THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
COURT OF COMMON PLEAS

R. Lawton McIntosh, Circuit Court Judge

Case No.: 2017-CP-04-01382

Federal Logistics, Inc.....Respondent

v.

DMP Construction, LLC,.....Appellant.

APPELLANT'S FINAL REPLY BRIEF

William Norman Epps III
EPPS & EPPS, LLC
Post Office Box 2167
Anderson, South Carolina 29622
(864) 224-2111
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. **CASES:**

SOUTH CAROLINA RULES OF CIVIL PROCEDURE:

ARGUMENT

1. THE TRIAL COURT ERRED IN FAILING TO GRANT APPELLANT'S MOTION TO VACATE AND/OR FOR A NEW TRIAL

After the trial court granted a directed verdict, it found, "If on the other hand, I'm going to tell you this, I do not know procedurally how proper it is, but in taking this case away from the jury, if you find that there has been actually inclusion of this daily interest in the figures, then by way of timely filed post-trial motion, I'm going to grant his relief, okay, so be aware that may happen". (R. p. 225). The trial court also stated, "Okay. Again, if you show me that they agreed, then I'm going to change the judgment to the original plus the amount he's asking, and you'll have to pay his fees. Okay? All right. You will then – you will no longer be prevailing party. Okay. So I don't think that's going to happen, but that's – that's what it is. (R. pp. 227-228).

Federal Logistics conceded at the post trial hearing, "The e-mails did, which we had already provided to them in – in our discovery. We had already provided that. And there's no question that he sent e-mails to them and – and he had sent invoices to them. And the invoices said interest will run at 3.5 percent daily rate. **And the e-mails were – were asking for interest at – 1.5 percent on a daily rate. No question he did that**. He did not collect it. We did not sue for it. Quite frankly, they never objected to any of those submissions either. (R. pp. 246-247).

The attachments to the motion to vacate and/or for a new trial were Federal Logistics own documents, documents that Rich Fair failed to produce to DMP in response to Interrogatories and Request for Production, and documents Rich Fair denied sending to Appellant, particularly Defendant's Exhibit 3 - DMP Construction Statement as of July 13, 2016. (R. pp. 167 though 175). Exhibit A is actually Federal Logistic's Exhibit 5 at trial. (R. p. 275). The Exhibit C email was entered as evidence in trial. (R. p. 312).

Evidence was submitted by timely post trial motion that showed Federal Logistics did bill DMP late interest fees of 1.5% per day, as instructed by the trial court. (R. p. 225). While the Respondent objected to the motion, the trial court reviewed the motion and attachments and took it under advisement. (R. p. 246 and p. 255). The trial court made no finding that the attachments to the motion to vacate and/or for a new trial were not to be considered, and did in fact consider them. The trial court found, "Defendant argued that the undiscounted amounts billed and sued upon included improper interest. Defendant seems to rely upon e-mails sent to Defendant which contained admittedly incorrect information about the interest accruing on the account". (R. pp. 6-9). This evidence is not speculation or supposition by counsel as claimed by Respondent. It is important to note that the amount sued on by Federal Logistics is $54,377.24 and the DMP Construction Statement as of July 13, 2016 is $51,791.37, a difference of only $2,585.87.

In further response to the arguments in paragraph II and III of Respondent's brief, the case of *Nelson v. Nelson*, 428 S.C. 152, 833 S.E.2d 432 (Ct. App. 2019), which is an appeal from a family court action, however, has a very similar issue and factual scenario, as argued herein. The *Nelson* court found in part....

> In addition, after receiving the family court's final order, Husband discovered the original mortgage on 6 Judith Street had been refinanced and there was still a mortgage on the property. Husband filed a motion entitled "Motion for Relief from Judgment or Order Pursuant to Rule 60(b)" on November 9, 2016, arguing he was entitled to a modification of the final order based upon (1) mistake, inadvertence, surprise, or excusable neglect; and (2) fraud, misrepresentation, or other misconduct of an adverse party. Wife argued there was no evidence of fraud or excusable neglect because Husband had ample opportunity to present evidence of a mortgage on 6 Judith Street throughout the course of litigation yet failed to do so. Accordingly, Wife asserted Husband's failure to present this information did not amount to excusable neglect.
>
> The family court found that although the mortgage information was knowable by Husband and he had a duty to disclose accurate information about the property on

his financial declaration, there was excusable neglect on the part of both Husband and Wife for presenting incomplete evidence regarding the existence of a mortgage on 6 Judith Street. Accordingly, the family court granted Husband's 60(b) motion and issued an amended final order including the newly discovered mortgage. After amending the final order and accounting for the refinanced mortgage, the family court found Husband's net equity in the property was only $62,516. Wife appealed this order, and her appeal was consolidated with Husband's. *Id.* at 172, 833 S.E.2d at 442.

The *Nelson* court further held..

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect ... [and] (3) fraud, misrepresentation, or other misconduct of an adverse party ...." Rule 60(b), SCRCP. "The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle him to relief." *Bowers v. Bowers*, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct. App. 1991). "In order to gain relief under Rule 60(b)(1), SCRCP, a party must first show a good faith mistake of fact has been made ...." *Williams v. Watkins*, 384 S.C. 319, 324, 681 S.E.2d 914, 917 (Ct. App. 2009). "In determining whether to grant relief under Rule 60(b)(1), the court must consider the following factors: '(1) the promptness with which relief is sought; (2) the reasons for the failure to act promptly; (3) the existence of a meritorious defense; and (4) the prejudice to the other party.' " *Rouvet v. Rouvet*, 388 S.C. 301, 309, 696 S.E.2d 204, 208 (Ct. App. 2010) (*quoting Mictronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 510–11, 548 S.E.2d 223, 226 (Ct. App. 2001)). *Nelson* at 172-74, 833 S.E.2d at 443.

In this case, there is Federal Logistics' presentation of incomplete evidence of its billing to DMP. DMP timely filed a post trial motion to vacate the judgment, as instructed by the trial court, the existence of Federal Logistics billing statements to DMP that include impermissible late interest fees of 1.5% per day is a meritorious defense and the denial of the post trial motion would result in a windfall to Federal Logistics to which it would not otherwise be entitled. There is no prejudice to Federal Logistics, particularly, in that the billing statements are its own documents that it sent directly to DMP.

CONCLUSION

For the reasons stated, the Appellant, respectfully asks the court to reverse the trial court's grant of a directed verdict and that a new trial be granted, or that this court reduce the judgment to the amount of $16,421.28 plus 1.5% per month for 30 months since May of 2016. That interest amount would be $7,389.60, for a total amount due to Federal Logistics of $23,810.88.

Respectfully Submitted,

EPPS & EPPS, LLC

WILLIAM N. EPPS III (S.C. Bar # 73158)
230 W. Whitner Street
Post Office Box 2167
Anderson, SC 29622-2167
Telephone: (864) 224-2111
ATTORNEYS FOR APPELLANT

February 21, 2020

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Appellant's Final Reply Brief is in compliance with Rule 211(b) SCACR.

William Norman Epps III
Post Office Box 2167
Anderson, South Carolina 29622
(864) 224-2111
Attorney for Appellant

February 21, 2020

RECEIVED
FEB 27 2020
SC Court of Appeals