THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge

Rad S. Deaton, Magistrate Judge

Civil Court Appeal Case No. 2018-CP-08-00266
Civil Court Appeal Case No. 2018-CP-08-01008

Appellate Case No. 2019-001169 (consolidated)

Aracelis Santos, ... Appellant,

v.

Harris Investment Holdings, LLC, ... Respondent.

RESPONDENT'S INITIAL BRIEF

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STATEMENT OF THE CASE

On November 14, 2016, Harris Investment Holdings, LLC ("HIH") filed an application for ejectment in the Berkeley County Magistrate's Court seeking to eject Aracelis Santos ("Santos") from property located at 5901 Loftis Road, Hanahan, South Carolina, known as "El Alamo." (11/14/2016 Application for Ejectment.) Santos and her partner, Benjamin Reyna ("Reyna"), operated El Alamo as a nightclub. HIH alleged Santos and Reyna facilitated and participated in criminal activity at El Alamo in violation of the terms of the Lease and created a public nuisance.[1] (11/14/2016 Application.)

The magistrate held a bench trial on October 11, 2017. Following trial, the magistrate granted HIH's application for ejectment.[2] (12/7/2017 Order.) He concluded based on the evidence that Santos repeatedly violated local law in violation of the Lease and created a public nuisance on the property. (*Id.* at 13-21.) The Ejectment Order stated that "Santos has maintained El Alamo as a place where the laws are publicly, repeatedly, persistently, and intentionally violated, thus disturbing the public peace." (*Id.*) The magistrate also awarded HIH attorney's fees and costs in the amount of $34,608. (2/9/2018 Order.)

Santos filed a motion for a new trial, which the magistrate denied. (2/2/2018 Order.) On February 2, 2018, the magistrate issued a writ of ejectment. On February 8, 2018, Santos filed a

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[1] Before the eviction, the Hanahan City Council unanimously revoked the business license for El Alamo due to persistent criminal activity. Reyna (the license holder) appealed the license revocation to the circuit court, which affirmed the City Council. (11.16.2016 Order.) Reyna made the same unsubstantiated allegations of discrimination and unfair treatment by the City that Santos asserts in this appeal, and the circuit court rejected them. Reyna appealed the circuit court's decision to this Court but subsequently dismissed the appeal voluntarily. (See *Reyna v. Town of Hanahan*, COA Case No. 2017-000796.)

[2] The Magistrate also grated HIH's application to eject Santos from another nearby property at which Santos operated a convenience store known as "Latino Mix." Santos vacated Latino Mix voluntarily after trial, and that property is not at issue in this appeal, except insofar as HIH is entitled to attorney's fees as the prevailing party.

Notice of Appeal of the magistrate court's orders to this Court in Case No. 2018-CP-08-0026 (the "First Appeal").

Following a hearing on February 26, 2018, the magistrate set an appeal bond in the amount of $59,295.23. Santos filed a motion for reconsideration of the bond, which the magistrate denied via written order dated March 7, 2018.

Thereafter, Santos moved to vacate the bond requirement. The circuit court determined that inclusion in the bond of any amount awarded to HIH for attorneys' fees was improper and remanded "the issue of the bond" to the magistrate's court for re-calculation. (4/9/2018 Order.) Meanwhile, the First Appeal remained pending in the circuit court.

After the magistrate re-calculated the bond, on June 1, 2018, Santos filed a second civil action in the circuit court (Case No. 2018-CP-08-1008, the "Second Appeal"), in which she again sought to appeal the magistrate's order of ejectment and related orders and also asserted various tort claims against HIH. HIH moved to dismiss the Second Appeal on several grounds, including that the combination of a civil appeal with new tort claims was procedurally improper. (Motion to Dismiss.)

Following a hearing on HIH's motion to dismiss the Second Appeal, the circuit court issued a consent order dated October 2, 2018 (the "Consent Order"), which required Santos to dismiss the Second Appeal without prejudice. (10/2/2018 Consent Order.) Despite repeated demands by counsel for HIH, Santos failed to comply with the Order. Accordingly, HIH filed a motion to dismiss and rule to show cause seeking to enforce the Consent Order. (12/4/2018 Motion.)

On June 3, 2019, the circuit court held a hearing on the First Appeal and HIH's motion to enforce the Consent Order requiring Santos to dismiss the Second Appeal without prejudice. 6/3/2019 Hr'g Tr.) After the hearing, the circuit court dismissed the Second Appeal without prejudice in accordance with the Consent Order and affirmed the magistrate's award of attorney's

fees to HIH. (6/6/2019 Orders.) Santos moved to reconsider both orders, and the circuit court denied the motions for reconsideration via orders entered June 18, 2019. (6/18/2019 Orders.)

STATEMENT OF THE FACTS

HIH and Santos were party to a lease dated May 22, 2014, for a shopping center unit in which Santos operated a convenience store known as "Latino Mix" (the "Latino Mix Lease"). (Pl's Tr. Ex. 23.) They were also parties to a lease dated December 2, 2015, for another unit located in the same shopping center in which Santos and Reyna operated El Alamo (the "El Alamo Lease" and, jointly with the Latino Mix Lease, the "Leases"). (Pls. Tr. Ex. 2.)

The Leases entitled HIH to recover its reasonable attorney's fees and costs in connection with any action to enforce the Leases. The El Alamo Lease provided as follows:

> **32) ATTORNEY'S FEE**. In the event Landlord successfully defends any action by the Tenant, or if it is necessary for Landlord to employ an attorney for the collection of rent or any other sum due hereunder, or to enforce any covenant of this lease, or the termination of this lease, or for the possession of the Premises or any part thereof the Tenant shall pay all costs, including reasonable attorney's fees.

(Pls. Tr. Ex. 2, Sec. 32). Notably, this provision did not require determination of a "prevailing party." Rather, HIH had only employ an attorney to "enforce any covenant of this lease" or "for the possession of the Premises" to be entitled to its attorney's fees.

The Latino Mix Lease stated as follows:

> **46) ATTORNEYS FEE** - In the event that any legal matter, dispute, action or proceeding exist arts commenced by or between lessor and Lessee under this Lease, the prevailing party shall be reimbursed reasonable attorney fees and court cost in such matter. If either party hereto without fault is made a party team litigation instituted by or against any other party to this Lease, such other party shall indemnify and hold harmless Lessor or Lessee, as the case may be, against all costs and expenses, including reasonable attorney's fees incurred in connection therewith.

(Pls. Tr. Ex. 23, Sec. 46.)

The El Alamo Lease prohibited Santos from engaging in or permitting any immoral conduct or illegal activity on the premises. (Pls. Tr. Ex. 2, Sec. 4). It also required her to keep the premises "in compliance with all laws, ordinances, and requirements of any legally constituted public authority." (Pls. Tr. Ex. 2, Sec. 10.)

Santos testified she understood the Leases required her to maintain the premises in compliance with local law. (Santos Testimony.) She also admitted that violations of local ordinances limiting building occupancy and prohibiting after-hours consumption constitute breach of the Leases. (Santos Testimony.)

City of Hanahan Chief of Police Dennis Turner testified El Alamo constituted a public nuisance due to repeated acts of criminal activity and violations of local ordinances at and arising from the establishment. (Turner Testimony.) Chief Turner described numerous incidents involving criminal activity at El Alamo from 2014 to the present. These incidents included, *inter alia*: (1) violations of local ordinances regarding occupancy, after-hours alcohol consumption, and selling alcohol without a license; (2) physical altercations, including assaulting a police officer; (3) alcohol/intoxication arrests; (4) drug arrests and confiscation of drugs, including marijuana and cocaine; (5) arrests of an El Alamo employee for pointing and presenting a firearm on premises; (5) an El Alamo employee assaulting patron; (6) weapons charges and confiscation of illegal firearms; and (7) noise violations. (*Id.*)

Incident reports from the Hanahan Police Department also established repeated violations of local and state laws on the premises and creation of a public nuisance. For example, these reports detailed the following:

1. Numerous citations of El Alamo for substantially exceeding its maximum occupancy of 99 persons in violation of the International Fire Code as adopted by the City of Hanahan pursuant to S.C. Code Ann. § 6-9-80. (e.g., Pls. Tr. Ex. 27, HPD 44-45, 53, 372, 380.)

2. Repeated violations of Hanahan Ordinance 4-2, which prohibited onsite consumption of alcohol after 2am. (e.g., Pls. Tr. Ex. 27, HPD 372, 380, 402, 415, 424, 437, 444, 445, 449, 451, 473.)

3. Repeated instances of El Alamo selling alcohol without a license. (e.g. Pls. Tr. Ex. 27, HPD 432.)

4. Repeated drug offenses at El Alamo and in its parking lot, including confiscation of cocaine and marijuana. (e.g., Pls. Tr. Ex. 27, HPD 74, 221-222, 258-260, 275, 294, 424, 437, 444, 445, 449.)

5. Numerous fights, including arrests for assault and assaulting police officers and incidents of gun fire and confiscation of weapons (including a sawed-off shotgun). (e.g. Pls. Tr. Ex. 27, HPD 78, 85, 340, 402, 459, 465.)

Santos and Reyna were present at El Alamo for many of these incidents, and HIH and the Hanahan Police Department repeatedly warned them to stop the ordinance violations and criminal activity. (Santos Test.; Pls. Tr. Ex. 27, HPD 402, 424, 449.) Santos acknowledged to officers on several occasions that she was aware of prior warnings regarding criminal activity and other disturbances at El Alamo. (Pls. Tr. Ex. 27, HPD 287.)

Detective Clif Driggers with the Hanahan Police Department testified that, during the period 2014 to 2016, Hanahan police were dispatched to address disturbances at El Alamo significantly more often than to other establishments within the City that allow for on-premises consumption of alcohol. (Driggers Testimony.) In addition to El Alamo, the City had three other establishments that allowed for on-premises consumption of alcoholic beverages. Detective Driggers stated that El Alamo had a total of 44 arrests from 2014 to May of 2016 and that the other three establishments combined had a total of only 2 arrests. (Pls. Tr. Ex. 6, p. 92.) He also presented a chart showing that calls to the Police Department for service for which incident reports were taken at El Alamo greatly exceeded the number for the other establishments. (Pls. Tr. Ex. 28.)

Chief Turner testified that the amount of resources the Hanahan Police Department was required to devote to El Alamo hampered the Department's ability to address criminal activity

elsewhere in the City. (Turner Testimony.) Turner also testified the Department was forced to address an incident at El Alamo nearly every weekend, and, because of the danger posed by incidents of violence and weapons possession, the Department had to send multiple officers to El Alamo each time. (*Id.*)

Nearby business owners also testified regarding disruption to the surrounding area caused by El Alamo. (Chinners Testimony.) Chad Chinners, a resident of Hanahan who owns a hardware store across the street from El Alamo, testified that signage for his business was destroyed by a patron leaving El Alamo. (*Id.*) Ron Newman, who owns a mobile home park adjacent to El Alamo, testified the noise late at night disturbs his customers, who regularly complain to him about the nightclub. (Newman Testimony.)

Due to criminal activity and disturbances at El Alamo, the Hanahan City Council unanimously voted on May 26, 2016, to revoke the business license of El Alamo. Specifically, Councilman Dan Owens made the following motion, which was unanimously approved, 6-0, by City Council:

> After careful consideration of all of the facts presented by both sides at this hearing — and thank you both — I move that we revoke the license of El Alamo/Benjamin Reyna (license No. 9692) pursuant to Hanahan City Ordinance Section 10-9. The public welfare makes this revocation necessary due to the fact that the operation of El Alamo's business creates a nuisance attributable to the frequent and persistent suspected criminal activity associated with the operation of the business including repeated acts of unlawful possession or sale of controlled substances, multiple intoxication and alcohol incidents, and continuous breach of the peace.

(Pls. Tr. Ex. 6, 157-158.)

The Town's revocation of the business license was upheld on appeal to the circuit court. The circuit court concluded the decision to revoke the business license "was sound, reasonable, and supported by abundant evidence and testimony." (Pls. Tr. Ex. 7, p.15). In denying Reyna's motion for reconsideration, the court further concluded that the record "contains ample evidence

that since 2014 [El Alamo] had proven to be a nuisance because of the unlawful activity arising from and associated with the business." (Pls. Tr. Ex. 10, p. 2.)

Despite revocation of the business license, Reyna continued to operate El Alamo in violation of Hanahan City Ordinance 10-2, which prohibited operation of a business without a valid business license. (DeLuca Testimony.) The incident reports from the Hanahan Police Department detailed repeated instances in which El Alamo was cited and shut down for the night due to violations of Ordinance 10-2. (Pls. Tr. Ex. 27, HPD 444, 448, 449, 451.)

Detective Driggers also testified that he and other officers of the Department, on many occasions, personally witnessed Reyna and others carrying large quantities of alcohol from Latino Mix to El Alamo. (Driggers Test.; Pls. Tr. Ex. 27, HPD 468.) Driggers testified Santos and Reyna used Latino Mix to support the operation at El Alamo by providing alcohol, which El Alamo did not have a license to sell. (Driggers Test.)

DeLuca testified that he personally met with Reyna at El Alamo in the Fall of 2016 and warned him that criminal activity and violations of local ordinances must stop or else HIH would be forced to take further legal action. (DeLuca Testimony) Via letter dated October 13, 2016, HIH CFO Eric Coulter provided Santos with a notice of default for failure to comply with Section 10 of the El Alamo Lease by grossly exceeding the maximum occupancy for El Alamo and stated further violations of local laws would result in eviction. (Pls. Tr. Ex. 3.) Despite repeated warnings to stop the violations of local ordinances, the violations continued. (Pls. Tr. Ex. 27.)

The magistrate concluded the evidence at trial overwhelmingly established Santos breached Sections 4 and 10 of the El Alamo Lease by repeated violations of local ordinances and by permitting the operation of a public nuisance on the premises. (Trial Order.) He also found the breach of the El Alamo Lease was material because the operation posed a danger to public safety

and significantly increased HIH's exposure, as the owner of the premises, to liability associated with potential criminal activity or other wrongdoing on the property. (*Id.*)

Following trial, the magistrate granted HIH's motion for an award of attorney's fees and costs pursuant to the Leases. (2/9/2019 Order.) The magistrate rejected Santos' argument that it lacked jurisdiction to award fees greater than $7,500, holding that the jurisdictional limitation does not apply to matters between landlord and tenant involving the possession of property. (*Id.*) He also rejected Santos' argument that HIH was not the "prevailing party" because, he concluded, HIH "prevailed on the ultimate issue in each action, the ejectment of the Defendant." (*Id.* at 2.) The magistrate also analyzed the requested fee award under the six factors established by South Carolina precedent. He concluded these actions were "highly contested" and "transformed from simple commercial eviction matters . . . into complex litigation." (*Id.* at 4.) He also found that the time spent by HIH's counsel was reasonable and not duplicative. (*Id.* at 5.) However, the magistrate concluded that HIH's counsel's billing rate, and those of his paralegal and project assistants, exceeded the prevailing hourly rate for commercial evictions in magistrate's court and reduced the billing rates, resulting in a fee award of $35,887.23. These appeals followed.

STANDARD OF REVIEW

Santos misstates the standard of review. Although the circuit court maintains a broad scope of review of a civil appeal from a magistrate, when the circuit court affirms the magistrate in a civil appeal, as in this case, the appellate court's standard of review is more limited. *Bowers v. Thomas*, 373 S.C. 240, 244, 644 S.E.2d 751, 753 (Ct. App. 2007). Specifically, "[i]n ejectment proceedings first heard in magistrate's court, the Court of Appeals is without jurisdiction to reverse the findings of fact of the circuit court if there is ***any*** supporting evidence." *Id.* (quoting *Vacation Time of Hilton Head Island, Inc. v. Kiwi Corp.*, 280 S.C. 232, 233, 312 S.E.2d 20, 21 (Ct. App. 1984)) (emphasis added); S*tate v. 192 Coin–Operated Video Game Machines*, 338 S.C. 176, 184,

525 S.E.2d 872, 876 (2000) ("This Court cannot question findings of fact in a magistrate's court approved by a circuit judge on appeal when there is any evidence, however slight, tending to prove issues involved."); *Bowers v. Thomas*, 373 S.C. 240, 245, 644 S.E.2d 751, 753 (Ct. App. 2007) ("[W]here the testimony is sufficient to sustain a judgment of the magistrate's court, and it is affirmed on appeal to the circuit court, this court will assume the circuit court affirmed the judgment on the merits, in the absence of facts showing the affirmance was controlled or affected by errors of law."). Thus, when reviewing a circuit court's adjudication of an appeal of an ejectment action in magistrate's court, this Court reviews the order under a limited standard of review in which "(1) findings of fact are to be upheld if there is any supporting evidence and (2) absent an error of law, the circuit court's holding is to be affirmed." *McNair v. United Energy Distribs.*, 390 S.C. 44, 49, 699 S.E.2d 723, 726 (Ct. App. 2010).

ARGUMENT

I. **The circuit court correctly determined the magistrate had jurisdiction under S.C. Code Ann. § 22-3-10(10) to make the attorney's fee award.**

The magistrate's court has concurrent jurisdiction with the circuit court over the categories of civil actions described in S.C. Code Ann. § 22-3-10. Subsections 22-3-10(1) and (2) grant the magistrate jurisdiction over actions for breach of contract and injury to the person or personal or real property, if the damages do not exceed $7,500. However, this jurisdictional limitation on damages does *not* apply to "matters between landlord and tenant and the possession of land," over which the magistrate's court has jurisdiction under section 22–3–10(10). *Mosseri, Mosseri, Castro v. Austin's at the Beach, Inc.*, 372 S.C. 593, 595, 642 S.E.2d 760, 761 (Ct. App. 2007). The statute also specifically states the jurisdictional limitation on damages does not apply to any counterclaim in actions between landlord and tenant involving the possession of land. S.C. Code Ann. § 22–3–10(12). Thus, if a civil action involves a dispute between landlord and tenant over possession of

real estate, there is no jurisdictional limitation on the amount of damages incident to the dispute that the magistrate may award to either party. S.C. Code Ann. § 22–3–10(10), (12); *Mosseri, Mosseri*, 372 S.C. at 595, 642 S.E.2d at 761.

A magistrate's award of attorney's fees incident to an ejectment action falls squarely within § 22–3–10(10). The statute's plain language grants the magistrate jurisdiction over "***all matters*** between landlord and tenant" if the action concerns a dispute over possession of land, as in this case. *Id.* (emphasis added). Thus, the magistrate's ability to award damages of more than $7,500 in an ejectment action is not limited, for example, to damages for unpaid rent. Had the legislature intended to limit the statute's application only to certain categories of damage incident to a landlord-tenant dispute, it would have written the limitation into the statute. This Court should not apply a limitation the legislature elected not to include. *CFRE, LLC v. Greenville County Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) ("The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the legislature. In doing so, we must give the words found in the statute their 'plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation.'" (quoting *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007)).

Further, such a limitation would render section 22-30-10(10) inconsistent with section 22-30-10(12), which grants the magistrate jurisdiction over ***any*** counterclaim, including one for attorney's fees, asserted in an ejectment action. It would make no sense for the legislature to grant the magistrate jurisdiction, for example, to award attorney's fees of more than $7,500 to a tenant/defendant on a *counterclaim* under section 22-30-10(12), but to impose the jurisdictional limitation of $7,500 on an attorney's fee award to a prevailing landlord/plaintiff in the same civil action. Construing section 22-30-10(10) to allow the magistrate to award attorney's fees of more than $7,500 to the plaintiff in an ejectment action therefore treats the plaintiff and defendant

equally with respect to the availability of fee awards and other damages. It also effectuates the purpose of the statute to efficiently resolve in the magistrate's court all components of ejectment disputes—including the award of attorney's fees, which is available to the prevailing party under most lease agreements. *See Georgia-Carolina Bail Bonds, Inc. v. County of Aiken*, 354 S.C. 18, 24, 579 S.E.2d 334, 337 (Ct. App. 2003) ("Courts should consider not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law.")

Section 22-30-10(10) applies to the instant ejectment actions because they were not only between landlord and tenant but also involved the possession of property. *Mosseri, Mosseri*, 372 S.C. at 595, 642 S.E.2d at 761. HIH sought and obtained possession of its property via ejectment in both actions. Thus, the lower courts correctly determined section 22-3-10(10) granted the magistrate's court jurisdiction to award attorney's fees in an amount greater than $7,500 in these cases.[3]

II. <u>The circuit court correctly affirmed the magistrate's award of attorney's fees to HIH</u>.

The lower courts correctly determined that HIH was the prevailing party[4] below and the magistrate properly awarded HIH reasonable attorney's fees and costs pursuant to the terms of the Leases and the six factors established by South Carolina case law.

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[3] Santos argues this issue, and the propriety of the attorney's fee award, should be remanded because the circuit court did not explain in the order why it affirmed the magistrate. But no authority requires a circuit court to state the grounds on which it chooses to affirm. Nor are the parties left to "grope in the dark" regarding why the circuit court affirmed, as Santos contends. The magistrate issued a written order containing detailed factual findings and conclusions of law in support of the fee award. (2/9/2019 Order.) The parties briefed these issues to the circuit court, which held oral argument on the appeal before issuing the order affirming the magistrate. As indicated by the circuit court's order, the court agreed with the magistrate's factual findings and conclusions of law. The court did not need to regurgitate those conclusions in an order of its own.

[4] Having failed to argue any grounds for reversal of the ejectment order in her brief, Santos abandoned appellate review of the magistrate's conclusion that ejectment was proper. *See* Rule

A. HIH was the "prevailing party."[5]

"The determination of who is a prevailing party for the purposes of an award of costs is committed to the sound discretion of the trial court." *EFCO Corp. v. Renaissance on Charleston Harbor, LLC*, 370 S.C. 612, 617, 635 S.E.2d 922, 924 (Ct. App. 2006). The supreme court has defined a "prevailing party" as "one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention [and] is the one in whose favor the decision or verdict is rendered and judgment entered." *Heath v. County of Aiken*, 302 S.C. 178, 182–83, 394 S.E.2d 709, 711 (1990) (alteration in original) (*quoting Buza v. Columbia Lumber Co.*, 395 P.2d 511, 514 (Alaska 1964)); *see also Seckinger v. The Vessel Excalibur*, 326 S.C. 382, 483 S.E.2d 775 (Ct. App. 1997) (observing this definition of a prevailing party is applied in the context of statutes allowing attorney fees).

The lower courts correctly determined HIH "prevailed on the ultimate issue in each action" and therefore was the prevailing party below. (2/9/2018 Order.) HIH asserted a single claim for ejectment in the underlying ejectment proceedings. The Court granted HIH the only relief it requested in both cases. The law did not require HIH to prevail on *every ground* allegedly

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208(b), SCACR (stating that, for appellate review of an issue to occur, the issue must be set forth in a statement and argument); *Woodson v. DLI Properties, LLC*, 406 S.C. 517, 529, 753 S.E.2d 428, 434, n.11 (2014) ("We find Petitioners have abandoned the negligent misrepresentation claim by failing to set forth an argument on the issue in their brief."); *Biales v. Young*, 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993) ("Failure to argue is an abandonment of the issue and precludes consideration on appeal."). Therefore, the ejectment order is the law of the case. *Dreher v. S.C. Dep't of Health & Envtl. Control*, 412 S.C. 244, 250, 772 S.E.2d 505, 508 (2015) ("Thus, should the appealing party fail to raise all of the grounds upon which a lower court's decision was based, those unappealed findings - whether correct or not - become the law of the case.").

[5] Unlike the Latino Mix Lease, the El Alamo Lease did not require the court to determine HIH was the "prevailing party" below. Rather, to be entitled to its attorney's fees under the El Alamo Lease, HIH had only to "employ an attorney" to "enforce any covenant of this lease" or "for the possession of the Premises." (El Alamo Lease.)

warranting ejectment to be the prevailing party. *Heath*, 302 S.C. at 182–83, 394 S.E.2d at 711 (prevailing party is "one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, *even though not to the extent of the original contention* [and] is the one in whose favor the decision or verdict is rendered and judgment entered." (emphasis added). Because HIH prevailed on the ultimate issue in both cases, it was the prevailing party.

B. Substantial evidence supported the magistrate's fee award.

The amount of attorney's fees and costs awarded to HIH was reasonable under the circumstances of this case. The magistrate could have awarded the full amount of fees requested by HIH, but he discounted HIH counsel's billing rate by 35%. That award was reasonable under the circumstances of this case and amply supported by the evidence.

The court considers six factors in determining an award of attorney's fees: 1) nature, extent, and difficulty of the legal services rendered; 2) time and labor devoted to the case; 3) professional standing of counsel; 4) contingency of compensation; 5) fee customarily charged in the locality for similar services; and 6) beneficial results obtained. *Seabrook Island Property Owners' Ass'n v. Berger*, 365 S.C. 234, 239, 616 S.E.2d 431, 434-45 (2005). These factors supported the magistrate's award.

1. Nature, extent and difficulty of legal services rendered

As the magistrate correctly held, these actions entailed much more than a simple ejectment for failure to pay rent. Although Santos did repeatedly fail to pay rent, HIH sought to evict Santos, in part, due to repeated violations of law and for creating a public nuisance on the premises. Proving HIH's entitlement to ejectment on that basis required extensive review and analysis of police records, and preparation and coordination of several witnesses for trial. These cases lasted for more than a year before trial, due primarily to Santos' repeated efforts to delay the trial and procedural maneuvering. The parties engaged in significant motions practice, including Santos'

motions for removal to circuit court and to dismiss her own counterclaims, and Plaintiffs' motions for summary judgment, the latter of which was granted in part. And the actions culminated in a day-long trial at which eight witnesses testified. The record in these cases establishes, and the magistrate correctly found, the actions raised difficult legal issues and a large volume of evidence, and the cases extended over a lengthy period, such that this factor supports the amount of fees claimed by HIH.

2. The time and labor expended

This factor also supported an award of the fees and costs incurred by Nelson Mullins. This was a time-consuming and labor-intensive case, as reflected in the detailed time records maintained by Nelson Mullins (NMRS Invoices.) The invoices and affidavits of HIH's attorneys show the time and labor expended by Nelson Mullins in these matters. By way of example, and not limitation, Nelson Mullins prepared complaints and replies to counterclaims in both actions; prepared motions for summary judgment and opposed several motions filed by Santos; attended several pre-trial conferences and motions hearings; reviewed and prepared hundreds of pages of police reports and other documents for use at trial; prepared six witnesses for trial (some, on multiple occasions due to Santos' request for a continuance on the eve of the initial trial). All of Nelson Mullins' work was imminently reasonable and necessary to HIH's prosecution of these matters.

In addition, as set forth in the Affidavit of Merritt Abney, Nelson Mullins staffed this case leanly (virtually all the legal work on HIH's behalf was performed by Abney) and managed the tasks in an efficient manner. (Abney Aff. at ¶¶ 13-14.) The lower courts properly determined this factor weighed heavily in favor of an award of the actual attorney's fees and costs incurred by Nelson Mullins.

3. Professional standing of the attorneys

The lower courts properly concluded this factor also favored an award of the fees requested. The magistrate found that Abney is an experienced commercial litigator and enjoys a strong reputation in the community, as does the entire firm of Nelson Mullins. (2/9/2018 Order at 5.) Santos introduced no evidence at trial to the contrary.

4. Contingency of compensation

This factor does not apply because Nelson Mullins did not handle this engagement on a contingency fee arrangement.

5. The customary fee for similar work

Nelson Mullins' rates charged in these cases were reasonable and within this market for similar work by attorneys and other professionals with a similar background, experience, and expertise. Abney's affidavit demonstrated that the rate he charged in these cases was below his standard rate charged for similar work at the time. (Abney Aff. at ¶¶ 9-12.) Moreover, the rates charged were agreed to by HIH, and HIH in fact paid the fees. (*Id.* at ¶¶ 9-10.) This is strong evidence that Nelson Mullins' rates charged in this case were accepted in the marketplace. Additionally, the South Carolina Supreme Court nearly twelve years ago awarded attorneys' fees pursuant to a fee-shifting statute under the lodestar methodology in an amount far in excess of the highest rate sought by HIH in this case. *See Layman v. State*, 376 S.C. 434, 459, 658 S.E.2d 320, 333 (2008) (awarding fees based upon a rate of $600 per hour for lead counsel and $200-$250 per hour for associates).

Santos presented no evidence at trial of the prevailing rate. She now argues, for the first time, that even the reduced billing rate of HIH's counsel exceeded her own counsel's rate for these matters, but she did not make this argument below and the record contains no evidence regarding her counsel's rate. Thus, this argument is not preserved for review. *Wilder Corp. v. Wilke*, 330

S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (holding it is "axiomatic that an issue cannot be raised for the first time on appeal."); *Mims v. Alston*, 312 S.C. 311, 440 S.E.2d 357 (1994) (holding that an issue neither raised to nor ruled upon by trial court will not be considered on appeal).

Moreover, this Court may not reverse the magistrate's factual conclusions regarding the prevailing rate where there is *any* evidence to support it. *Bowers*, 373 S.C. at 244, 644 S.E.2d at 753. The evidence submitted by HIH in support of a higher billing rate is also plainly enough to support the reasonableness of the billing rate awarded. Thus, the applicable standard of review precludes reversal on this issue. *Id.*

6. Beneficial results obtained

This factor strongly supports the fee award. HIH was successful in ejecting Santos from both properties and obtained all the relief requested at trial. The result obtained is the most important factor in the reasonable fee calculation. *Brodziak v. Runyan,* 145 F.3d 194, 196 (4th Cir. 1998). The United States Supreme Court has stated that "where a [litigant] has obtained excellent results, his attorney should receive a fully compensable fee. Normally, this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified." *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983). Given the outcome of these cases, the magistrate properly concluded this factor strongly supported the fee award.

III. <u>HIH did not waive its entitlement to attorney's fees by demolishing the building.</u>

Santos argues the fee award should be vacated because HIH demolished the building after the Lease term expired. This argument is not properly before this Court because it was not raised to and ruled upon by the lower courts. *Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733.

Moreover, the argument is frivolous. No authority holds that an appellate court may nullify a judgment below based on a litigant's allegedly wrongful conduct occurring *after* the judgment.

Santos can seek relief in the lower courts for claims related to demolition of the building. But this Court lacks jurisdiction to decide those claims in the first instance or to vacate the magistrate's fee award based on Santos' unsubstantiated allegations. Nor can HIH's demolition of its building constitute spoliation of evidence because the building is not evidence relevant to this appeal. To review the lower court's rulings, this Court requires access only to the record on appeal, not to the building.

Furthermore, as discussed more fully in HIH's return filed August 28, 2020, to Santos' motion for remand (which HIH incorporates herein by reference), HIH's conduct in retaking possession and demolishing the property after expiration of the lease term did not contravene any court order and was expressly authorized by the Lease and South Carolina law.

IV. **The circuit court correctly dismissed the Second Appeal.**

Santos contends the circuit court erred in dismissing the Second Appeal without prejudice because she argues the Consent Order did not require it. She argues the order only to required her to amend her pleading in the Second Appeal to delete the claim for civil appeal. But the circuit court correctly concluded that the plain language of the Consent Order, to which Santos consented, expressly requires *dismissal of the action* without prejudice. The Consent Order defines the Second Appeal as "a second *civil action* in this Court (Case No. 2018-CP-08-1008)" and states that "Santos will dismiss the Second Appeal without prejudice, and HIH will withdraw its motion to dismiss the Second Appeal without prejudice." (10/2/2018 Order) (emphasis added). The order says nothing about Santos amending her pleading in that action to delete only *portions* of her pleading. Rather, it unambiguously requires dismissal of the *entire action* without prejudice. Thus, the circuit court correctly enforced the Consent Order by dismissing the action without prejudice.

V. <u>The Court should dismiss the appeals because Santos failed to state grounds for the appeal in the notice of appeal.</u>

As an additional sustaining ground, Santos' appeals should be dismissed because she failed to state any grounds for appeal in her initial notice of appeal to the circuit court. SCRCP 74 governs the procedure for appeals to the circuit court and requires that "[e]xcept for the time for filing the notice of appeal, the procedure on appeal to the circuit court from the judgment of an inferior court or decision of an administrative agency or tribunal shall be in accordance with the statutes providing such appeals." The statute governing the procedure for appeals of ejectment actions indicates that "such appeal shall be heard and determined as other appeals in civil cases from the magistrate's court." S.C. Code § 27-37-120. Title 18, Chapter 7 of the S.C. Code outlines the circumstances and procedure for appeals from inferior courts to the circuit court. S.C. Code § 18-7-10 requires that appeals from inferior courts, such as the magistrates court, shall be to the circuit court of the county where the judgment was rendered and S.C. Code §§ 18-7-20 and 18-7-30 mandate that the notice of appeal must "[state] the grounds upon which the appeal is founded" and "shall state in what particular or particulars [the appellant] claims the judgment should have been more favorable to him."

The South Carolina Supreme Court has confirmed that, where a specific statute requires the grounds for appeal to be stated in the notice, the failure to do so deprives the reviewing court of jurisdiction and results in dismissal of the appeal. *Pringle v. Builders Transp.*, 298 S.C. 494, 495–96, 381 S.E.2d 731, 732 (1989); *State v. Brown*, 358 S.C. 382, 387, 596 S.E.2d 39, 41 (2004); *Great Games, Inc. v. S.C. Dep't of Revenue*, 339 S.C. 79, 83, 529 S.E.2d 6, 8 n.5 (2000) ("The failure of a party to comply with the procedural requirements for perfecting an appeal may deprive the court of 'appellate' jurisdiction over the case[.]") *Sternberger v. McSween*, 14 S.C. 35, 39

(1880) (stating that the notice of appeal must state the grounds upon which the appeal is founded in every case).

Santos' original notice of appeal provided no grounds whatsoever for the appeal—it simply stated that Santos "appeals the Orders of the Honorable Rad S. Deaton dated December 7, 2017, and the Order Denying Motion for Reconsideration dated February 2, 2018." (Notice of Appeal.) Santos also filed an amended notice of appeal on March 6, 2018 and a second amended notice of appeal on March 9, 2018. (Amended Notices of Appeal.) Like the initial notice of appeal, the first and second amended notices stated no grounds appeal. Because Santos failed to state the grounds for appeal in her initial and first and second amended notices of appeal, the circuit court lacked appellate jurisdiction over her appeal, and it should be dismissed accordingly. *Pringle*, 298 S.C. at 495–96, 381 S.E.2d at 732 (holding that where statute required grounds for appeal to be stated in the notice, appellant's failure to state the grounds for appeal in the notice required dismissal).[6]

VI. <u>The Court should affirm the award of attorney's fees to HIH because Santos materially defaulted under the Leases by repeatedly failing to timely pay rent</u>.

As an additional sustaining ground, this Court should affirm the magistrate's award of attorney's fees to HIH because Santos repeatedly failed to make timely rent payments. The evidence at trial established, and the magistrate found, that Santos repeatedly failed to make rental payments as required by the Leases and failed to timely cure within the periods required by the Leases. (12/7/2018 Ejectment Order at 4-7.) However, the magistrate concluded that Santos' repeated failure to pay rent on time did not constitute material breach, citing *Kiriakides v. United*

[6] In *Pringle*, the court also noted that "the policy of liberally allowing amendment of pleadings does not apply to amendment of a notice of appeal requested after expiration of the thirty-day statutory period for filing the appeal." *Id.* As such, Santos' third amended appeal, in which she first stated the grounds for appeal, cannot cure her failure to state the grounds in her initial notice. Moreover, Santos was not granted leave to amend her notice of appeal in the circuit court. Thus, the third amended appeal did not cure her three prior defective notices.

Artists Communications, 312 S.C. 271, 440 S.E.2d 364 (1994), because Santos tendered all past due rent by the time of trial. This conclusion was error. Even under the stringent requirements of *Kiriakides*, a tenant's *repeated* failure to pay rent or cure after notice constitutes material breach of the lease agreement. Moreover, unlike in *Kiriakides*, which involved an insignificant delay in payment and potentially significant forfeiture of the tenant's investment in the property, Santos consistently missed payments deadlines, and the Leases were approaching expiration at the time of trial. Thus, financial default constitutes an additional ground on which ejectment should have been granted and for which HIH is entitled to recover its reasonable attorney's fees. *See Potomac Leasing Co. v. Otts Market, Inc.*, 292 S.C. 603, 606, 358 S.E.2d 154, 166 (Ct. App. 1987) (holding an appellate court "may affirm a trial judge's decision on any ground appearing in the record and, hence, may affirm the trial judge's correct result even though he may have erred on some other ground").

CONCLUSION

For the foregoing reasons, this Court should affirm the rulings by the circuit court.

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PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Harris Investment Holdings, LLC, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

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