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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

Appeal from Berkeley County
Court of Common Pleas
Kristi F. Curtis, Circuit Court Judge

Case No. 2018-CP-08-00266
Case No. 2018-CP-08-01008
Appellate Tracking No.: 2019-001169

Aracelis Santos,Appellant,

vs.

Harris Investment Holdings, L.L.C., Respondent,

MEMORANDUM IN SUPPORT OF
MOTION TO REMAND TO MAGISTRATE COURT

August 18, 2020

Thomas R. Goldstein, S. C. Bar No. 2186
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Attorneys for Appellant

During the course of this appeal, and while the Appellant had filed and served several pleadings requesting the circuit court to enjoin the Respondent from interfering in Appellant's use of the premises under an Appeal Bond Order, the Respondent applied for and received a demolition permit from the City of Hanahan and destroyed the building as well as all of Appellant's valuable restaurant equipment. This contumacious act caused harm to the Appellant in two ways:

1) It rendered moot her appeal from the Magistrate's Court as to the ejection because any opinion about whether ejection was or was not proper was reduced to an advisory opinion because a successful appeal would "have no practical outcome of the case":

"It is elementary that the courts of this State have no jurisdiction to issue advisory opinions." *Booth v. Grissom*, 265 S.C. 190, 192, 217 S.E.2d 223, 224 (1975); see also *Hitter v. McLeod*, 274 S.C. 616, 618, 266 S.E.2d 418, 420 (1980) ("[I]t does not ipso facto confer jurisdiction on this Court, or the court below, to render an advisory opinion, which we have repeatedly refused to do even on constitutional issues. . . ."); *McDill v. Nationwide Mut. Ins. Co.*, 368 S.C. 29, 32, 627 S.E.2d 749, 750 (Ct.App.2006) ("[A] court is not permitted to issue advisory opinions."). A court renders an advisory opinion when commenting on an issue will have no practical effect on the outcome of the case. See *Shasta Beverages v. S.C. Tax Com'n*, 280 S.C. 48, 56, 310 S.E.2d 655, 659 (1983) ("It is not the role of this [c]ourt to advise the legislative or executive branches how to proceed, nor to render an advisory opinion on a hypothetical situation."); *Comm'r. of Pub. Works v. S.C. Dep't. of Health & Env'tl. Control*, 372 S.C. 351, 641 S.E.2d 763 (Ct. App.2007) (declining to address an issue which would be merely advisory in nature); *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 76 n. 36, 558 S.E.2d 902, 911 n. 36 (Ct.App.2001) ("This court will not issue advisory opinions that have no practical effect on the outcome."). *Horry County v. Parbel*, 662 S.E.2d 466, 378 S.C. 253 (S.C. App. 2008)

It is not fair to the Appellant to expect her to brief an assignment of error (evidence did not support finding of ejection) when the Respondent preempted any possibility of meaningful review by destroying the subject matter of the ejection. Since Appellant's space no longer exists there is no ejection action to review. Likewise, it is not fair to the Court to expect it to render an opinion over a landlord/tenant dispute that no longer exists because of the Respondent's willful disobedience of the Court and the willful destruction of the subject matter. The Respondent's contumacious conduct is obvious because it destroyed only Appellant's space and left the rest of

the shopping center untouched. In short, the Respondent seeks to profit from its own unlawful conduct.

2) South Carolina has a well-developed body of case law authorizing sanctions when parties intentionally destroy evidence. The rule of adverse inference in spoliation cases is well established in South Carolina. See Kevin Eberle, "Spoliation in South Carolina," *South Carolina Law Review*, (September 2007) There, Eberle traces the evolution of the doctrine, including an 1811 case that sums up the reasoning behind the principle. In that case, a party took possession of a jewelry store and altered the records making an accurate accounting impossible. The Court of Appeals wrote:

"[I]f there was any difficulty in discriminating, it arose solely from the unjustifiable and illegal act of [the defendant] in taking possession of the whole shop and all its contents; and in taking the books of the shop and in cutting out the leaves, and so destroying the evidence which would have thrown light on the case. That *in odio spoliatoris omnia presumuntur*; and that [the defendant] should be made liable to the utmost extent that the Court could do it." *Id.* at *2. The court continued, "There is no doubt that the conduct of [the defendant] was highly unjustifiable; and considerable indignation is excited by his conduct in this respect, as well as in his taking the books and cutting out some of the leaves." *Id.* at *3.

Executors of Blake v. Lowe, 1811 WL 319 (S.C. Ct. App. 1811)

The South Carolina Supreme Court made clear that our state will adopt the tort of intentional destruction of evidence when presented with a discrete set of facts supporting the claim. See *Austin v. Beaufort County Sheriff's Office*:

In *Hannah*, the Supreme Court of Appeals of West Virginia recognized two "stand-alone torts" regarding spoliation of evidence: (1) negligent spoliation of evidence by a third party; and (2) intentional spoliation of evidence by either a party to the civil action or a third party.

. . .

As for the tort of intentional spoliation of evidence, the *Hannah* court listed similar elements:

- (1) a pending or potential civil action;
- (2) knowledge of the spoliator of the pending or potential civil action;

(3) willful destruction of evidence;

(4) the spoliated evidence was vital to a party's ability to prevail in the pending or potential civil action;

(5) the intent of the spoliator to defeat a party's ability to prevail in the pending or potential civil action;

(6) the party's inability to prevail in the civil action; and

(7) damages.

Hannah, 584 S.E.2d at 573.

Under the particular facts of the instant case, it is clear that appellant's allegations do not rise to the level of stating a claim. *Austin v. Beaufort County Sheriff's Office*, 659 S.E.2d 122, 377 S.C. 31 (S.C. 2008)

This case presents a set of facts establishing all 7 of the elements our Supreme Court determined are necessary to make out a tort of intentional spoliation, not to mention conversion, tortious interference with business relations, trespass, trespass to chattels, outrage, *etc.* By taking matters into its own hands, the Respondent has deprived the Court of the opportunity to review the underlying ejectment action upon which the award of attorney's fees is grounded. Since the Appellant cannot raise this new issue—destruction of Appellant's space—for the first time on appeal, the proper remedy is to remand the case to the Magistrate to allow an evidentiary hearing on the Respondent's contumacious conduct to give the Magistrate an opportunity to consider these new facts to determine if the award of attorney's fees should be vacated or modified in light of the Landlord's outrageous conduct.

Respectfully submitted,

August 18, 2020



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Aracelis Santos, Appellant,

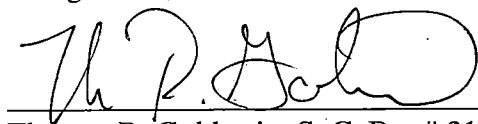
vs.

Harris Investment Holdings, L.L.C., Respondent,

PROOF OF SERVICE

I certify that I have served the Appellant's Motion for Remand along with Supporting Memorandum on the Respondent, Harris Investment Holdings, L.L.C., by depositing a copy of it in the United States Mail, postage prepaid, on August 18, 2020, addressed to the attorneys of record, Merritt Abney, 151 Meeting Street, Sixth Floor, Charleston, S. C. 29401-2239.

August 18, 2020



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August 18, 2020

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Hon. Jenny A. Kitchings,
Clerk of Court
S. C. Court of Appeals
P. O. Box 11629
Columbia, S. C. 29211

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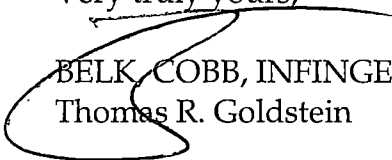
Re: Aracelis Santos v. Harris Investment Holdings, L.L.C.
Case Nos.: 2018-CP-08-00266 and 2018-CP-08-01008; Appellate Tracking
Number 2019-00169

Dear Ms. Kitchings,

I enclose Appellant's Initial Brief, Designation of Contents of Record on Appeal along with a proof of service. Would you be so kind as to file these and return clocked copies to me in the envelope provided?

I also enclose an original and seven copies of Appellant's original Motion to Remand and supporting memorandum of law along with a Proof of Service and the filing fee. Would you be so kind as to file this and return a clocked copy to me in the envelope provided? I thank you in advance for your attention to this request. With kind regards, I am

Very truly yours,


BELK, COBB, INFINGER & GOLDSTEIN, P.A.
Thomas R. Goldstein

TRG/

enclosure: Initial Brief, Motion to Remand, check No. 19253, return envelopes

cc: Merritt Abney, Esq.
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