as documents or as exhibits at the trial of this matter. Therefore, these documents, including the Attorney Fee Affidavit and the Affidavit of Costs, are not part of the record and cannot be considered on appeal. Rule 210(c), South Carolina Appellate Court Rules. Many of the exhibits attached to the Attorney's Fee Affidavit are documents which were created by Respondents/Appellants as a basis for their request for attorney's fees. Some of these documents include portions of Appellants/Respondents Answers to discovery which have been "cut and pasted" onto a single document. (R. pgs. 93-97) One exhibit consists of portions of correspondence between the trial attorneys which were "cut and pasted" onto a document. (R. pgs. 98-99) These documents were not presented to the Trial Court, were not introduced as exhibits at trial, and were not considered by the Trial Judge. Accordingly, they are not part of the record and should not be considered on appeal.

CONCLUSION

For the forgoing reasons, this Court should affirm the decision of the Trial Judge denying Respondents/Appellants claim for attorney's fees, costs, and disbursements.

TURNER & BURNEY, P.C.

By: 

Matthew P Turner
Attorney for Appellants/Respondents
105 West Public Square
Post Office Box 668
Laurens, South Carolina 29360
(864) 984-6565

April 15, 2016
Laurens, South Carolina

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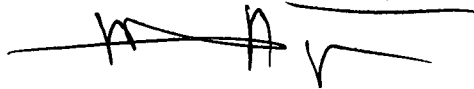
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CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Appellants/Respondents, Reply Brief of Appellants/Respondents, and Respondents Brief of Appellants/Respondents comply with Rule 211(b), SCACR.

April 21, 2016

TURNER & BURNEY, P.C.



Matthew P. Turner
105 West Public Square
Post Office Box 668
Laurens, South Carolina 29360
(864) 984-6565
Attorney for Appellants/Respondents

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PROOF OF DELIVERY

I certify that I have served a copy of the Final Brief of Appellants/Respondents, Reply Brief of Appellants/Respondents, and Respondents Brief of Appellants/Respondents, on Respondents/Appellants, this the 22nd day of April, 2016, by hand delivering a copy to their attorney of record, John R. Ferguson, Esquire, at his address below:

John R. Ferguson, Esquire
107 E Laurens Street
Laurens, South Carolina 29360

TURNER & BURNEY, P.C.



April 22, 2016

Matthew P. Turner
S.C. Bar No.: 71719
105 West Public Square
Post Office Box 668
Laurens, South Carolina 29360
(864) 984-6565
Attorney for Appellants/Respondents