THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, III, Circuit Court Judge

Case No. 2016-CP-40-00100

Hills Machinery Company, LLC, ... Respondent,

v.

Jackson Development Group, LLC, and J. Elliott Summey, ... Appellants.

RESPONDENT'S BRIEF

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Date: Feb. 18, 2020

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STATEMENT OF THE CASE[1]

In 2014, Appellant Jackson Development Group, LLC ("JDG") signed five contracts with Respondent Hills Machinery Company, LLC ("HMC").

One contract was the credit application (Pl. Exhibits 1a and 1b, R. pp. 191-92), in which Defendant-Appellant J. Elliott Summey also personally, unconditionally, and irrevocably guaranteed to pay any and all "indebtedness" of JDG to HMC. He also agreed on behalf of his company, to interest on past due sums at 1½ % per month, and all costs of collection including attorney's fees. The credit application stated, in part:

> As used herein, "indebtedness" means and includes every claim, demand, right and/or cause of action of every kind or character and all extensions and renewals thereof, whether arising by reason of sales of goods, merchandise or services on open account, promissory notes, interest, expressed or implied contracts, or tort, or any other matter, or whether constituting a joint or several, direct or indirect, primary or secondary liability of Debtor to Hills.

The other four contracts were separate rental agreements appearing in Pl. Exhibits 1c, 1d, 1e, and 1f (R.pp. 193-200), each for a different piece of heavy equipment. The rental agreements addressed rental payments, damage repairs, re-fueling, and other matters, and included, again,

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[1] Respondent HMC provides its own statement of the case pursuant to Rule 208(b)(2), SCACR, because Appellant JDC's and Summey's statement of the case contains contested matters in noncompliance with Rule 208(b)(1)(C), SCACR.

For example, Appellants incorrectly state that in March 2015, "Respondent sent several itemized statements to Appellant with varying amounts of charges alleged to be due." To the contrary, there is no evidence whatsoever, nor was there any assertion at trial, that in March, Respondent sent any statement but the one, March, monthly statement of account to Appellants, with one unvarying total that month in the amount of $117,986.89 shown to be due.

As a further example of not having the facts and contentions correct, Appellants state that "[t]here was a dispute over the total amount of the charges." To the contrary, Respondent disputes that there was a dispute. The Record is clear that at trial, Appellants did not produce one scrap of evidence of a written dispute, and that despite Appellant Summey's late-professed assertion that he had questioned one set of charges, Respondent maintained throughout the trial that until being sued, Summey had never disputed any charges – not even verbally.

provisions for interest on past-due sums, costs of collection including attorney's fees, and personal guarantee by the signatory.[2]

JDG also agreed in paragraph 4 of each equipment rental contract, that JDG accepted the validity and accuracy of any invoiced charge unless JDG challenged the charge in writing to HMC within 15 days of the invoice originally containing the charge.

HMC never, from September 2014 to the time suit was filed in January 2016, received any such written dispute from JDG or Summey or anyone else. (Transcr. p. 32, R. p. 81, lines 17-21, p. 34, R. p. 83, lines 13-19, p. 36, R. p. 85, lines 14-23, p. 39, R. p. 88, lines 6-19, p. 43, R. p. 92, lines 11-20, p. 67, R. p. 108, line 9-p. 69, R. p. 110, line 4, p. 84, R. p. 125, lines 9-14, and p. 137, R. p. 178, line 19-p.138, R. p. 179, line 11; 2/13/19 order at 18, R. p. 28.)

From August of 2014, JDC incurred charges for rental, damage repairs, refueling machines, and interest with HMC as appeared on statements of account sent monthly to JDG. In each instance of a new charge appearing on the statement, the invoice was sent as well, and the invoices each stated, "Interest of 18% per year charged on past due invoices with minimum of $2. Customers are responsible for all collection costs and attorney fees."

Among the regular monthly statements sent to Summey was a March 2, 2015 statement, introduced as Pl. Exhibit 2 (R. p. 218) in the amount of $117,986.89. JDG did not send written dispute of the account. (Transcr. p. 32, R. p. 81, lines 17-21, and p. 34, R. p. 83, lines 13-19.)

The March 2, 2015 statement, and the statement before it, included among many others, the charges pertaining to the January 7th, 2015 damage of a bulldozer rented by JDG, which were

[2] Summey signed three of these contracts on behalf of JDC, and another JDG employee signed the fourth.

invoiced January 28, 2015.

A meeting was held at HMC on March 23, 2015 to discuss the status of the account. The meeting was attended by Summey, Jim Hills, a principal of HMC, Adam Hills, another principal of HMC, and Dee Allesandro, a sales employee of HMC. Summey's account of the meeting differs from that of the three others attending.

After the March 23, 2015 meeting, JDG made three partial payments on the account. HMC held off on legal action, including forbearing on filing liens and payment bond claims on projects on which HMC's equipment was used by JDG. HMC continued to send Summey regular monthly statements of account.

Payments on JDC's account were paid on the account in general, and not designated to be applied to any particular invoice or charge.

By September of 2015, JDG ceased to pay. In early September, 2015, Jim Hills directed that Summey be sent a demand letter, and this was done September 9, 2015, setting out the debt and stating the account to Summey again in the amount of $66,663.77, plus legal expenses and interest after September 9, 2015. (Pl. Exhibit 4, R. pp. 219-221.)

The statement Summey was sent was the September 8, 2015 statement, Pl. Exhibit 1g (R. p. 201). All the components of the September 8, 2015 statement had appeared on the account stated March 2 (Pl. Exhibit 2, R. p. 218) before the March 23, 2015 meeting, except for additional rental ending in March, subsequent refueling and repairs, and finance charges.

As the trial judge later found with respect to Summey's testimony, "No witness or exhibit showed that any of the invoices in Pl. Exh. 1g were disputed in writing within 15 days." (2/13/19 Order at 18, R. p. 28.)

Introduced in evidence at trial as Pl. Exhibit 5 (R. pp. 222-269) were text communications between Hills and Summey leading up to the March 23, 2015 meeting, texts following up after the meeting on the payments sought, texts leading up to the September 2015 demand letter, and texts preceding the January 2016 filing of suit. All were devoid of any dispute.

On January 11, 2016, Respondent HMC filed suit seeking payment of amounts alleged to be past due, plus, as alleged in Paragraph 7 of the complaint, contractual interest and a contract-based award to Respondent HMC of its reasonable expenses including attorneys' fees in connection with the collection of the debt. The complaint was not labeled with a legal theory of recovery. It alleged the five contracts and other facts and prayed for relief. No motion to separately state, motion for more definite statement, or any other motion directed to the pleadings was filed by Appellants before answer or at any time thereafter.

In their answer filed February 23, 2016, Summey and JDG stated that they "demanded written agreements of the allegations of Paragraph 7," that each agreement called for interest at 1 ½% per month and costs and expenses including attorney's fees.

The case progressed, and over about three years, included various continuances at the behest of Appellants, paper discovery requests served by HMC, a motion by HMC for summary judgment, an offer of judgment by Appellants, depositions of Summey and another witness, motions by HMC to compel, mediation, etc.[3] There is no record of any deposition or other discovery requested or undertaken by Appellants directed to the manner of calculation of attorney's fees.

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[3] See electronic docket sheet showing entries as of January 7, 2019, R.p. 303-304. HMC designated this docket sheet rather than every actual item shown in it.

The case came to be tried in a bench trial before The Honorable Doyet A. ("Jack") Early III on January 7, 2019. Judge Early was scheduled to retire on February 28, 2019. (Transcr. p. 147, lines 13-14, R. p. 188.) Post-hearing submissions of proposed 0rders were made by the parties. HMC made its submission four days after the trial, on January 11, and Appellants made theirs 31 days after the trial, on February 7.

On February 13, 2019, the trial court entered an Order granting judgment to HMC. (2/13/19 Order, R. pp. 11-35.) In that Order, the trial court detailed the material contentions of the parties and evidence at trial. The trial court held that HMC had established the liability of JDG and Summey for $52,978.63 in charges on the accounts stated to them. This figure reflected backing out the charges attributed to the damage of the bulldozer, which had been invoiced on January 28, 2015. The trial court also held that Appellants were liable for contractual interest on the charges for which they were liable, at 1 ½% per month, in the amount of $24,426.57 as of February 11, 2019, continuing at $21.31 per day thereafter.

The trial court also held: "Further, Plaintiff is entitled by contract to expenses incurred in collection of the debt including reasonable attorney's fees, and as requested at trial, shall be allowed to submit a bill of expenses including attorney's fees thus far, by affidavit." (2/13/19 Order at 20, R. p. 30.)

In that Order, the trial court also set forth the procedure for the taxing of expenses including attorney's fees and for making any objection, as follows:

> Plaintiff is directed to file within fourteen (14) days of receipt of written notice of the entry of this order, (i) an affidavit of all expenses and reasonable attorney's fees incurred thus far, as directed above, along with (ii) a proposed order awarding expenses including attorney's fees and directing that the clerk of court add such fees and expenses, and any additional accrued interest, to the judgment and (iii) a proposed amended Form 4 adding

> the award and any additional accrued interest to the amount of the judgment. Upon motion served within 10 days after service of these items, I will, before taking action on the application, review it in any particulars set forth in the motion.

(2/13/19 Order at 21, R. p. 21.)

On February 20, 2019, Appellants JDG's and Summey's two trial counsel[4] submitted a motion to reconsider the 2/13/19 Order, asserting that Appellants owed $42,226.06, that HMC was not entitled to any interest or attorney's fees, that any interest was determined at the statutory rate, that Appellants did not sign the statements of account which were sent to them, and that HMC had not mitigated its damages.

On February 26, 2019, as instructed in the 2/13/19 Order, Respondent HMC's sole trial counsel submitted an affidavit for HMC, containing a discussion of factors for reasonableness of attorney's fees, biographical data, and detailed time quantities spent on collecting the debts, and also submitted a proposed supplemental order.

On February 28, 2019, Appellants' counsel sent a two-sentence e-mail to the court and HMC's counsel stating only that Appellants would like to be heard on the legal fees, which they stated they "believed were excessive," and that they further "believed these matters should have been raised at the trial." However, Appellants thereafter filed no motion setting forth any particulars or basis of their stated belief within the time instructed in the 2/13/19 Order.

On February 28, Respondent HMC filed a reply to both the 2/20/19 motion to reconsider and the 2/28/19 two-sentence e-mail in which Appellants objected to the amount of, but not the awarding of, fees. Appellants did not do anything further to request further hearing.

On February 28, 2019, the trial court then entered a supplemental Order awarding

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[4] One of Appellants' three counsel on appeal, Mr. Player, was not counsel at trial.

Respondent HMC's costs and attorneys' fees of $32,548.55 incurred in connection with collection of the debt, plus two days' more interest in the amount of $42.62. (2/28/19 Order at 3, R. p. 6.)

In its 2/28/19 Order, the trial court stated that it had considered more than one source of facts: (1) "the circumstances of the case" and (2) "the affidavit submitted pursuant to this Court's February 13, 2019 Order ruling on the bench trial." The trial court made specific factual findings regarding the reasonableness of Respondent HMC's attorney's fees, to wit:

> 1. The expenses of $32,548.55 as of 2-25-19 submitted by the plaintiff Hills Machinery Company, LLC are reasonable, taking into account numerous factors, the chief one of which is that the expenses were actually agreed and incurred.
>
> 2. Additionally, the legal services were complicated by the length of time over which they were rendered, and the issues or potential factual and legal issues involved, e.g., what present disagreement there was with the charges, the merits of any present disagreements, whether there were past disagreements, whether there was express or implied agreement, or both, to the invoices and statements, the law of account stated as applied to the dealings of the parties, the calculation of interest, etc. The time devoted was considerable and was all accounted for; in fact some has actually not been charged, some money has been discounted after charging for the time, and a potential agreed increase in rate has not been applied. Counsel has professional standing justifying the fees charged. The fees are no more than those customarily charged by him in the locality for similar services, and the fees charged by others in the locality vary according to the nature of the matter and the lawyers hired, and I take note that the fees in the instant case are within that range. The trial ended in a money judgment for the plaintiff which was beneficial.

(2/28/19 Order at 1-2, R. pp. 4-5.)

On March 28, 2019, the trial judge denied Appellants' 2/20/19 motion for reconsideration, and overruled Appellants' 2/28/19 e-mail objection to the reasonableness of the fee affidavit and the award of fees. This appeal followed when Appellants served notice of appeal April 22, 2019.

STANDARD OF REVIEW

Respondent HMC agrees the standard of review of a question of law properly raised at trial and preserved both at trial and on appeal for review is de novo. Respondent agrees that the findings of fact of the trial judge in a bench trial are only reviewable for whether they are unsupported by any evidence at all in the record, i.e., where a finding has no evidentiary support as a matter of law.

ARGUMENT

I. The judgment was not based strictly on the stating of an account to Appellants and their agreeing to it; the judgment was based on the facts adduced at trial establishing the duties and liabilities of the parties, and any and all theories that provided relief, and was not based on any technical form of pleading, and this is particularly so in light of the fact that no objection or motion was made at trial, supported by specific grounds, pertaining to the pleadings or the theory or theories of recovery or the admission into evidence of the five contracts, and all the invoices covered by them.

Appellants first argue that the suit, and therefore, the judgment, was based only on an account stated, and not a breach of contract. This separate argument is not asserted by Appellants to alone result in reversal of the Circuit Judge, but is argued separately as a proposition for use in all three of the other arguments Appellants present on appeal.

It should be noted that in making this argument, Appellants admit and concede that a cause of action for account stated was pled and proved. They concede that judgment was granted thereon. They do not contend the elements were not proved. Appellants thus raise no issue on appeal challenging the Circuit Court's ruling that Respondent HMC should recover $52,978.63 in charges on the accounts stated to Appellants. They do not challenge any of the bases for concluding that Appellant JDG had expressly or impliedly assented to the account stated.

Any challenge, on reply, to granting relief on the theory of account stated, is too late.

Ordinarily, an issue not set forth in the statement of issues on appeal will not be considered by the appellate court. Rule 208(b)(1)(B), SCACR.

Moving to the argument Appellants presently make, Appellants' argument is incorrect in asserting that only this single theory of recovery may form the basis of the relief granted. Appellants are also incorrect to assert that an appellate court's review of relief granted in an action is bound to the theory of recovery identified by the trial court in its order.

As for pleading, a party is not required to label its complaint with a theory of recovery. A complaint is only required to include a short and plain statement of the facts showing the pleader is entitled to relief and a prayer for judgment for the relief to which the pleader deems himself entitled. Rule 8 (a), SCRCP. The complaint did this. The complaint in this case bears no label stating a restricted theory of recovery; the complaint alleges five contracts, their salient terms, the debt, the statement of the debt, and the nonpayment thereof.

A judgment in the trial court, other than in cases of default, shall grant all the relief to which a party is entitled, regardless of whether the relief is of the kind or nature prayed for in the complaint. Rule 54 (c), SCRCP.

Further, in reviewing a challenged judgment, an appellate court may affirm the trial court on any basis appearing in the record. I'on, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) (citing Rule 220(c), SCACR and clarifying that such grounds do not have to have been ruled upon by the trial judge).

In the instant case, all five contracts and and two statements of account and every single invoice making up the principal debt pursued under the contracts were admitted into evidence. The invoices were numbered to correspond to the contract under which they were incurred unless

they were under the general account governed by the credit application contract.

The contracts themselves stated as a contractual term, that the customer accepts and HMC would be entitled to rely on invoices not disputed in writing within 15 days. None were. Each invoice in evidence, therefore, establishes the contractual obligation represented by the invoice, and ample testimony demonstrated the breaches of the obligations by nonpayment. I.e., the Record demonstrates straight out breaches of contract as well.

In its 2/13/19 Order, the trial court stated that the court understood HMC to be seeking "judgment on a cause of action for an account stated, or alternatively on the underlying contracts between the parties." (2/13/19 Order at 1, R. p. 11.) The trial court observed, "HMC has also pled and produced evidence of the written contracts and guarantees underlying the account stated." (Id. at 3, n. 1, R. p. 13.)

Furthermore, Appellants' apparent argument that the relief HMC sought and received was only for an account stated and had nothing to do with the underlying five contracts is incorrect. An account stated, while a separate cause of action, is related to the action that would be pursued for the underlying debt, here, an action for breaches of contracts, in that an account stated is a cause of action that fixes the amount of liability for debt for which there is an independent basis. Bushnell v. Portfolio Recovery Associates, LLC, 255 So.3d 473, 43 Fla. L. Weekly D2144a (Fla. 2d DCA Sept. 14, 2018)(concluding that an account stated fixes the amount due in respect of previous transactions and that when the transactions arise from a contract, the contract is "inextricably intertwined" with the cause of action for purposes of attorney's fees provisions in the contract); see also Citibank (S.D.), N.A. v. Martin, 807 N.Y.S. 2d 284, 291-92 (Civ. Ct. 2005)(observing that the creditor on an account stated must establish an independent basis for

liability because "'[t]he account stated can only determine the amount of the debt' and cannot 'create liability where none existed.'")

The bases for the debt which was stated in the account were several contracts, which were pled and introduced in evidence[5] and the terms of which were specifically sought to be enforced in the action. Appellants' argument that the action did not seek to enforce contractual terms or that the relief awarded somehow vitiated rights under the contracts is incorrect.

II. Interest was agreed in the five contracts to be one and one-half (1 1/2%) percent per month and that is the rate which applies, not the statutory pre-judgment rate, which applies in the absence of a contractual rate.

Appellants next argue that because the action was for an account stated, prejudgment interest was limited to the 8 3/4% per year stated in S.C. Code § 34-31-20.

No argument was presented on this question at trial or at any time prior to ruling by the trial court, despite testimony at trial as to the rate to be applied and calculation of amounts claimed, and proposed orders submitted prior to ruling by the trial court.

At trial, Summey's only contention regarding interest was that – with no explanation -- he owed no interest. Neither he nor his counsel made any contention at trial regarding the rate. (R. p. 182, line17-p. 183, line 6.) Accordingly, if this issue could have been argued with any colorable authority, it was too late to do so in a Rule 59 (e) motion to reconsider. Stevens & Wilkinson of South Carolina, Inc. v. City of Columbia, 409 S.C. 568, 762 S.E.2d 696 (2014)("a party cannot use a Rule 59 (e) motion to present to the court an issue the party could have raised to the circuit court prior to judgment, but did not"). The Rule 59 (e) motion itself never stated

[5] Failure to make contemporaneous objection at trial to admission of evidence, stating the specific ground of objection, does not preserve error in admitting the evidence for appellate review. Rule 103 (a), SCREvid.

the present argument or specific grounds for the assertion that a different rate applied. After first stating, with no specific grounds, that no interest was required, Appellants moved for use of the rate set forth in the statute, but never told the Circuit Judge specifically why the rate in the statute was applicable instead of the rate to which the parties had agreed. Appellants did nothing more than refer to the statute. It is therefore too late to raise or argue the issue now.

Nevertheless, the simple answer is that the parties agreed in five written contracts to the rate of interest, and the five contracts were admitted into evidence. The statute providing for pre-judgment interest in instances in which the rate is not provided by contract does not set a limit, nor a minimum, on the rate to which the parties can agree. The statute sets a specific rate which applies when interest or the rate of interest is not provided by contract.

As stated in Bickerstaff v. Prevost, 398 S.C. 231, 727 S.E.2d 769 (Ct. App. 2012):

> Our Courts have held that the statutory interest rate under § 34-31-20(B) "is applicable only in the absence of a written agreement between the parties fixing a different rate of interest." Renaissance Enterprises, Inc. v. Ocean Resorts, Inc., 326 S.C. 460, 466, 483 S.E.2d 796 (Ct. App. 1997), rev'd on other grounds by Renaissance Enterprises, Inc. v. Ocean Resorts, Inc., 334 S.C. 324, 513 S.E.2d 617 (1999) (citing Turner Coleman, Inc. v. Ohio Construction & Engineering, Inc., 272 S.C. 289, 251 S.E.2d 738 (1979)). Further, "if a contract has specified a lawful rate of interest to be paid after maturity, the same rate will apply on the judgment entered on the contract." Id.

398 S.C. at 236.

It is well settled that the parties are at liberty to contract, within legal limits, relative to the interest to be paid on an obligation, including the rate of interest to be charged after maturity. If the parties agree that a higher rate of interest than the legal, or statutory, rate is to be paid after maturity, the agreement of the parties controls. Bowen v. Barksdale, 33 S.C. 142, 11 S.E. 640 (1890); Reid v. Stevens, 38 S.C. 519, 17 S.E. 358 (1893).

As the Court stated in Butler Contracting, Inc. v. Court St., LLC, 369 S.C. 121, 133-134, 631 S.E.2d 252, 258 (2006):

> The law has long allowed prejudgment interest on obligations to pay money from the time when, either by agreement of the parties or operation of law, the payment is demandable, if the sum is certain or capable of being reduced to certainty. Smith-Hunter Constr. Co. v. Hopson, 365 S.C. 125, 128, 616 S.E.2d 419, 421 (2005); Babb v. Rothrock, 310 S.C. 350, 353, 426 S.E.2d 789, 791 (1993); Ancrum v. Slone, 29 S.C.L. (2 Speers) 594 (1844).

631 S.E.2d at 258.

Appellants now appear to argue that the statute specifically singles out accounts stated as an instance limited to the rate in the statute. Here, they argue that because the statute refers to "all" accounts stated being subject to pre-judgment interest, and the statute also states the rate, no other rate than the statutory rate is allowed for accounts stated. However, Appellants' reliance on the word "all" as the sole basis for this interpretation is misplaced. The statute uses the word "all" a second time in also describing every other interest-bearing instance within its purview. Despite both "all"s in the statute, the law of South Carolina is well established that the rate in the statute is only the required rate if the parties have not provided for a different rate by contract. Turner Coleman, Inc. v. Ohio Construction and Engineering, 272 S.C. 289, 251 S.E.2d 738 (1979); Bickerstaff. Here, they have. Each of the four rental contracts state: "Late payments accrue interest at 1 ½% per month or the highest rate allowed by law, whichever is lower." The credit application states "A service charge of 1.5% per month will be charged on all balances exceeding terms."

Therefore, the contractual, rather than the statutory, rate applies, and any argument that the contracts were not pled, were not in evidence, or did not support the relief granted in the judgment is incorrect as well.

III. Attorney's fees were recoverable under contractual obligations pled and proved.

The third issue presented by Appellants on appeal is whether attorney's fees may be recovered at all. They argue, citing no authority, that because, under their characterization, the action included facts supporting recovery on the basis of an account stated, based on amounts HMC claimed were due under the five pled and proved contracts, rather than an action only for breaches of five contracts, the contractual agreement for attorney's fees somehow disappeared and was unenforceable in the action.

This argument was not raised at trial. A party cannot use a Rule 59 (e) motion to present an issue to the court that could have been raised prior to judgment but was not so raised. Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 27, 609 S.E.2d 506, 510 (2005).

To satisfy a breach of contract action, the plaintiff must produce a contract and evidence of individual charges that make up an unpaid balance. Citibank (S.D.), N.A. v. Martin, 807 N.Y.S.2d 284 at 289. HMC did this. HMC pled the five contracts, and the attorney's fees provisions. HMC entered the five contracts in evidence, entered evidence of individual amounts due under them, and sought relief under the contractual terms, and was awarded same.

Although these issues were indeed also raised by the pleadings, if they had not been, it still would have been too late for Appellants to argue about lack of precision of the pleadings when, as here, the existence, terms, and amounts due under the contracts were tried without objection. Rule 15 (b), SCRCP (stating that issues tried by express or implied consent of the parties "shall be treated in all respects as if they had been raised in the pleadings"). Each rental contract provided that HMC could recover its attorney's fees incurred in collecting. Appellants' argument is without merit.

As noted above, Appellants cite no law in support of their brief argument on this issue. "[W]here an issue is not argued within the body of the brief but is only a short conclusory statement, it is abandoned on appeal." Ellie, Inc. v. Miccichi, 358 S.C. 78, 99, 594 S.E.2d 485, 496 (Ct. App. 2004); see also State v. Colf, 332 S.C. 313, 322, 504 S.E.2d 360, 364 (Ct. App. 1998)(finding a conclusory two-paragraph argument that cited no authority other than an evidentialry rule was abandoned).

Interestingly, a variant of Appellants' argument has been made in Florida, where one judge has observed that, "Attorney's fees is the single most litigated issue in civil courts." Island Hoppers, Ltd. v. Keith, 820 So.2d 967, 977 (Fla. 4th DCA 2002)(Gross, J. concurring specially). Yet in one Florida case, the party advancing the variant of Appellants' argument "did not cite any binding cases, and the Court did not find any, where a court held that [the statute providing reciprocal attorney's fees based on an attorney's fees provision contained in the contract] did not apply, even though the situation fell squarely within the attorney's fees contractual provision, because of the cause of action that was pled." Portfolio Recovery Associates, LLC v. Benjamin, 24 Fla. L. Weekly Supp. 96a (Fla. 9th Cir. Ct. April 18, 2016).

However, in 2018, in Bushnell, it was argued that, where under Florida's pleading rules, the plaintiff credit-card-debt-portfolio-purchaser brought an action solely on the theory of an account stated so as to avoid having to produce evidence of the original contract and modifications and records of purchases, and did not make any allegation of the existence or terms or breach of the underlying contract, and did not have the contract admitted into evidence or seek any relief at all under any particular contractual provisions, the prevailing defendant could still file an affidavit post-judgment, attaching the contract to it, and use Florida's reciprocal-

entitlement-to-attorney's-fees statute to recover fees from the unsuccessful plaintiff. That is, Florida had a statute providing that a contractual provision assuring rccovery of attorney's fees to the creditor would also assure recovery of attorney's fees to a prevailing alleged debtor. The unsuccessful plaintiff creditor argued, however, that since the creditor did not seek to recover attorney's fees in the action and did not assert rights directly under the contract, the plaintiff could not have recovered attorney's fees in the action if the plaintiff had won, and that therefore, neither could the prevailing debtor now recover under the reciprocality statute. In Bushnell, finding the contract to be inextricably intertwined with the claim for an acccount stated, the court disagreed, and allowed the debtor-defendant attorney's fees.

On the other hand, in Ham v. Portfolio Recovery Associates, LLC, 260 So.3d 450 (Fla. 1st DCA Nov. 30, 2018), it was argued that, where under Florida's pleading rules, the plaintiff brought an action solely on the theory of an account stated, and did not make any allegation of the existence or terms or breach of the underlying contract, and did not have the contract admitted into evidence or seek any relief under any particular contractual provisions, the prevailing defendant could not use Florida's reciprocal-entitlement-to-attorney's-fees statute to recover fees from the unsuccessful plaintiff. That is, the plaintiff creditor argued that since the creditor did not seek to recover attorney's fees in the action and did not assert rights directly under the contract, the plaintiff could not have recovered attorney's fees in the action and that therefore, neither could the debtor recover under the reciprocality statute. In Ham, finding the plaintiff had a right to expressly not pursue rights directly under the contract, the court agreed.

If the conflict between Districts in Florida is ever resolved by the Florida Supreme Court, it will not result in a decision useful to Appellants in the instant case. The likely rule will be that,

in any case, in an action for an account stated in which the plaintiff does not avoid pleading the contract and does not avoid offering the contract into evidence, a contractual provision for attorney's fees in a contract which is admitted in evidence at trial will support an award of attorney's fees.

In the instant case, the contracts underlying the account stated have been pled and have been admitted in evidence pursuant to an explicit prayer for attorney's fees from the beginning, with no surprises. A post-trial award of attorney's fees based on fee recovery provisions in the contracts is proper.

IV. The award of attorney's fees was not required to be determined in an in-person hearing.

The fourth issue presented by Appellants on appeal is whether attorney's fees were required to be determined in a hearing in which Appellants' counsel could cross-examine HMC's counsel. Appellants argue that same was required by the Due Process Clause of the United States Constitution.

Appellants made no objection to the amount of attorney's fees other than a two-sentence e-mail which did not comply with the procedure set forth in the 2/13/19 order, and then declined to follow it with a motion or affidavit in accordance with that procedure. The two-sentence e-mail is the only communication from Appellants regarding the amount of attorney's fees and itself did not identify a single factor that was challenged, did not state a single defect, omission, or inaccuracy in the affidavit, and did not present or identify any contrary evidence, legal authority or constitutional principle which Appellants wished to adduce.

It thus not only did not comply with the 2/13/19 Order, but it also provided no grounds

for the broad and virtually meaningless "objection" stated. Objections stated without grounds are ineffective, as are objections with grounds so general that the specific basis or line of argument is guesswork for the opposing party and the trial court. Rule 103 (a), SCREvid. See also, e.g., State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005)(holding objection to remoteness of prior convictions did not preserve issue of how trial court applied moral turpitude standard with respect to convictions); State v. Stone, 376 S.C. 32, 655 S.E.2d 487 (2007)(holding objection to admitting evidence of suicide attempt on basis that impetus for the attempt might be misunderstood did not preserve the issue whether evidence of the attempt invited consideration of impact of the potential verdict on person making said attempt); and State v. Caldwell, 378 S.C. 268, 662 S.E.2d 474 (Ct. App. 2008)(holding objection using word "character" was insufficient to preserve issue of improper character evidence under Rule 404, SCREvid.). Appellants' objection provided no cogent reason for further delaying the matter.

No request for live hearing and cross-examination of opposing counsel was made by Appellants in response to the 1/11/19 submission of a proposed order by HMC's counsel setting forth a procedure for post-trial taxing of fees. No such request was made in response to the trial court's issuance of its 2/13/19 Order setting forth the procedure of decision on affidavit. No such request was made in Appellants' 2/20/19 motion to reconsider. At no place in their 2/28/19 e-mail did Appellants advance the Due Process Clause as a basis for cross-examining the opposing lawyer. The issue is therefore not preserved for review. A state or federal constitutional argument is not preserved for appellate review where trial counsel fails to argue the constitutional basis for the objection at trial. See State v. Byram, 326 S.C. 107, 485 S.E.2d 360 (1997); State v. McWee, 322 S.C. 387, 472 S.E.2d 235 (1996); and see State v. Perry, 359 S.C.

646, 598 S.E.2d 723 (Ct. App. 2004)(holding objection to relevance does not preserve due process issue).

It should additionally be noted that Appellants do not raise as an issue on appeal, any challenge to determining attorney's fees post-trial; they only challenge whether determining fees post-trial should be accompanied in all cases by a hearing limited to that issue.[6]

Under the Due Process Clause or other parts of the Bill of Rights, there may be, in instances, a process which is due to be offered, but seldom is it process which is provided despite a failure to avail oneself of it. There is a federal, Seventh Amendment, right to jury trial, for example, but not if one does not timely demand it. See Fed. R. Civ. P. 38 (allowing jury trial if demanded within 14 days of service of last pleading providing basis for demand) and Rule 38, SCRCP (same, but within 10[7]). A defendant in a lawsuit is entitled to a trial before judgment, but not if, when at a juncture requiring her to come forward, she fails to show that her defenses are more than a sham, see Rule 56 (c), SCRCP (outlining procedure for summary judgment), or if she is sued only for a liquidated sum and does not answer the complaint against her, see Rule 55 (b)(1), SCRCP (providing for default judgment with no hearing).

Provided that there is an opportunity to submit evidence, there is no right to have a hearing on a post-judgment application for attorney's fees. Seabrook Island Property Owners'

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[6] The fact that HMC was claiming attorney's fees was certainly no surprise at all; it was raised in opening statement and throughout the trial and the contractual basis for claiming attorney's fees was discussed each time. (See Transcr. p. 5, R. p. 54, line 20-p. 6, R. p. 55 line 7; p. 9, R. p. 58, line 19-p. 10, R. p. 59, line 1; p. 12, R. p. 61, lines 7-9; p. 18, R. p. 67, lines 7-23; p. 21, R. p. 70, line 24-p. 22, R. p. 71, line 9; p. 28, R. p. 77, line 22-p. 29, R. p. 78, line 8; p. 30, R. p. 79, lines 8-16; p. 71, R. p. 112, lines 7-20; p. 97, R. p. 138, lines 4-8; p. 129, R. p. 170, line 8-p. 131, R. p. 172, line 11; p. 144, R. p. 185, lines 5-13.)

[7] The Seventh Amendment right to jury trial in a civil case is not concurrently required by the Due Process Clause and is not applicable to the States under the Fourteenth Amendment.

Association v. Berger, 365 S.C. 234, 616 S.E.2d 431 (Ct. App. 2005). Evidence on motions may be received by affidavit, unless the court directs otherwise. Rule 43(e), SCRCP. Appellants were given the opportunity to submit evidence, and declined to do so. There was no error in not conducting an in-person hearing.

Further, had there been error in considering the affidavit instead of taking identical live testimony, there is no demonstrated prejudice in, nor any attempt to show prejudice in, the Circuit Judge's consideration of the affidavit and award of fees. The amount, or reasonableness of amount, of the fees awarded is not an issue presented on appeal.[8]

In the instant case, the materials supporting the application for fees and expenses are detailed and extensive. Even where, contrary to the case here, affidavits and records are "somewhat deficient," the trial court's determinations of the time spent and the other factors in the case, when based on the trial court's familiarity with the case and observation of the proceedings and the attorneys, may serve as support for the trial court's proper consideration of the required factors. See Taylor v. Medenica, 331 S.C. 575, 503 S.E.2d 458 (1998) (affirming fee award in excess of principal judgment where some attorneys kept no contemporaneous time records, some made estimates, and some submitted no estimates).

Whether due process would otherwise require an in-person hearing or not, Appellants did not ask for it in accordance with the Circuit Judge's instruction. The Judge's order stated that the particulars of any exception to HMC's affidavit and proposed order be set forth in a motion served within 10 days after service of those items. This procedure emulates the procedure for taxing costs under Rule 54 (d), SCRCP, as well as the procedure in the appellate courts. See

[8] Thus, one more feature of due process, appellate review, which was available, has been declined as well.

Rule 222 (d), SCACR.

On February 26, 2019, the fee affidavit and proposed order were served and submitted. No particulars or motion was served or filed within ten days thereafter or at any time. No opposing affidavit or other opposing evidence was submitted or referenced. Appellants sent a two-sentence e-mail not compliant with the judge's instructions as to form or specificity. Nevertheless, HMC responded with a filed brief to the concerns only generally expressed in the e-mail.

Despite failure to comply with the 2/13/19 Order, Appellants state that they continue to have a constitutional right to "confront the witness." Appellants cite no cases pertaining to ordinary private-party civil litigation, in which cross-examination of the opposing party or the opposing party's attorney was required under the Due Process Clause. The confrontation clause of the 6th amendment is limited to criminal matters. See U.S. Const. Amend. 6 ("In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him.")

There is a more flexible, and not explicitly mandated, ability to confront witnesses under the Due Process Clause of the Fifth Amendment, but it is generally held to apply to exercise of government power in administrative procedures, in which the state or one of its political subdivisions is the adversary. See, e.g., Goldberg v. Kelly, 397 U.S. 254, 269 (1970)(involving government financial aid); ICC v. Louisville & Nashville R.R., 227 U.S. 88, 93-94 (1913)(involving government regulation of rates of railroads); and Green v. McElroy, 360 U.S. 474, 496-97 (1959)(involving armed forces security clearance of aeronautical engineer).

Due process is flexible and calls for such procedural protections as the particular situation

demands. State v. Binnarr, 400 S.C. 156, 165, 733 S.E.2d 890, 894 (2012).[9] There is not necessarily a right to cross-examine adverse witnesses in a civil or regulatory matter when a review of the procedures reveals a party has been given a meaningful opportunity to be heard, including ability to access evidence in opposition, the ability to submit evidence, and the ability to obtain appellate review. See Kurschner v. Camden Planning Com'n, 376 S.C. 165, 656 S.E.2d 346 (2008)(involving application to planning commission to subdivide parcel of land).

In the context of habeas corpus litigation, the United States Court of Appeals for the Ninth Circuit has held that there is not even a right to cross-examination in the punitive setting of determining a motion for sanctions. In Lambright v. Ryan, 698 F.3d 808 (9th Cir. 2012), the court observed: "The [District] [C]ourt noted that Lambright would like the opportunity to cross-examine the Arizona Attorney General's Office to verify their story, but, after considering the challenges to their credibility raised by Lambright, found that 'there is no basis for questioning the affiants' veracity and holding a hearing to have counsel restate what is already in their affidavits would be a waste of time and resources.'" Id. at 825-26.

The court went on to hold:

> "When necessary, the district court may hold an evidentiary hearing on a motion for sanctions." Wyle v. R.J. Reynolds Indus., Inc., 709 F.2d 585, 592 (9th Cir. 1983). Hence, the district court has the discretion, but is not required, to hold an evidentiary hearing prior to imposing sanctions on a party. Indeed, in cases in which the sanctioned party argued that it was deprived of due process because the district court failed to conduct an evidentiary hearing, where the standard is necessarily higher than it is here, as Lambright does not raise a due process argument, we have held that "[t]he opportunity to brief the issue fully satisfies due process requirements." Pac. Harbor Capital, Inc. v. Carnival Air

[9] The process which is due is also determined in part by whether the process or incident thereof is one which was historically afforded in the circumstances. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)(referring to whether a practice is "so rooted in the traditions and conscience of our people as to be ranked fundamental"). Appellants have failed to show that the post-trial taxing of fees in England or colonial America did require cross-examination.

Lines, Inc., 210 F.3d 1112, 1118 (9th Cir. 2000).

Id. at 825-26.

As noted above, even now, the actual reasonableness of the Appellants' attorney's fees is not an issue on appeal, and nor is the trial judge's determination on any of the factors for determining that reasonableness, and no argument is made concerning the correctness of the trial judge's findings on those factors. Appellants provide no challenge whatsoever to the accuracy of the trial judge's assessment of: (1) the nature of the matter, (2) its complexity, (3) the materials observed in the court file and at trial, (4) the standing of counsel, (5) the time expended on the matter, or (6) the results achieved.

As noted above, in making the fee award, the trial judge did not rely solely on the fee affidavit of HMC's counsel. As the judge who read the court file and presided over the trial, he also relied directly on his own observations of the matter and familiarity with counsel. In his 2/28/19 Order, he stated he considered the circumstances of the case. (Order at 1, R. p. 4.) In the opening of the trial, he stated on the record that he knew the lawyers very well and that there were excellent lawyers on both sides. (Transcr. p. 4, lines 6-12, R. p. 53.) During the trial, he remarked, not surprisingly, that he had read the file. (Transcr. p. 47, lines 1-2, R. p. 96; see also p. 126, lines 5-12, R. p. 167 (directing the witness to invoice attached to the Complaint).)

Avoiding the three-ring circus, or waste of time, of a hearing in which no proper exceptions were taken going in was within the trial judge's discretion.

In such a hearing, by Appellants' reasoning, it would also have been relevant to examine or cross examine the trial judge himself on his observations. In fairness, then it would also have been relevant to allow the trial judge or HMC's counsel to examine Appellants' counsel on their

own customary rates,[10] the hours they expended using two lawyers to defend the case,[11] and the things they or their client did or failed to do which, intended or not, increased the time expended by HMC's counsel over the course of three years.

Hypothetically, the latter subject might include missing hearings or roster meetings which HMC's counsel nevertheless was required to attend, repetitively requesting continuances or reschedulings, to which HMC cooperatively consented, not responding timely or completely to paper discovery, on which HMC's counsel civilly followed up with repetitive reminders and later motions, defendant Summey taking issue with nearly every single invoice he was questioned about in his deposition, after extended periods of never challenging any of them, and Appellants then filing and serving a three-month-old affidavit of Summey after summary judgment proceedings had already begun.

Since the fees sought were simply actual fees, or less, incurred on an hourly basis, and not contingent or estimated fees, and since detailed hourly figures were provided and some of the time, additionally, was discounted, the task was not one requiring an extensive hearing. See Seabrook v. Berger (observing, where the fee sought was "actually incurred," there was no evidence that the award of same was excessive). See also Taylor v. Medenica (recognizing that trial judge was in a position to judge the amount and quality of work).

Appellants, several times, argue that the importance of cross examing their opponent's attorney is heightened because he is the one who is going to get the money. (See Appel. Brf. at 9

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[10] See Seabrook (observing trial judge's request that the party objecting to the attorney's fees of the opposing party provide information about the objecting party's own attorney's fees and explain why the objecting party thought the opposing party's attorney's fees were excessive).

[11] Appellant's present appellate counsel, Mr. Player, was not a lawyer in the case at the trial level.

(referring to "testimony from the person who will be receiving") and 11 (asserting that the affiant is the one "who will reap the rewards").) To the contrary – as was clear -- at the time of the fee petition, the bulk of the fees sought had been paid by HMC to counsel, and the remainder, which were accounted for by the hour, were owed whether included in the fee award or not. All the fee award was to go to HMC to reimburse HMC for what HMC actually spent or owed. As of this writing, HMC has not received any of that reimbursement.

There was no error in, under the circumstances, not holding a hearing on the application for attorney's fees. The trial court should be affirmed.

CONCLUSION

For the foregoing reasons, the trial court should be affirmed.

Respectfully submittted,

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