

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Judge

Case No. 2017-CP-04-01382

Appellant Case No.: 2019-000692

Federal Logistics, Inc.,

Respondent,

v.

DMP Construction, LLC,

Appellant.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR IN FINDING THAT A VERDICT IN FAVOR OF THE APPELLANT WAS NOT REASONABLY POSSIBLE UNDER THE EVIDENCE PRESENTED AT TRIAL?
- II. DID THE TRIAL COURT ERR IN DENYING APPELLANT'S POST-TRIAL MOTION TO VACATE THE JUDGMENT AND/OR GRANT A NEW TRIAL?
- III. SHOULD THE DOCUMENTS ATTACHED TO APPELLANT'S POST-TRIAL MOTION BE CONSIDERED ON THIS APPEAL?

STATEMENT OF THE CASE

Respondent, Federal Logistics, Inc., commenced this action by filing its Summons and Complaint on July 4, 2017 alleging a cause of action to recover an unpaid account balance due from Appellant, DMP Construction, LLC, and an alternative cause of action based on *quantum meruit*. Appellant filed its Answer admitting its execution of the credit application and agreement to the terms and conditions, but denying the remaining substantive allegations of the Complaint. The case was called for trial on December 5, 2018, before The Honorable R. Lawton McIntosh. After all evidence was presented at trial, and upon motion, Judge McIntosh granted a directed verdict in favor of Respondent, and the Order for Judgment was filed December 13, 2018 granting Respondent judgment against Appellant for \$86,946.74. On December 19, 2018, Appellant filed its Motion to Vacate and/or For a New Trial. A hearing on the Appellant's motion was held before Judge McIntosh on January 31, 2019. Judge McIntosh denied the Appellant's motion by Order filed March 21, 2019. Thereafter, Appellant filed its Notice of Appeal on or about April 22, 2019.

FACTS

Appellant executed the credit application to obtain brokerage or transportation services from Respondent from time to time under the terms and conditions provided to Appellant by Respondent. R. p. 176, lines 18 – 23; p. 180, line 16 – p. 181, line 1; p. 192, line 25 – p. 193, line 4; p. 195, lines 11 -20; R. p. 257. The terms and conditions were read and reviewed by Appellant as the terms and conditions for these transactions. R. p. 193, lines 5 – 6; p. 193, line 25 – p. 194, line 4. Appellant acknowledged that he had applied for and used the Respondent's services in order to get discounted rates for shipping goods. R. p. 180, lines 1 – 5; p. 194, lines 10 – 14. Pursuant to the agreement of the parties, the discounted rates could be lost and the charges invoiced for the full rates if the discounted rates were not paid within thirty days. R. p. 193, line 25 – p. 194, line 9; R. p. 259. The parties further agreed that any dispute with an invoice must be made in writing within thirty days of the invoice or the invoice charges would be conclusively presumed valid. R. p. 195, line 21 – p. 196, line 4; R. p. 259. In addition, the parties agreed that interest on past-due balances would accrue at the rate of 1.5% per month, and that the Appellant would be liable for costs and reasonable attorneys fees if suit were brought on a delinquent balance. R. p. 181, lines 2 – 7; p. 193, lines 7 – 11; R. p. 258. Thereafter, and pursuant to these agreements, the Respondent provided to Appellant brokerage and transportation services for shipments identified in invoices numbered 1065, 1071, 1072, 1073, 1074, 1075, 1076, 1086, 1088, 1091, and 1099. R. p. 176, line 24 – p. 177, line 13; p. 181, lines 8 – 13; R. p. 263 – p. 273. Appellant admitted that it received each of these aforesaid invoices shortly after the invoices were issued. R. p. 177, lines 19 – 23; see R. p. 134, lines 2 – 20; p. 196, lines 15 – 17; p. 199, line 6 – p. 200, line 8. No written dispute was given to Respondent regarding any of these invoices. R. p. 122, line

24 – p. 123, line 2; p. 125, lines 6 – 12; p. 151, lines 5 – 13; p. 189, lines 7 – 11; see R. p. 195, line 21 – p. 196, line 11; p. 196, line 15 – p. 197, line 6; p. 197, lines 13 -17; p. 199, lines 6 – 14. At trial, Appellant claimed that it was liable only for the discounted rates with interest at 1.5% per month. R. p. 191, lines 6 – 8; p. 205, lines 2 – 14; p. 205, line 23 – p. 206, line 15. Appellant’s counsel argued at trial that the full (undiscounted) rate billed to Appellant was a result of improper interest being added on to the unpaid discounted rate.

In directing a verdict in favor of Respondent, the trial judge found that there was no evidence that the full rate billed to Appellant was the result of the addition of improper interest, and consequently that there was no evidence from which a jury could reasonably determine the case in Appellant’s favor. R. p. 1 – p. 5.

Appellant filed its Motion to Vacate and/or For a New Trial, attaching to it documents which were not presented as evidence at the trial of the case and asserting in the argument to said motion purported statements of fact regarding those documents and what they represented. See R. p. 27 – p. 73. Respondent objected to the use and submission and presentation of any documents not presented as evidence at trial. R. p. 246, lines 4 – 16. After arguments the trial judge denied the Appellant’s motion. See R. p. 6 – p. 9.

ARGUMENTS

I. THE TRIAL COURT PROPERLY FOUND THAT A VERDICT IN FAVOR OF APPELLANT WOULD NOT BE REASONABLY POSSIBLE UNDER THE EVIDENCE PRESENTED AT THE TRIAL.

When the case was called for trial, Appellant and Respondent, through their respective counsel, stipulated that there existed a contract between the parties and that the only issue in this case was the principle amount owed on the account. R. p. 89, line 17 – p. 90, line 4; p. 91, lines 3 – 11; p. 92, line 22 – p. 93, line 5. Respondent asserts the principle amount due on the unpaid invoices is \$54,377.24, and Appellant asserts that the principle amount owed is \$16,421.28. R. p. 119, lines 23 – 25; p. 125, lines 13 – 20; p. 191, lines 6 – 18; p. 205, lines 2 – 14; p. 205, line 23 – p. 260, line 15. The trial judge directed a verdict in favor of Respondent at the close of all the evidence and testimony presented at trial for the principle amount of \$54,377.24 plus interest and reasonable attorneys fees pursuant to the agreed terms and conditions. R. p. 1 – p. 5; see R. p. 258.

The Supreme Court has stated the standard of review of a directed verdict as follows:

In reviewing a directed verdict, this Court must determine whether a verdict for the party opposing the motion would have been reasonably possible under the facts. ... The issue must be submitted to a jury whenever there is material evidence tending to establish the issue in the mind of a reasonable juror. ... However, this rule does not authorize submission of speculative, theoretical and hypothetical views to the jury. We have repeatedly recognized that when only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court. ... A corollary of this rule is that verdicts may not be permitted to rest upon surmise, conjecture or speculation.

Hanahan v Simpson, 326 S.C. 140, 485 S.E.2d 903, 908 (Ct.App. 1987) In the case at bar Appellant admitted that the terms and conditions governed the parties' contract. R. p. 195, lines 11 – 20. Appellant agreed that payment of invoices was due to Respondent within

fifteen days, and interest at 1.5% would accrue on past due invoices. R. p. 193, lines 7 – 11; see R. p. 258. Appellant admitted that it was using Plaintiff's services in order to obtain discounted rates from what it would otherwise have to pay in the marketplace if it was contracting the carriage on its own. R. p. 180, lines 1 – 5; p. 194, lines 10 – 14. Appellant also acknowledged the language in the agreed terms and conditions that provided it would lose the discounted rate if not paid within thirty days, and that Respondent could reinvoice the full price, without discount. R. p. 193, line 25 – p. 194, line 9; see R. p. 258 – p. 259. Appellant further acknowledged its agreement that any dispute of an invoice must be made in writing within thirty days of the invoice, otherwise the invoice charges would be conclusively presumed valid. R. p. 195, line 21 – p. 196, line 4; see R. p. 259. All of these terms and conditions were agreed to and acknowledged by the Appellant prior to the transactions. R. p. 192, line 25 – p. 193, line 6. Appellant readily admitted that he did not pay the invoices within thirty days. R. p. 193, lines 12 – 20. Indeed at the time of trial, the invoice balances were admittedly at least 2½ years delinquent. R. p. 193, lines 17 – 20. It is further admitted by Appellant that no written disputes of the invoices was ever made to Respondent. R. p. 195, line 21 – p. 196, line 11. In fact, although Appellant disputed the invoice balances at trial, there was no evidence entered into the record that Appellant had disputed the invoices any sooner, particularly in writing. See R. p. 196, line 15 – p. 197, line 6; p. 197, lines 13 – 17; p. 199, lines 6 – 11. In addition, Appellant admitted, in response to Request for Admission, that it had received each of the invoices attached to the Requests for Admission on or shortly after the dates of the invoices. R. p. 176, line 3 – p. 177, line 25. Since Appellant failed to produce any documents in response to Respondent's Request for Production, and since Appellant's counsel made a point that he had not seen

the discounted invoices prior to trial, it is clear that the invoices Appellant admitted to having seen and received through the Request for Admission were the invoices for the full undiscounted prices totaling \$54,377.24. See R. p. 263 – p. 273; see also R. p. 134, lines 18 – 20. Therefore, having made no written dispute with the full price invoices, these charges are conclusively deemed valid per the parties agreement. See R. p. 259.

In Bultman v. Barber, 277 S.C. 5, 281 S.E.2d 791 (1981), the Supreme Court acknowledged the general rule that in a review of a directed verdict, the evidence and all reasonable inferences would be viewed in the light most favorable to the opposing party. The Court added:

However, this does not give the Court license to ignore facts unfavorable to that party. In essence, we must determine whether a verdict for a party opposing the motion would be reasonable possible under the facts as liberally construed in his favor.

Id., at 792. The appellants in Bultman argued that the second description was just a more detailed version of the first, without evidence that tied the second description to the first. In affirming the directed verdict in that case, the Court found no evidence in the record to support the appellants' claim of paramount title to the property in question:

There is no evidence in the record which locates the tract of land which was initially deeded to William Harper. There is no indication where the lands of Green, Great and Gainey, as mentioned in the first description, might have been. The description change in the deed to Elizabeth McKenzie ion 1943, without substantial, independent and supportive evidence, is merely gratuitous and is legally insufficient. Appellants position that the second description is a more detailed version of the first description, without more, is without legal merit.

Id., at 794.

Here, Appellant has offered no evidence that it does not owe the agreed and admitted balance of the full price invoices. Appellant here argues that Respondent had improperly added interest at the daily rate of 1.5% to arrive at the full price invoices.

However, there is no evidence before the Court to support this hypothesis. This speculative assertion was not testified to by Appellant, but was simply presented by way of argument of Appellant's counsel. "Arguments made by counsel are not evidence." S.C. Dept. of Transp. v. Thompson, 357 S.C. 101, 590 S.E.2d 511, 513 (Ct.App. 2003). But Appellant failed to present any testimony or evidence that the full price rate was arrived at by adding erroneous daily interest to the discounted rate. In fact, the only witness for Appellant never really communicated with Respondent (that he could articulate), and admitted that when the amounts had become an issue with him, the Appellant had no further communications with Respondent. R. p. 186, line 24 – p. 187, line 9; p. 188, lines 13 – 15; p. 189, lines 7 – 11. The speculative nature of Appellant's argument that the accrual of daily 1.5% interest became the full price invoices is demonstrated by simply mathematical calculations. Not only do such calculations fail to arrive at the true full price invoice amounts, but in addition the undiscounted amounts on the invoices did not rise ratably across the board. If, as counsel speculated, the full price invoice amounts were simply the discounted amounts plus daily interest, there would have been a consistent increase to the full price amount.

In Gosnell v. S.C. Dept. of Highways and Public Transp., 282 S.C. 526, 320 S.E.2d 454 (Ct.App. 1984), the plaintiff had run into a motor grader operated by the Highway Department. Gosnell claimed that the motor grader had moved suddenly out onto the highway into the path of his car. The Highway Department moved for directed verdict and judgment n.o.v. The Court of Appeal noted:

South Carolina adheres to the rule which requires submission of an issue to a jury whenever there is material evidence tending to establish the issue in the mind of a reasonable juror. ... However, this rule does not authorize the submission of speculative, theoretical and hypothetical views to the jury. While adhering to the scintilla rule, our Supreme Court has repeatedly recognized another equally important rule which provides that when only one reasonable inference, not just

one inference, can be deduced from the evidence, the question becomes one of law for the court.

Id., at 457. The Court of Appeals reversed the trial court's denial of the Highway Department's motion for judgment n.o.v., holding:

... that the testimony of Gosnell and Moore that they did not recall seeing the grader in the roadway, when viewed in light of the direct evidence by Gosnell's own witness, Kelly, (and other eyewitnesses) that the grader was clearly visible in the roadway and Gosnell just "plain" ran into its rear, does not give rise to a reasonable inference that the grader suddenly darted out in front of Gosnell's car. The record fails to show the facts to be other than as Gosnell's witness Kelly and the other eyewitnesses testified.

Id., at 457-458.

Similarly here, there was no evidence in the record at trial from which a jury could reasonably find that the principal balance due on these delinquent invoices was anything other than \$54,377.24. Appellant admitted the terms and conditions governed the parties' transaction. Appellant admitted Respondent performed the services. Appellant admitted through Request for Admission to receiving the invoices totaling \$54,377.24. This admission is conclusively established for the purpose of this action. See Rule 36(b), SCRCP. Appellant admitted making no dispute thereon to Respondent. Accordingly, under the terms of the parties' agreement, these invoice balances are conclusively deemed valid, and there is no evidence in the record that would reasonably support a verdict otherwise.

II. THE TRIAL COURT PROPERLY DENIED APPELLANT'S POST-TRIAL MOTION AS THE EVIDENCE PRESENTED AT TRIAL WOULD NOT REASONABLY SUPPORT A VERDICT FOR THE APPELLANT.

The bulk of Appellant's argument on its Motion to Vacate and/or For A New Trial is based upon documents and facts set forth in Appellant's filed Motion. See R. p. 27 – p. 73. The attachments to Appellant's Motion included documents identified therein as Exhibits A, B, C, and D. The documents identified as Exhibits A, B, C, and D and attached to Appellant's Motion were not documents presented as evidence at trial, nor were they documents identified and/or produced in response to Interrogatories and Requests for Production. R. p. 196, line 15 – p. 197, line 17; p. 199, lines 6 – 14; p. 200, lines 1 – 23; see also R. p. 32 – p. 71. At the close of all the evidence, upon motion, the trial court granted the directed verdict to Respondent. Appellant thereafter filed its Motion where, for the first time, Exhibits A, B, C, and D attached to the Motion were presented to the trial court as attachments to the Motion. These documents were unsworn and unverified, and were not presented to the trial court by way of competent affidavits or competent witnesses. These documents had not been submitted as evidence during the trial and therefore would not have been considered by the jury in any event. In fact, Appellant had produced no documents in response to Respondent's production request prior to trial. R. p. 196, line 15 – p. 197, line 17; p. 199, lines 6 – 14; p. 200, lines 1 – 23. Statements of fact in the written motion purported to identify the documents and purported to state what they were and what they represented. Particularly the documents, Exhibits A, B, C, and D to the Motion, were alleged to be e-mails received by Appellant with specific documents attached (although some of these e-mails appear to be between agents of Appellant).

Although post-trial motions may be heard on affidavits, there were no

affidavits presented to the trial court in support of the Appellant's Motion. See Saro Investments v. Ocean Holiday Partnership, 314 S.C. 116, 441 S.E.2d 835 (Ct.App. 1994). Statements of fact which are presented only in arguments of counsel are not to be considered by the Court. McManus v. Bank of Greenwood, 171 S.C. 84, 171 S.E. 473 (1933). Furthermore, attachments to a motion cannot be considered on appeal. Spreeuw v. Barker, 385 S.C. 45, 682 S.E.2d 843 (Ct.App. 2009).

McManus, id., involved an attempted levy by the sheriff pursuant to an execution on a judgment. The levy was attempted against funds on deposit in a bank on an account of the judgment debtor. The lower court issued an order requiring the bank to turn over the account proceeds to the sheriff. In reversing the lower court, the Supreme Court noted:

It is urged by the respondent, however, that even if the deposit was not the property of the [judgment debtor], the fund in question was hold [sic] in trust by the bank and the [judgment debtor] for her, having been collected on an assessment levied specifically to pay her loss suffered by fire. This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered, if the deposit was a fund of the association held by the bank for a special purpose, it does not so appear from the record.

McManus, id. at 474-475.

In Shinn v. Kreul, 311 S.C. 94, 427 S.E.2d 695 (Ct.App. 1993), the family court issued an order finding that Kreul was not arrears in payment of child support. Shinn had presented as evidence Iowa court records and an affidavit showing that no support payments had been made since July 1990 and stating the total arrearage due. Kreul had offered no evidence challenging the increase in support or the amount of the arrearage, but presented only the argument of his counsel. The Court of Appeals reversed the lower court's finding that Kreul was not in arrears, stating "[A] court cannot consider facts

appearing only in argument of counsel.” Id. at 700.

In Sulton v. HealthSouth Corp., 400 S.C. 412, 734 S.E.2d 641 (2012), the plaintiff tried to introduce the defendant’s 10-K financial form during the punitive damage phase, as evidence of the defendant’s net worth. The trial court properly excluded the 10-K form from evidence, but allowed the plaintiff’s counsel to inform the jury of the amount of the defendant’s net operating revenue as stated on the 10-K form. The Supreme Court found that the presentation of that financial information through counsel’s argument without the supporting evidence was improper. Id.; see also S.C. Dept. of Transp. v. Thompson, 357 S.C. 101, 590 S.E.2d 511 (Ct.App. 2003).

In Spreeuw, id., the father argued that the trial court had improperly determined his total vehicle expenses in arriving at a determination of his income. The father attached his form 2106 EZ to his post-trial motion to show the alleged correct amount of vehicle expense. However, since the form 2106 EZ appeared only as an attachment to the motion, it could not be considered on appeal. Id.

Accordingly, the documents attached to Appellant’s Motion as Exhibits A, B, C, and D and the factual statements in the Motion and in argument of counsel regarding those documents were not presented as evidence at trial and cannot be considered by the Trial Court, or by this Court on appeal. In the case at bar, Appellant presented no evidence at trial that the full rate invoices included improper interest, or that they reflected anything other than the undiscounted rates as testified by Respondent. The attempt to create a factual issue by presenting in post-trial motion documents not previously produced and not submitted into evidence at trial is simply an attempt to get two bites at the apple. Appellant should not be allowed to try the case, then go back after an adverse verdict, and only then

produce and present newly selected documents to support a claim or other issues or facts.

Accordingly, based upon the evidence presented before the trial court, the trial court properly denied the Defendant's Motion to Vacate and/or For a New Trial since there was no evidence properly in the record from which the jury could reasonably render a verdict for the Appellant.

III. BECAUSE DOCUMENTS ATTACHED TO APPELLANT'S POST-TRIAL MOTION WERE NOT PRESENTED NOR ENTERED AS EVIDENCE AT TRIAL, THE SAME SHOULD NOT BE CONSIDERED ON APPEAL.

As set forth in the Argument II above, in this appeal Appellant relies substantially on attachments to its Motion To Vacate and/or For a New Trial. The documents attached to Appellant's Motion included documents identified as Exhibits A, B, C and D. Those documents were not produced as evidence at trial. See R. p. 196, line 15 – p. 197, line 17; p. 199, lines 6 – 14. Those documents were not presented to the trial court by way of competent affidavit. They are simply unsworn, unverified documents attached to Appellant's post-trial Motion.

Statements of fact which are presented only in arguments of counsel are not proper to be considered by the Court. McManus, id. Attachments to a motion cannot be considered on appeal. Spreeuw, id. There has been no allegation, evidence, or argument that these documents would be “newly discovered evidence.” Even if that were argued, to date, there has been no showing that these documents could not have been discovered before trial (especially since they were apparently found within 12 days of the trial after Appellant had not produced any documents prior to trial), that they are not merely cumulative or impeaching, nor any other showing that the required elements to obtain relief on “newly discovered evidence” have been established. See, Spreeuw, id.

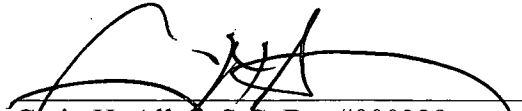
Accordingly, the attachments to Appellant's post-trial Motion should not be considered by this Court on appeal.

CONCLUSION

For the reasons set forth hereinabove this Appeal should be dismissed, with costs, and/or the Order for Judgment of the trial judge should be affirmed, with costs.

Respectfully submitted,

February 10, 2020



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THE STATE OF SOUTH CAROLINA
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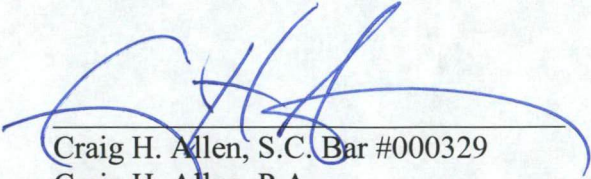
DMP Construction, LLC,

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Brief of Respondent complies with Rule 211(b), SCACR.

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