

BRIEF OF RESPONDENT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Case No. 2012209227

Joseph N. Grate,


Appellant,

v.

Waccamaw EOC, Inc.,

Respondent.

FINAL BRIEF OF RESPONDENT



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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

1. THIS APPEAL SHOULD BE DISMISSED BECAUSE RULES OF PRESERVATION REQUIRE THAT ON APPEAL, THE APPEALING PARTY BE LIMITED TO THE ARGUMENTS RAISED TO, AND RULED UPON BY, THE TRIAL JUDGE IN SUPPORT OF A MOTION OR OBJECTION WHICH IS NOT PRESENTED IN APPELLANT'S INITIAL BRIEF.
2. THE JURY VERDICT WAS NOT IN ERROR BECAUSE THE EVIDENCE REASONABLY SUPPORTS THE JURY'S FINDINGS THAT RESPONDENT SUBSTANTIATED THE BREACH OF CONTRACT COUNTERCLAIM
3. THE JURY VERDICT WAS NOT IN ERROR BECAUSE THE EVIDENCE REASONALBY SUPPORTS THE JURY'S FINDINGS THAT APPELLANT FAILED TO MEET THE BURDEN OF PROOF FOR BREACH OF CONTRACT.

STATEMENT OF THE CASE

On December 20, 2010, Appellant, Joseph N. Grate, filed a breach of contract action against Respondent, Waccamaw EOC, Inc. In January of 2011, Appellant filed an Amended Complaint. Thereafter, Respondent answered the Amended Complaint alleging in part the contract was a legal impossibility and counterclaimed alleging breach of contract. The contract action was tried by a jury on January 10 and 11, 2012. The jury found for Respondent and awarded Two Thousand Ninety (\$2,090.00) Dollars in damages. On March 7, 2012, Appellant served the Notice of Appeal on Respondent.

FACTS

Appellant's Amended Complaint alleges Respondent breached a contract entered into by the parties on April 30, 2010. Respondent is a non-profit organization, who received grants and/or federal funding to construct a Head Start Center in Georgetown,

South Carolina. Under the contract, Appellant was to provide project management services for the design and construction of the Choppee Head Start Center in Georgetown, South Carolina. The compensation clause of the contract in dispute was drafted by the parties. Respondent paid Appellant an advance payment against future billing in the amount of Ten Thousand (\$10, 000.00) Dollars and final payment would not be made until the entire project was complete. The contract stated the contractor, the Appellant herein, shall be compensated at a fee not to exceed 9% of the total building cost (excluding design, engineering and permitting fees). The price term in the agreement is equivalent to a "cost-plus-a-percentage-of-cost" or "percentage of construction cost" method. Title 45 §74.44(c) of the Code of Federal Regulations precludes "the cost-plus-a-percentage-of-cost" or "percentage of construction cost" methods of contracting. At the time the contract was entered into, neither Appellant nor Respondent were aware the agreed upon price term of the contract violated Title 45 §74.44(c) of the Code of Federal Regulations. As soon as Respondent was on notice the "cost-plus-a-percentage-of-cost" or "percentage of construction cost" method violated Federal law, Respondent met with Appellant in August of 2010 in an effort to resolve the price-term issue of the contract. Appellant refused to resolve the price-term issue with Respondent. Thereafter, Appellant filed the breach of contract action. After the parties received notice the contract violated federal law and after Appellant refused to fix the price term and initiated the civil action, Respondent sent Appellant a 30 Day Notice of Termination of Contract letter on February 7, 2011.

ARGUMENTS

- I. THIS APPEAL SHOULD BE DISMISSED BECAUSE RULES OF PRESERVATION REQUIRE THAT ON APPEAL, THE APPEALING PARTY BE LIMITED TO THE ARGUMENTS RAISED TO, AND RULED UPON BY, THE TRIAL JUDGE IN SUPPORT OF A MOTION OR OBJECTION WHICH IS NOT PRESENTED IN APPELLANT'S INITIAL BRIEF.

An issue that is not raised to the trial court will not be considered by the appellate court. Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1997). An appellate court will not consider an issue that has not been preserved for appellate review. Ulmer v. Ulmer, 369 S.C. 486, 632 S.E.2d 858, 861 (2006). Issue preservation requires a party to preserve an issue both at trial and in presentation of the issue on appeal. S.C. Dep't of Transp. V. M & T Enters. Of Mt. Pleasant, LLC, 379 S.C. 645, 659, 667 S.E.2d 7, 15 (Ct. App. 2008).

Here, Appellant states as his first argument on appeal Respondent failed to substantiate its breach of contract counterclaim and the jury verdict was in error. However, Appellant does not address any issues, if any, from the record that were preserved at trial of this matter. Specifically, Appellant does not cite arguments in his Initial Brief raised to, and ruled upon by, the trial judge in support of a motion or objection.

Additionally, Appellant simply states as his second argument on appeal Respondent breached the contract, Appellant should be compensated and the jury verdict was in error. Again, Appellant does not cite arguments in his Initial Brief raised to, and ruled upon by, the trial judge in support of a motion or objection. Appellant failed to raise issues in Appellant's Initial Brief for adequate appellate review. Appellant simply argues

the findings by the jury are in error but fails to cite specific error.

II. THE JURY VERDICT WAS NOT IN ERROR BECAUSE THE EVIDENCE REASONABLY SUPPORTS THE JURY'S FINDINGS THAT RESPONDENT SUBSTANTIATED THE BREACH OF CONTRACT COUNTERCLAIM

As a contract action, this is an action at law. Small v. Springs Industries, Inc., 292 S.C. 481, 357 S.E.2d 452 (1987). "In an action at law, on appeal of a case tried by a jury, the [j]urisdiction of this Court extends merely to the correction of errors of law, and a factual finding of the jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings." Townes Associates, LTD v. The City of Greenville, South Carolina, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976).

Here, Appellant argues the findings by the jury are in error. However, the evidence reasonably supports the jury's findings that Respondent substantiated the Breach of Contract Counterclaim.

Appellant and Respondents entered into the contract at issue in April 2010. (R. pp. 133-141; R. p. 254, lines 22-25; R. p. 286, lines 7-14). Pursuant to the contract, Appellant was to provide project management services for the design and construction of the Choppee Head Start Center in Georgetown, South Carolina. (R. pp. 133-141; R. p. 323, lines 6-16). For Appellant's services, Respondent would compensate him a fee not to exceed nine (9%) percent of the total building costs excluding design, engineering and permitting fees payable as set forth in 3-1 of the contract. (R. pp. 133-141; R. p. 306, lines 11-25). Additionally, Respondent would pay Appellant an advance payment against future building billings of \$10,000.00 as soon as funds are available to Respondent. (R.

p. 306, lines 11-25; R. p. 140). On April 30, 2010, Respondent paid \$10,000.00 as an advance for his services. (R. p. 256, lines 13-20; R. p. 274, lines 8-10).

Respondent discovered in May or June of 2010, this type of contract was not allowable under the law. Janice Wideman, an employee of Respondent, testified the contract is a cost-plus or percentage-of-construction” contract which is not allowable under the law. (R. p. 306, lines 11-25-p. 307, lines 1-9). She further testified that she sent a copy of the statute to Attorney Ralph Wilson that applies to a “cost-plus” or “percentage of construction contract. (R. p. 307, lines 10-18). At no time prior to this date were the Appellants or Respondents aware that the contract was improper due to federal regulations. (R. p. 324, lines 14-22). In fact, Wilhemina B. Whitfield testified she was under the impression that she was signing a legal binding document and she was not aware of the CFR Regulation at the time of signing. (R. p. 293, lines 19-25).

Appellant testified he learned of the statute on December 6, 2010. (R. p. 250, lines 20-25,-p. 251, line 1). Appellant further testified the “cost-plus-a-percentage-of-cost” or “percentage of construction” method shall not be used under Title 45 §74.44(c) of the Code of Federal Regulations. (R. p.103; R. p. 248, lines 20-25-p. 250, lines 1-14).

Upon finding out the contract was improper from staff, Respondents sent it to an attorney for review. (R. p. 325, lines 1-7). In fact, Zacharius Grate testified on August 9, 2010 he sent an email to Ralph Wilson forwarding a memo from Beth Fryar regarding the contracts for Joseph Grate and Steve Strickland (Earthworks). In the memo she requests the contracts be amended to be a fixed amount as to not violate federal regulations. (R. p. 326, lines 24-25-p. 328, lines 1-6; R. p. 424).

Respondents and Appellant and/or attorney, Ralph Wilson had several meetings to discuss changing the contract to a fixed amount. (R. p. 328, lines 7-14). Appellant testified he met with attorney Ralph Wilson on at least three of four separate occasions and at least one of these occasions they discussed Title 45 §74.44(c) of the Code of Federal Regulations. (R. p. 248, lines 2-9). Appellant further testified he had a discussion with attorney Ralph Wilson regarding replacing the percentage-cost-plus with a dollar figure in the contract but he refused to change the contract. (R. p. 252, lines 4-12). Despite their efforts, Appellant would not agree to change the contract from a “percentage-cost-plus” contract to a fixed amount contract. (R. p. 328, lines 15-18). Appellant testified he refused to substitute the dollar amount for the nine (9%) percent. (R. p. 368, lines 10-14). In addition to the contract with the Appellant, the Respondents entered into another contract with Earthworks that included a percentage clause and it was rectified by changing the contract to a fixed amount leaving Earthworks on the project. (R. p. 350, lines 3-15).

Although there was a problem with the contract, Respondents continued to work with Appellant in an effort to change the contract. Additionally, Appellant testified he was meeting with Respondents, billing them for meetings from April 2010 when he entered into the contract until August or September of 2010, and received payment for invoices submitted. (R. p. 253, lines 19-25-p. 254, lines 1-16; R. pp. 143-146). Appellant was paid \$4,591.00 on August 5, 2010. (R. p. 273, lines 1-3; R. p. 274, lines 1-4). Respondents paid Appellant a total of \$14,459.00 between April and August of 2010. (R. p. 274, lines 11-13).

Zacharius Grate testified at no time prior to Appellant filing this action, did Respondent attempt to terminate his services. (R. p. 328, lines 19-25). It was not until February 7, 2011, attorney, Ralph Wilson sent him a letter by Certified and First Class mail with notice of termination of his contract. (R. p. 373, lines 13-25-p. 374, lines 1-8; R. p. 425). Appellant filed his lawsuit in December of 2010. (R. p. 374, lines 9-10).

As the record shows, evidence was presented during the trial of the case. This evidence reasonably supports the jury's findings price term of the contract violated Title 45 §74.44(c) of the Code of Federal Regulations and Respondent substantiated the breach of contract counterclaim.

III. THE JURY VERDICT WAS NOT IN ERROR BECAUSE THE EVIDENCE REASONALBY SUPPORTS THE JURY'S FINDINGS THAT APPELLANT FAILED TO MEET THE BURDEN OF PROOF FOR BREACH OF CONTRACT.

As a contract action, this is an action at law. Small v. Springs Industries, Inc., 292 S.C. 481, 357 S.E.2d 452 (1987). "In an action at law, on appeal of a case tried by a jury, the [j]urisdiction of this Court extends merely to the correction of errors of law, and a factual finding of the jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings." Townes Associates, LTD v. The City of Greenville, South Carolina, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976).

Here, Appellant argues the findings by the jury are in error. However, the evidence reasonably supports the jury's findings that Appellant failed to meet the Burden of Proof for Breach of Contract.

Appellant and Respondents entered into contract in April 2010. (R. p. 254, lines 22-25; R. p. 286, lines 7-14; R. pp. 133-141). Pursuant to the contract, Appellant was to provide project management services for the design and construction of the Choppee Head Start Center in Georgetown, South Carolina. (R. p. 323, lines 6-16; R. pp. 133-141). For Appellant's services, Respondent would compensate him a fee not to exceed nine (9%) percent of the total building costs excluding design, engineering and permitting fees payable as set forth in 3-1 of the contract. (R. p. 306, lines 11-25; R. pp. 133-141.) Additionally, Respondent would pay Appellant an advance payment against future building billings of \$10,000.00 as soon as funds are available to Respondent. (R. p. 306, lines 11-25; R. pp. 133-141). On April 30, 2010, Respondent paid \$10,000.00 as an advance for his services. (R. p. 256, lines 13-20; R. p. 274, lines 8-10).

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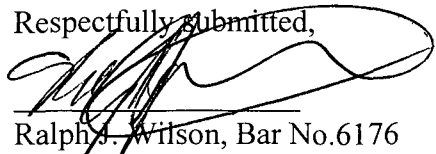
As the record shows, evidence was presented during the trial of the case. This evidence reasonably supports the jury's findings that Appellant failed to meet the burden of proof for breach of contract.

CONCLUSION

For the reasons stated, this Court should affirm the judgment of the circuit court.

September 7, 2012

Respectfully submitted,



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CERTIFICATE OF COUNSEL IN FINAL BRIEF

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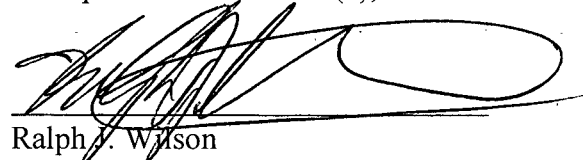
Joseph N. Grate,

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

September 7, 2012



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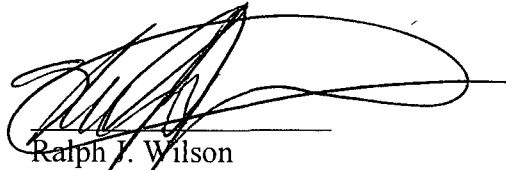
Joseph N. Grate,

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PROOF OF SERVICE

I certify that I have served three (3) bound copies of the Final Brief Of Respondent on Joseph N. Grate by depositing it in the United States Mail, by certified mail, return receipt, article number 7011 1150 0000 5100 2691 postage prepaid, on September 12, 2012, addressed to Joseph N. Grate, Post Office Box 1294, Pawley's Island, South Carolina 29585.

September 12, 2012



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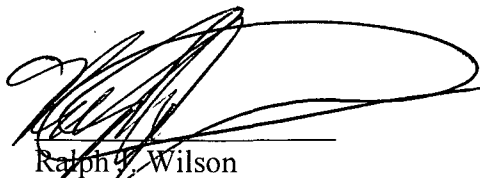
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PROOF OF SERVICE

I certify that I previously served three (3) bound copies of the Final Brief Of Respondent on Joseph N. Grate by depositing it in the United States Mail, on September 12, 2012. I further certify that I served three (3) bound copies of the Final Brief of Respondent, correcting the deficiencies, on Joseph N. Grate by certified mail, return receipt, article number 7011 1150 0000 5100 2707 postage prepaid, on September 26, 2012, addressed to Joseph N. Grate, Post Office Box 1294, Pawley's Island, South Carolina 29585.

September 26, 2012



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