THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
In the Court of Common Pleas

Marvin H. Dukes, Presiding Judge

Case No. 2016-000767

JRC Properties, LLC.....Respondent,

v.

Dennis Corporation, a South Carolina Corporation,
and Daniel R. Dennis, III .....Appellants.

RESPONDENT'S FINAL BRIEF

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STATEMENT OF THE CASE

In 2008, Respondent entered into a commercial lease of 6 Buckingham Plantation in Bluffton, South Carolina ("Lease") (R. p. 510) with Appellant Dennis Corporation ("Corporation"), which is operated by Appellant Dan Dennis ("Dennis"), sole owner/shareholder, president, sole director, and sole officer (R. pp. 34, 38, 39). Section 8 of the Lease provides that, upon termination, Respondent is entitled to recover its costs of collection, including attorney's fees and costs, for unpaid rent, charges and other debt owing from the tenant.

Beginning in October of 2010, Appellant Dennis stopped paying rent. In January of 2011, Appellant Corporation exercised its right to terminate the lease early, pursuant to Section 2.2 of the Lease. For the next two years, the Plaintiff's principal, Rollin McKim, made countless (and fruitless) attempts to induce Appellants to pay the outstanding rent and accrued late charges. Finally, Respondent sued Appellants in 2013; the lawsuit included three causes of action: breach of contract, conversion and violation of the S.C. Unfair Trade Practices Act ("UTPA") (R. p. 18).

From the outset of the case, Appellants engaged in a pattern of delay, obstruction and evasion, resulting in the Respondent spending more and more time on the case. Initially, Appellants were represented by Attorney Franklin Smith of Columbia, who filed an answer and motion to dismiss, which included a baseless motion to dismiss based on improper venue, despite Appellants' lease of commercial property in Beaufort County (R. p. 24; R. p. 478). The Answer contained no admission to owing any monies to Respondent, nor did it contain any admission that Appellants failed to pay four month's rent.

Subsequently, Attorney Jake Moore took over as counsel for Appellants; however, no motion to be relieved as counsel was ever filed by Smith, no notice of appearance was ever filed by Moore, and no consent order for substitution of counsel was ever presented to Respondent's counsel. Thus, for the first year of the lawsuit, Respondent found it necessary to serve documents on both attorneys.

The Respondent served initial discovery requests, including a request for admissions (R. p. 436), in January of 2014. Request Number 3 set forth as follows:

ADMIT OR DENY THE FOLLOWING:

3. That the Defendants made no rental payments to the Plaintiff for the following months: October, November and December of 2010, and January of 2011.

Appellants responded to this Request on January 14, 2014, as follows:

3. Denied.

(R. p. 438). Thus, the litigation continued.

Appellants' remaining discovery responses were evasive and incomplete, and had to be addressed by a motion to compel, filed by Respondent. The motion was subsequently resolved by consent order (prepared by Respondent's counsel), which required Appellants to provide full and complete responses to all of the discovery requests by no later than June 6, 2014.

On June 5, 2016, Appellants served supplemental responses (R. p. 439). The all-new response to Interrogatory Number 15 was as follows:

> Defendants made no payments to the Plaintiff during the time period October 2010 through January 2011.

Also, in the supplemental response to Interrogatory Number 18, wherein Appellants had been asked for the factual basis for denying Request for Admissions Number 3, Appellants' response was as follows:

> At the time the request for admissions were responded to, it was not known to be true.

Appellants also produced at this time a copy of the written contract with Beaufort County; despite having Appellant Dennis having informed McKim otherwise, the contract contained no express provision requiring Appellants to set aside monies received by the county to pay rent. Accordingly, the Respondent essentially abandoned its conversion cause of action[1] and, in September of 2014, filed a motion seeking summary judgment ("SJ Motion") on its claim for breach of contract alone (R. p. 442).

The SJ Motion was scheduled the following January for a February 10 hearing date. At this time, Respondent's attorney's fees and costs were $12,125.00 (R. p. 473). On February 9, 2015, Appellants' counsel contacted the presiding judge and requested that the hearing be continued to a later date. The Honorable Perry Buckner held a status conference telephone call and the parties agreed that the summary judgment motion hearing would be continued and, further, the parties would simply submit their supporting documents (at this point, Appellants had submitted no return and no counteraffidavits, despite the SJ Motion having been filed for four months) and have Judge Buckner rule without the necessity of oral argument.

Having not yet received a decision from Judge Buckner by May of 2015,

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[1]Though it was asserted in good faith, the Respondent spent very little time developing the UTPA cause of action.

Respondent's counsel contacted the Court and was informed that an order denying summary judgment had been issued the previous February and, according to Judge Buckner's clerk, sent to Appellants' counsel for service (R. p. 472). The undersigned never received an order from opposing counsel and, apparently, the Clerk of Court could not find the original order signed by Judge Buckner. Eventually, however, an amended order denying summary judgment ("Buckner Order") was issued, albeit four months after the first one (R. p. 9). In his Order, Judge Buckner specifically held as follows:

> However, ***in viewing the Plaintiff's First Request for Admissions and the Defendants' Responses*** in the light most favorable to the Defendants, attached to the Motion for Summary Judgment as Plaintiff's Exhibits D and E, respectively, ***there is a genuine issue of material fact as to whether the Plaintiff is owed four months of rent.*** Specifically, number three of the Request for Admissions asks the Defendants to admit or deny making no rental payments for October, November, and December of 2010, and January of 2011. ***The Defendants deny making no rental payments for those four months in their Responses. Therefore, there still remains at least this genuine issue of material fact to be determined by jury.*** (Emphasis added.)

Thus, summary judgment was denied based solely on Appellants' previous denial that Appellants had failed to pay rent for those four months.[2]

After the denial of summary judgment, Respondent noticed the deposition of Appellant Dennis, both individually and as the 30(b)(6) witness for Appellant Corporation. It was necessary for Respondent's counsel to spend the requisite amount of time preparing for the depositions, including: reviewing the Lease terms, pleadings, orders, motions,

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[2]Respondent is unaware of any attempt by Appellants to correct Judge Buckner's impression that Appellants were standing by their denial of Request for Admissions Number 3, despite later recanting the denial in supplemental responses to Interrogatories 15 and 18.

discovery responses and file notes; researching the relevant Code sections and case law; preparing examination questions for the deponents; and assembling exhibits. The Respondent focused primarily on the breach of contract cause of action for which the Plaintiff had already filed the SJ Motion.

During the depositions, held in June of 2015, Appellant Dennis testified that, during the contract with the county, he regularly received funds that were earmarked to pay rent to his landlord, as the county was required to reimburse him for his rent under the terms of the contract (R. pp. 68, 69, 79-80, 81). As a result, Respondent determined that the conversion cause of action was once again viable; even then, however, very little of the time spent by Respondent's counsel involved the conversion cause of action. Also during his deposition, Appellant Dennis stated for the first time in the case that there was "no question" he owed Respondent at least $15,000.00 (R. pp. 125, 127) and that Respondent was entitled to charge the late fees set forth in Section 8.3 of the written Lease (R. p. 48). No payment of the undisputed past due rent and associated fees materialized, however.

In August of 2015, Respondent's counsel reminded opposing counsel by letter that the case required mediation, and requested names of mediators and dates of availability. Appellants' counsel responded to the August letter nearly two months later, and asked that the mediation be coordinated with Appellants' counsel's staff. Respondent secured a mediator in October and the case was scheduled for a mediation conference to be held on November 19, 2015. By this time, the case had been referred to the Beaufort County Master-in-Equity. It became necessary for Respondent's counsel to prepare a consent order allowing the parties to go beyond the deadline for mediation, which was also November 19. Despite

repeated requests from counsel and the court (R. p. 476), Appellant's counsel would not sign the consent order, so the Master-in-Equity finally crossed out "CONSENT" on the order, signed it and dated it November 16 (R. p. 13).

Respondent's counsel prepared for the mediation by meeting with his client, reviewing the file and assembling documents and a pre-mediation summary for the mediator, at the mediator's request. The mediation took place as scheduled, but was not successful. No payment of the undisputed past due rent and associated fees materialized.

Respondent subsequently secured a trial date of January 25, 2016 and served notice of the trial date on or about December 2, 2015. A week or so before the scheduled trial date, Respondent's counsel began preparation for trying the case. No payment of the undisputed past due rent and associated fees materialized prior to trial.

The case was tried on the scheduled date. The trial court ruled in favor of the Respondent on its breach of contract claim, dismissed the other two claims, and instructed the parties to brief the court on the issue of attorney's fees within twenty days (R. pp. 393, 394, 395), or by February 15. Appellants sent their brief to the court on February 19, and Respondent objected to same as untimely (R. p. 488). Subsequently, the trial court awarded Respondent damages for the unpaid rent and associated fees, as well as physical damage to the premises, in the amount of $36,914.50, and attorney's fees and costs in the amount of $32,110.00 (R. p. 7). In essence, the trial court granted what Respondent sought (but was denied) via the SJ Motion a year or so prior. This appeal followed.

STANDARD OF REVIEW

On appeal from an action at law, tried with or without a jury, the appellate court's standard of review extends only to the correction of errors of law. *Frampton v. S. Carolina Dep't of Transp.*, 406 S.C. 377, 752 S.E.2d 269 (Ct. App. 2013); *Townes Assocs., Ltd. v. City of Greenville,* 266 S.C. 81, 221 S.E.2d 773 (1976). The factual findings of the trial judge or jury will not be disturbed "unless a review of the record discloses that there is ***no evidence*** which reasonably supports [its] findings." *Id.* (Emphasis added.)

ARGUMENT

I. The trial court committed no error in awarding attorney's fees to the Respondent.

The trial court's decision to award attorney's fees and costs to the Respondent was authorized by contract, but Respondent was nevertheless the prevailing party at trial, there was no error and the trial court's Final Order and Judgment should be affirmed in its entirety.

1. The trial court awarded attorney's fees to the Respondent based on the parties' contract, not pursuant to statute.

In their Brief, the Appellants claim that the trial court erred by awarding attorney's fees to the Respondent on the ground that Respondent was not the "prevailing party;" however, the fees awarded to Respondent were authorized under the parties' Lease.

Typically, attorney's fees are not recoverable unless authorized by contract or statute. *Blumberg v. Nealco, Inc.,* 310 S.C. 492, 427 S.E.2d 659 (1993); *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). A statutory award of attorney's fees is typically authorized under what is known as a "fee-shifting" statute, which permits a "prevailing party" to recover fees from the losing party. *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008). When attorney's fees are claimed pursuant to 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. *Blumberg* at 493.

In their Brief, the Appellants assert that "attorney's fees and costs may only be awarded to the prevailing party," and argue that, had the trial court properly "determined the degree of success" obtained by Respondent, attorney's fees would not have been awarded to Respondent. In support of this proposition, they cite the case of *Seckinger v. Vessel Excalibur,* 326 S.C. 382, 483 S.E.2d 775 (Ct. App. 1997).[3] Their reliance on *Seckinger* is misplaced, as reflected in the following passage:

> Generally, attorney fees are not recoverable unless authorized by contract or statute. *Blumberg v. Nealco, Inc.,* 310 S.C. 492, 427 S.E.2d 659 (1993). ***Because the contract between Seckinger and McDonnell did not address attorney fees, any entitlement to them must emanate from statute.***
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> *Seckinger* at 386–87 (Emphasis added).

The *Seckinger* case, then, dealt with a statutory award of attorney's attorney's (specifically,

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[3]Appellants also cite *Commissioner, I.N.S. v. Jean*, 496 U.S. 154, 110 S. Ct. 2316, 110 L. Ed. 2d 134 (1990), *Heath v. County. of Aiken*, 302 S.C. 178, 394 S.E.2d 709 (1990) and *Buza v. Columbia Lumber Co.*, 395 P.2d 511 (1964) for this proposition. As in *Seckinger*, the attorney's fees in the first two cases were awarded pursuant to statute. In *Buza,* an Alaska case, the fees appear to have been awarded at the discretion of the court, not pursuant to a contract.

the mechanic's lien statutes). Given that the parties' contract in that case "did not address attorney's fees," and that any award of such fees "must emanate from statute," it was necessary for the *Seckinger* court to determine which party prevailed at trial. The court there noted that the Supreme Court has defined prevailing party "[i]n the context of statutes allowing attorney fees," and then went on to determine who prevailed under the relevant statutes. In the instant case, however, the trial court awarded attorney's fees to the Respondent pursuant to the language of the parties' Lease (R. pp. 498, 7). Thus, the trial court was not required to "evaluate the degree of success" achieved by Respondent to determine who prevailed, as when fees are awarded by statute; instead, the trial court was merely required to avoid abusing its discretion in awarding attorney's fees. Appellants have shown no abuse of discretion, and the trial court's Order should accordingly be affirmed.[4]

B. The Respondent was the prevailing party at trial because the trial court ruled in Respondent's favor on the breach of contract cause of action.

Even if the trial court had undertaken to determine the degree of success obtained by Respondent, the Respondent would have been awarded its attorney's fees under the Lease because it prevailed on the main issue in the case.

A prevailing party has been defined as the party who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, ***even though not to***

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[4]Although the parties' contract contains the term "prevailing party," such does not necessarily require the trial court to undertake the analysis used when awarding fees authorized by statute.

the extent of the original contention, and the one in whose favor the decision or verdict is rendered and judgment entered. *Heath* at 182-183 (Emphasis added).

Under the *Heath* standard, Respondent was clearly the prevailing party at trial. The Respondent successfully prosecuted the case and won on the main issue (breach of the Lease), with the trial court rendering its decision for Respondent and entering judgment in excess of $36,000.00. Although the Respondent's causes of action for conversion and violation of the UTPA (both of which stemmed from the underlying breach of contract) were ultimately dismissed by the trial court, under *Heath*, such is not dispositive for purposes of determining the prevailing party. The trial judge himself noted that it was "good lawyering" on the part of Respondent to assert all causes of action it believed it had against the Defendants (182:1-2; R. p. 393). Even so, the Respondent spent very little time developing the UTPA claim, and essentially abandoned the conversion claim for much of the litigation, until Appellant Dennis revived the issue in his deposition (R. pp. 482, 68, 69, 79, 80, 81).

Furthermore, the Respondent achieved at trial what it sought in its prior motion for summary judgment, to wit: actual damages and associated fees for breach of the parties' Lease, as well as an award of attorney's fees and costs (R. p. 442). In its SJ Motion, the Respondent abandoned its claim for conversion and the UTPA claim, seeking instead to recover on its breach of contract cause of action alone. Although the Appellants successfully defended against that Motion – which was not granted due solely to the denial by Appellants that they had failed to pay four month's rent (R. pp. 480, 11) – the relief sought therein is essentially what was granted by the trial court, and the trial court's Order should be affirmed.

II. The trial court's award to the Respondent was not excessive, and was supported by the evidence on the record.

A. The Respondent presented evidence at trial of both a written fee agreement and of its payment of attorney's fees and costs.

Despite the Appellants' claims to the contrary, the Respondent had a written fee agreement with its counsel, paid attorney's fees and costs pursuant to that agreement and presented evidence of both.

In an action at law, the factual findings of the trial judge will not be disturbed unless there is no evidence on the record which reasonably supports his findings. *Townes* at 85.

The Appellants argue in their Brief that, because the Respondent did not produce a copy of its written fee agreement for inspection at trial, the agreement does not exist because there is no evidence of same. This is incorrect.[5] First, it should be noted that the Appellants served no discovery requests on the Respondent prior to trial; had they done so, they certainly could have requested a copy of the Respondent's fee agreement with counsel, rather than insist on the day of the trial that one be produced on command. Second, during examination by Appellants concerning attorney's fees, Respondent' counsel expressly testified that, in fact, there was a written fee agreement with the Respondent (R. p. 382).

Appellants also complain about the submission of Respondent's affidavit of attorney's fees, and that no "evidence was presented at trial that this amount was either charged to the Respondent or paid by the Respondent." This is also incorrect: Respondent's

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[5]Appellants cite no legal authority for their proposition that Respondent's counsel's alleged failure "to present any evidence of a fee agreement with the Respondent" renders the award of attorney's fees by the trial court "erroneous and improper."

witness, Rollin McKim, testified that Respondent received invoices every month from its counsel and that the invoices were paid with a check, and that there was a balance due (R. p. 386). Testimony is evidence, and, in this case, it is on the record. Any claim that there was "no evidence" here is simply incorrect, and the trial court's holding regarding attorney's fees and costs should accordingly be affirmed.

B. The amount of attorney's fees awarded to Respondent was supported by the evidence presented to the trial court.

There was more than sufficient evidence for the trial court to award Respondent the amount of attorney's fees that it did.

The six factors to be considered in awarding attorney's fees are: 1) the nature, extent and difficulty of the legal services rendered; 2) the time and labor necessarily devoted to the case; 3) the professional standing of counsel; 4) the contingency of compensation; 5) the fee customarily charged in the locality for similar legal services; and 6) the beneficial results obtained. *Blumberg* at 494. "Where an attorney's services and their value are determined by the trier of fact, an appeal will not prevail if the findings of fact are supported by **any** competent evidence." *Baron* at 384 (emphasis added).

Respondent submitted an attorney fee affidavit, about which Appellants' counsel thoroughly examined both the Respondent's witness and Respondent's counsel. Furthermore, after the bench trial concluded, the trial judge directed the Respondent to produce invoices for legal fees its received from its counsel during the litigation, and Respondent delivered monthly invoices from the previous two to three years of litigation. The trial court examined the invoices *in camera,* and subsequently awarded the Respondent

every penny of attorney fees and costs prayed for in the case.[6] Clearly, between the affidavit, the testimony elicited about the same at trial and the two-plus year's worth of invoices submitted, the trial court found competent evidence of the Respondent's counsel's services and their value.

Furthermore, the trial court expressly considered the *Blumberg* factors in issuing its ruling (R. p. 6). This case was rendered much more difficult by the actions of the Appellants, as outlined in detail hereinabove. In turn, the time and labor devoted to the case by Respondent's counsel was in direct response to the actions of the Appellants and their counsel. Regardless of Appellants' actions, however, it would have been necessary for the Respondent to spend requisite time on motions, mediation and depositions.[7] As the trial judge himself noted, in response to the Appellants' suggestion that Respondent's counsel spent too much time on the case: "as we all know the mediation for instance isn't just the mediation. It's the day or perhaps days leading up to the mediation." The trial court also pointed out that depositions require preparation, and that, while Appellants' counsel perhaps

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[6]Appellants complain in their Brief that the invoices reviewed by the trial court *in camera* were "not made a part of the record in this case." Appellants were well aware that the trial court had asked for time records (R. p. 496), that Respondent had delivered invoices to the court (R. p. 497), and that the trial court subsequently reviewed the invoices *in camera* to conclude that the "attorneys fee request of the Plaintiff is reasonable, called for in the lease and complies with the factors," (R. p. 498). Appellants voiced no objections at the time, choosing instead to object to the invoices for the first time in their Brief. However, "[i]t is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved." *Buist v. Buist*, 410 S.C. 569, 766 S.E.2d 381 (2014).

[7]This would also include some travel time: while Appellants complain in their Brief that their depositions "were taken on the same day in Columbia, South Carolina and took approximately five (5) hours," they neglect to mention that Respondent and its counsel live in Bluffton, South Carolina, over two hours from Columbia.

needed less preparation than others, "most everybody else probably has to prepare a little bit." (R. p. 392).[8]

With regard to professional standing of counsel, the undersigned has practiced in the field of civil litigation for 17 years, and has successfully handled matters in District Court, Circuit Court, Family Court, Probate Court, and Magistrate and Municipal Courts in several different counties and locations, has tried an estimated 80 to 100 non-jury cases during his career, and is a certified circuit court mediator. Moreover, the undersigned has argued cases on appeal before this Court, the S.C. Supreme Court, and the Fourth Circuit Court of Appeals. The Respondent would submit that the trial judge was aware of much of this, considering the number of cases the undersigned has tried and/or handled in the trial judge's court.

As for the fee customarily charged, the trial judge (as Beaufort County Master-in-Equity) was certainly in a position to determine whether Respondent's counsel's rate of $300 an hour is a reasonable rate for the Hilton Head Island/Beaufort area. Their Brief suggests the Appellants are shocked by Respondent's counsel's rate; this could be due to the fact that Appellants' counsel has had "approximately 1,800 jury trials" and charged his clients only $2,500.00 (R. pp. 387, 388). At his rate of $250.00 an hour, this means that counsel spent a total of ten hours on a case litigated for over two years. As the trial judge noted, the Appellants received a "spectacular deal" from their counsel (R. p. 391).

With regard to the beneficial results obtained, as indicated hereinabove, the

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[8]It should be noted that Attorney Moore was not actually present for the depositions of Appellants, but sent an associate in his stead. This was also the case with the mediation conference.

Respondent secured at trial what it sought via summary judgment motion filed a year before, albeit with attorney's fees and costs accrued in the interim. In *Baron Data*, the Supreme Court upheld an attorney's fee award to the Plaintiff that actually exceeded the Plaintiff's recovery, concurring with the trial court's determination that Plaintiff's counsel in that case "had to expend considerably more time and effort on the case because the defendants had transformed a simple collection action into complex litigation." *Id.* at 297. This is precisely what happened in the instant case. Accordingly, the Appellants' objections are without merit, there is no error, and the trial court's ruling should be affirmed.

CONCLUSION

For the reasons set forth hereinabove, the trial court's Final Order and Judgment should be affirmed in its entirety, and, further, should be affirmed on any ground(s) appearing in the Record on Appeal, pursuant to Rule 220©, SCACR.

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