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,

FINAL BRIEF

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STATEMENT OF THE CASE

In May 2014, the Appellant signed a 5-year lease with a local entity known as Francon, L.L.C. for two spaces located at 5901 Loftis Road in Hanahan, South Carolina. (R.O.A.Vol. 2, pages 531 and 545) 5901 Loftis Road is a small strip-mall at the intersection with Yeamens Hall Road that housed four small businesses when Appellant signed her lease. Appellant first opened a restaurant/discotheque called El Alamo in the larger space. (Record on Appeal, hereinafter "R.O.A." Exhibit 1 and Vol 2, page 545 and Vol. 2, page 506 [tr. Page 240, line 13.) Six months later, the Appellant opened next door a convenience store called Latino Mix in an adjoining smaller space. Both businesses served a large, 98%, Hispanic customer base. Even as the Appellant made an initial application for a business license, the City of Hanahan took a hostile position, erecting numerous barriers to the Appellant. ("And at the beginning of 2014, I went through seven months of hell from Hanahan to get the city—the business license. . . . they gave me a lot of problems

to get the business license." (R.O.A. Vol.2, page 514 [tr. Page 248, lines 7-13]) After Appellant successfully overcame the hurdles erected by the City, the Appellant continued to draw a lot of attention from the City of Hanahan, whose City Hall and Police Department are located on Yeamans Hall Road, just three doors down from El Alamo and Latino Mix.

Nineteen months later, on December 1, 2015, Francon, L.L.C. sold the property to Respondent, an out-of-state investment company based in Alpharetta, Georgia. (R.O.A. Vol 2, page 592 [deed, Exhibits 8 and 9]) Four months after Respondent acquired the shopping mall, in April 2016, the City began its effort to close both businesses by serving notice on both of its intent to revoke the business license for each entity. The record demonstrates, as discussed in detail below, the City's program to shut down the Appellant's businesses included extensive coordination with the Respondent. On November 14, 2016, following the City's revocation of Appellant's business license on May 26, 2016, a revocation stayed by appeal, the Respondent filed its one-page application for ejectment with the Berkeley County Magistrate. R.O.A. Vol. 1, page 105 and Vol. 3, page 719 [Notice of Ejectment and Exhibit 6, Business License Revocation] Absorbed in fending off the City's business license revocation and the new Landlord's efforts to put her out, the Appellant's cash flow was so interrupted that the Appellant voluntarily closed the convenience store, Latino Mix, in 2017, and for this reason, the record and the brief omits discussion of Latino Mix. (R.O.A. Vol. 2, page 506 [tr. Page 240, line 15]) (For the Court's convenience Appellant provides below on pages 11-13 a chronological summary for quick reference to the pleadings sequence.)

As set forth above, Appellant opened both businesses in 2014, despite the efforts of the City to thwart her from the beginning. When Harris Investments purchased the entire shopping center, her troubles with the City escalated into a two-front battle even though Harris purchased

the property subject to the Appellant's leases. (R.O.A. Vol. 2, page 592 [deed]) The Appellant operated a niche business serving lunches during the day and operating a late hours discotheque, which did not serve alcohol but allowed patrons to bring beer and wine inside, known informally as "brown-bagging." The business was a huge success and attracted a large, "98% Hispanic" crowd. (R.O.A. Vol. 2, page 499 [transcript page 233, line 11] As a result, not long after the Appellant opened the two businesses catering to an Hispanic clientele, the City of Hanahan saturated the business with a police presence, including issuing bogus fire and building code violations, arresting the owners and patrons for minor zoning violations. "I don't see other clubs with four or five police cars parked in front—just ours." R.O.A. Vol. 2, pages 488-89 [tr. Page 222, line 25—page 223, line 2] See list of citations and dispositions in the R.O.A. Vol. 2, pages 585-88 [Defendant's Exhibit 6]. (The Appellant omits a separate discussion analyzing whether the police incident reports were sufficient to sustain a finding of nuisance because during the pendency of this appeal, the Respondent bulldozed Appellant's space making the ejectment action moot. See Appellant's Motion to Remand, filed simultaneously with this initial brief.) However, when Appellant refused to be intimidated, the City's went in a new direction, which culminated in enacting ordinances specifically targeting the Appellant for elimination. See Record on Appeal pages 488 & 617 [tr. page 222, Ordinance 4-2] for an explanation of the origin and revision of the ordinance when the City realized it did not apply to El Alamo. As the Appellant explained, when Hanahan first passed its ordinance, it applied only to businesses that sold alcohol. When the city realized the ordinance did not apply to El Alamo because it did not sell alcohol, the City amended it, adding a Section C, to close down the Appellant. The record demonstrates that after overcoming the City's initial roadblocks to prevent them opening, 2016 blossomed into a three-prong attack

from the police, the City Council, and the landlord in a coordinated plan to put Appellant out of business.

In June 2016, as Hanahan completed final reading of a series of ordinances tailored to eliminate the Appellant's business, (R.O.A. Vol. 2, page 617 and Vol. 2, page 406, 410, and Vol. 2, page 507-08 [ordinance 4-2, tr. Page 140, lines 1-6, page 144, lines 1—13, page 163, lines 13-17, page 241, lines 242, line 14]), the Appellant continued to struggle through and survive the attacks. She refused to capitulate to the City's efforts to eliminate her through police and fire code actions, revocation of her business license, and saturating the premises with a heavy police presence to intimidate their clientele. When all this failed to destroy the Appellant, the City stepped up its efforts by serving a notice of business license revocation upon the Appellant on April 18, 2016, which it scheduled before City Council for a special meeting scheduled on May 26, 2016. Five weeks after serving its notice, the City held its hearing before itself and voted unanimously to strip El Alamo's business license but left Latino Mix's license intact. (R.O.A. Vol. 3, pages 719 – 884 [Plaintiff's Exhibit 6]) Appellant timely appealed that decision to the Berkeley County Court of Common Pleas at Case No.: 2016-CP-08-01261. After the circuit court affirmed the business license revocation, the Appellant sought judicial review before this Court, by Notice of Appeal dated March 14, 2017, (Appellate Tracking Case No.: 2017-000796). After the parties filed their Initial Briefs and Designation of Content of Record on Appeal, while the case was pending, the Respondent took matters into its own hands and in March, 2019, the Respondent hijacked the appeal process by bulldozing Appellant's business to the ground, including all of her valuable restaurant equipment, thereby preventing this Court from reviewing the City's decision to void the business license by destroying the premises even though the Appellant occupied them lawfully under an Appeal Bond Order. (R.O.A. Vol 1, pages 63 & 65 [Appeal Bond Orders])

The destruction also prevents this Court from reviewing the finding of nuisance as grounds for ejectment. (See Appellant's Motion to Remand.) After Hanahan revoked her business license, the Appellant remained open under the stay provided by her appeal. The Respondent filed its Notice of Ejectment on November 14, 2016, less than six months after the City vacated Appellant's business license on May 26th. The Respondent alleged that the Appellant breached her lease on three grounds: failure to pay rent, failure to maintain adequate insurance, and nuisance. (R.O.A. Vol. 2, pages 106 and 107 [Notice of Ejectment]) After a series of procedural skirmishes, summarized in the procedural timeline below on page 11, all of which were resolved in Appellant's favor, the Magistrate Judge heard the case as a bench trial on October 11, 2017. The Respondent presented the same prepackaged witnesses and evidence the City presented in its May 2016, business license revocation hearing. (See Respondent's Exhibit 6—transcript of Business License Revocation Hearing at Vol. 3, pages 719-881.)

Following a non-jury trial that required less than a day, the Magistrate issued his written Order on December 7, 2017, finding that the Appellant was not in breach of her lease on the two contractual grounds asserted by the landlord (rent and insurance), but found that the landlord proved by a preponderance of the evidence that Appellant constituted a nuisance and ordered ejectment. (See Final Order dated December 7, 2017, in R.O.A. Vol. 1, pages 7-32)

After the trial court issued its Order, the Respondent filed an application for attorney's fees on December 20, 2017, seeking an award in the amount of $54,340.58. (Vol. 1, R.O.A. pages 126-132) On January 8, 2018, the Appellant filed a written objection (R.O.A. Vol. 1, pages 206-212), and thereafter, on February 9, 2018, the Magistrate Judge issued an Order on attorney's fees awarding respondent's counsel two-thirds of its request, the sum of $35,887.23. (R.O.A. at page

Vol. 1, page 37.) In arriving at this figure, the Magistrate awarded recovery for all the hours submitted, but at a lower hourly rate of $280.00 per hour.

The Appellant timely moved for reconsideration on both the finding of nuisance and the award of attorney's fees, R.O.A. Vol. 1, page 119 and Vol. 3, page 1075, which the Magistrate Court denied on February 2, 2018, and February 9, 2018. (R.O.A. Vol. 1, pages 33 and 47). The Appellant appealed the case to the circuit court on February 8, 2018, at case number 2018-CP-08-00266. (R.O.A. Vol. 1, page 213) The Appellant amended the Notice of Appeal several times as subsequent orders came in. (R.O.A. Vol. 1, pages 214, 215, and 216)

After Appellant filed her appeal, on February 26, 2018, the Magistrate Court set an appeal bond as required by statute, § 27-37-130, S. C. Code, ann. in the amount of $59,295.23. After the Appellant timely moved for reconsideration of this appeal bond, the Appellant appealed the Order to the circuit court. On the issue of the appeal bond, the parties appeared before Judge Young on March 14, 2018, and Judge Nicholson on April 10, 2018. (R.O.A. Vol. 2 pages 621-636 and 637-664 [Transcripts of hearing]). On April 18, 2018, Judge Young ordered a remand to the Magistrate to recalculate the bond, and after the parties filed memoranda, the Magistrate Judge set the appeal bond $7,500.00 on May 15, 2018, and after reconsideration, $5,500.00 on May 17, 2018. R.O. A. Vol. 1, pages 63 and 65.

Appellant posted the appeal bond with the Magistrate Court, and as the case was making its way through judicial review, the Respondent stepped up its interference with the Appellant's use of the building even though the Appellant conformed to the appeal bond's conditions. The interference escalated to the point that on June 1, 2018, the Appellant filed a tort action against the Respondent at case No. 2018 CP 08 01008. (R.O.A. Vol. 1, page 227), combining it with the appeal then pending, the 266 case. The Respondent sought to dismiss the appeal. The parties

appeared before Judge Buckner on August 6, 2018, on the Respondent's motion to dismiss the appeal. (R.O.A. Vol. 2, page 665 [transcript]) The parties agreed to separate the appeal from the tort case, and Judge Buckner memorialized the agreement and ordered that the Appellant dismiss the appeal and re-file it under the earlier 266 case number, which the Appellant did on August 13, 2018, even though Judge Buckner had not yet issued a written Order. (R.O.A. Vol. 1, page 216 [third amended notice of appeal]) Judge Buckner filed his written Order on October 2, 2018, (R.O.A. Vol. 1, page 68), after the Appellant previously conformed. See cover letter to the Clerk of Court at Vol. 1, page 263 and Vol. 3, page 1074 R.O.A. Following the appearance before Judge Buckner, the Respondent became more and more aggressive in its interference with Appellant's use of the building, and on December 17, 2018, the Appellant filed a motion seeking a Temporary Restraining Order holding the Respondent in contempt for its willful disobedience to the Court's Order granting possession during the pendency of the appeal. (R.O.A. Vol. 1, page 255) Before the Clerk's office set that motion for hearing, on or about March 23, 2019, the Respondent bulldozed to the ground so much of the shopping center as contained the Appellant's business, including all of Appellant's restaurant equipment and inventory. The Respondent bulldozed **only** Appellant's space, leaving the rest of its shopping center untouched. The Respondent's resort to extra judicial self-help mooted the Appellant's opportunity to ask the Court to review both the City's termination of her business license and the Magistrate's decision on ejectment, leaving only two legal issues capable of being reviewed: the award of attorney's fees and the circuit court's decision to grant a non-suit of Appellant's tort suit without prejudice for an alleged improper joinder. Thus, the only issues left for the Court to decide on appeal are:

Whether the Magistrate erred in awarding $35,887.23 in fees and costs, and whether the circuit court judge erred in dismissing Appellant's claim for damages without prejudice over her objection for alleged improper joinder.

PROCEDURAL TIMELINE

(2018-CP-08-00266—Appeal from Magistrate Court Ejectment)
(2018-CP-08-01008—tort case)

May 21, 2014	**Plaintiff moves in building, signs lease with Francon**
December 1, 2015	**Harris Investments acquires building from Francon at Deed Book 2071 Page 749**
April 18, 2016	**Notice of Business License Revocation**
May 26, 2016	**City Council votes to revoke business license.**
November 14, 2016	**Landlord files Ejectment action on two businesses—El Alamo and Latino Mix**
July 19, 2017	**Magistrate's Order Granting Voluntary Non-Suit on Counterclaims**
October 11, 2017	**Non-Jury Trial in Magistrate's Court on ejectment**
December 7, 2017	**Magistrate's Order on the Merits—Ejectment based on nuisance.**
December 15, 2017	**Motion for New Trial**
December 20, 2017	**Request for Award of Fees and Costs of $54,340.38**
January 8, 2018	**Reply to Request for Attorney's Fees**
February 2, 2018	**Order Denying Motion for New Trial, Reconsideration**
February 8, 2018	**Notice of Appeal—2018-CP-08-00266**

February 9, 2018	**Order Awarding Attorney's fees ($35,887.23)**
February 26, 2018	**Hearing on Appeal Bond**
February 26, 2018	**Order on Bond to Stay Execution on Appeal**
March 2, 2018	**Motion to Amend Bond**
March 6, 2018	**Amended Notice of Appeal—2018-CP-08-00266.**
March 7, 2018 **March 7, 2018**	**Hearing on Non-Compliance of Bond** **Order Denying Motion to Amend Bond**
March 9, 2018	**Second Amended Notice of Appeal—2018-CP-08-00266**
March 14, 2018	**Judge Young hearing on Motion To Dismiss**
April 9, 2018	**Judge Young orders Remand to redetermine bond**
April 10, 2018	**Judge Nicholson hearing on Motion to Dismiss.**
May 17, 2018	**On Remand, Magistrate Sets Appeal Bond**
June 1, 2018	**Tort Case & Appeal filed at Case 2018-CP-08-1008.**
August 6, 2018	**Hearing on Motion for Summary Judgment** **Judge Buckner**
August 13, 2018	**Third Amended Notice of Appeal** **(Appeal dismissed from 2018-CP-08-1008 and filed at 2018-CP-08-0266)** **"Pursuant to Judge Buckner's Order, I enclose the original and an extra copy of the appellant's third amended complaint and a proof of service. By copy of this letter, I am filing the third amended notice of appeal with the Clerk of Court's Office in Goose Creek and providing a copy to opposing counsel."**

October 2, 2018	**Judge Buckner's Order from August 6th hearing filed 2018-CP-08-1008**
December 17, 2018	**Motion for Contempt of Court—interference with possession**
January 4, 2019	**Appellant's Motion for Interpleader of Rent**
March 19, 2019	**Appellant's Motion for Temporary Restraining Order**
March 19, 2019	**Appellant's Motion to Amend Complaint**
March 23, 2019	**Harris Investments, Inc. *et. al.* demolishes building and contents.**

FACTS

The undisputed facts are shocking because they depict a coordinated scheme between a local government and Appellant's landlord to disadvantage a minority business owner, culminating in the Landlord's decision, while this case is pending, to bulldoze the Appellant's space to the ground, including her valuable restaurant equipment. The City of Hanahan government operates on an atavistic, racially discriminatory model of municipal government, a vestige of South Carolina's recent discriminatory past. With a population of nearly 20,000, of whom approximately 30% are non-white, Hanahan's at-large electoral system forecloses the possibility of minority representation at any level of Hanahan's administration. Notwithstanding a sizable minority population, the City elects its entire governing body at-large under Ordinance 2-1 for terms of four years. (R.O.A. Vol 2, page 616) This at-large system prevents Hanahan's minority residents from having a voice in how the City is run.[1] Against this current of unequal

[1] The U. S. Supreme Court declared at-large voting unconstitutional in *Rogers v. Lodge*, 458 U.S. 613, 102 S.Ct. 3272 (1982). That case lists the factors courts consider in evaluating at-large voting under equal protection. While such an analysis is beyond the scope of this appeal, *Rogers v. Lodge* evaluated the at-large system in Burke County, Georgia which has about the same population as Hanahan, although it is more evenly divided racially. This case demonstrates the Court's analysis.

protection, the City acted with alacrity and with overwhelming deployment of governmental force, first to intimidate the Appellant and her customers and then later to eliminate entirely the Appellant's business because it served a Hispanic clientele. The City marshalled its considerable resources to eliminate Appellant by interfering in every way possible, including frequent police harassment, bogus fire code violations, and finally revoking her business license based on manufactured incident reports. R.O.A. Vol. 1, pages 232-237; Vol. 2 pages 585-588; Vol. 3, pages 719-884 [Exhibit 6, transcript of business license revocation hearing and summary of citations]. The police even arrested Appellant for an alleged municipal ordinance violation, placing her in handcuffs and transporting her in a police car to the Charleston County jail where they confined her overnight for a bond hearing the following morning for an alleged municipal violation that should result in a courtesy summons to Municipal Court. These acts were the subject of the action Appellant filed against the City for violation of her civil rights, which the parties settled at case number: 2017 CP 08 00177. However, when the City's two pronged attack on termination of Appellant's business license did not go as planned because Appellant stayed the action by seeking judicial review, the City then called in the Appellant's landlord to open a third front as proxy for the City.

The coordination between a government and a private citizen to deprive a plaintiff of her rights is discussed in case law. Such coordination can give rise to a civil rights violation against a private party. The U. S. Supreme Court decided private citizens are subject to suit for violations of civil rights when they coordinate with the government. *Dennis v. Sparks*, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980) As the procedural history of this case demonstrates, Appellant occupied her space 19 months prior to Respondent purchasing the shopping center, and the

Appellant's original landlord refused to coordinate with the City's effort to eliminate the Appellant. R.O.A. Vol. 1, page 298-299 [tr. Page 32, line 20—33, line 4]

On November 14, 2016, the Respondent's lawyer filed a one-page notice to quit with the Berkeley County Magistrate, for which Respondent's counsel billed 7.5 hours and charged $2,559.00. (R.O.A. Vol. 1, page 167 [Nelson Mullen invoices]) This bill gives away the game on both fronts—coordination and excessive charges—because the timekeeping establishes that of the 7.5 hours billed for filling out a one-page form, 5.9 hours resulted from coordination with the City's attorney on the business license revocation case. In other words 79% of the attorney's fees assessed against Appellant resulted from consultation with the City's lawyer handling the business license revocation. As discussed more fully below, the timekeeping entries from the landlord's lawyer reveals a startling amount of time planning strategy with the City of Hanahan. See motion for attorney's fees in the Record on Appeal at Vol. 1 pages 167-205. These records reveal 33 entries for 44.7 hours, or $16,986.00, incurred in consultation with Hanahan's City Attorney. To be fair, some of these billing entries included other tasks. A notice to quit is a one page form (R.O.A. Vol. 1, page 106 [notice to quit], but the time records demonstrate Respondent's counsel spent the time not in checking the boxes on a simple form designed for non-lawyers or talking to his client about the grounds for ejectment, but rather in consultation with the City of Hanahan's counsel to coordinate with the City's effort to eliminate Appellant. At trial, the Respondent, Costa DeLuca, conceded that it was acting on orders from the City. R.O.A. Vol. 1, pages 314-315 and 333 [tr. page 48, line 22—49, line 2; page 67, line 4—67, line 21.]:

Q. . . . now we've learned that the police called you over to the City of Hanahan and sat you down, right?

A. They asked if I'd come there, yes.

Q. And you went?

A. Of course.

Q. And the police called you to go?

A. Uh-huh.

Q. Right?

A. That's correct.

Q. You met with Chief Turner?

A. Yes.

Q. Who else was there?

A. There were a number of people there.

Q. Turner?

A. Yes.

Q. Who else was there?

A. There were a number of people there.

Q. Who?

A. There was a zoning person, and there were other police officers, and I believe Ms. Krutek [business license official] might have been there.

When the Chief of Police testified, he shed more specific light on this meeting, informing the Court that the City called the landlord in to meet with the Police Department, the Business License Official, the Code Enforcement Department, and the City Administrator! (R.O.A. Vol. 1, page 400-401 [tr. Page 134, line 16—page 135, line 22])

After the Respondent filed his notice to quit, the Appellant then sought to remove the case to circuit court on the ground that her tort counterclaims exceeded the jurisdiction of the

Magistrate's Court. (Record on Appeal, Vol. 1, page 108 [Answer and Counterclaim, Motion for Removal]. After the Magistrate ruled that he had unlimited jurisdiction over the counterclaims, rather than seeking judicial review, the Appellant sought a voluntary dismissal without prejudice. The Respondent resisted the Appellant's request to dismiss her counterclaim, which resulted in unnecessary and unproductive work, only ending when the Magistrate entered an Order on July 19, 2017, (R.O.A.Vol. 1, page 2 [Order]) granting the appellant the right to dismiss her counterclaim without prejudice.

The trial took place on October 11, 2017. The landlord called six witnesses:

- Costa DeLuca, the landlord's representative
- Dennis Turner, the Chief of Police
- Clif Driggers, a City of Hanahan police officer
- Joy Krutek, the City of Hanahan Business License official
- Chad Chinners, Blackwell Hardware Company owner
- Ronald Newman, mobile home park owner

In the companion case involving the City of Hanahan's revocation of business license (Appellate Case No. 2017-000796), which became moot after the landlord bulldozed the building, the City called the same witnesses and produced the same evidence. In its business license revocation case, the City called the following witnesses (R.O.A. Vol. 3 pages 719-884, Exhibit 6—transcript of Business License Revocation):

- Dennis Turner, the Chief of Police
- Clif Driggers, a City of Hanahan police officer
- Mike Cochran, former Chief of Police
- Ron Newman, mobile home park owner

- Chad Chinners, owner of Blackwell True Value
- Maria Carval (translated by Maris Aldrich), an El Alamo patron
- Joy Krutek, Business License Official

Thus, the Court can look no further than Respondent's own evidence to see that the two cases are indistinguishable (Costa DeLuca instead of Maria Carval and Mike Cochran) and that both cases relied upon the same witnesses and the same evidence toward the same purpose. Even though the Respondent thwarted this Court's opportunity to review the City's conduct in the business license case by bulldozing the building in violation of a court order rather than have this Court examine the City's conduct on the facts, the Respondent simplified judicial review by providing the City's business license revocation hearing as a trial exhibit, Exhibit 6, R.O.A. pages 718-884 [table of contents]. This table of contents of Plaintiff's exhibit demonstrates that the City's business license revocation case is materially identical to the landlord's ejectment case. The Landlord's representative, Costa DeLuca, is the only new witness. The fact that the City provided the landlord with prepackaged evidence and witnesses sheds important light on the Respondent's application for fees because the landlord simply presented a pre-packaged, ready-for-trial case. (As discussed more fully below, Respondent's counsel billed 20 times more for a Magistrate non-jury trial than Appellant's counsel.)

The landlord sought to eject the Appellant on three grounds: failure to pay rent timely, failure to maintain adequate insurance, and nuisance. The Respondent prevailed on one, the Magistrate's finding of nuisance. As demonstrated by the record (R.O.A. Vol. 1, pages 232-237 [summary of citations, Exhibit 6]), the undisputed fact is that the neither the Appellant nor an agent were found guilty of any serious criminal violation despite the City's efforts to build multiple criminal cases and thus the record is devoid of any evidence supporting a finding of nuisance.

(Appellant did not set out a separate argument to address the fact that the "evidence" of nuisance consists of nothing other than self-serving, self-generated police calls. Once the Landlord destroyed the building, the appeal of a finding of nuisance became moot because the destruction of the building prevented this Court from being able to render anything more than an advisory opinion on whether ejectment was or was not proper. As a result, Appellant omits a detailed analysis of the insufficiency of evidence to support a finding of nuisance.) See summary of citations in the Record on Appeal at page Vol. 1, page 232. In opening statements to the Magistrate, Appellant's counsel stated:

> I'll stipulate that there's all these incidents; I'll stipulate to that. That's not the issue. The issue is how many of them have resulted in convictions of criminal behavior. The answer is zero. . . . it's unfair to use unproven allegations as a basis to support a breach of a lease. . . . you're going to read evidence and hear testimony specifically, illustrative the town's coordination, the policy agency's coordination with the landlord, with the business license revocation. I feel a little bit like the mouse in the trap; I'm dealing not only with – fending off Mr. Abney on this case, but . . . the Haynsworth firm on the license revocation. (R.O.A. Vol. 1, page 283 [tr. Page 17, line 17—18, line 13])

After the Magistrate entered an Order of ejectment based on nuisance, the Respondent then attacked Appellant's appeal on a series of procedural complaints about the deficiency of the notice of appeal, the failure to post an appeal bond, *etc.* However, the Respondent mooted all these issues by destroying the premises even though the Appellant occupied them under an Order of the Court after posting the required appeal bond to secure the payment of rent during the pendency of the appeal. Also revealing is the fact that the Respondent also refuses to consent to a release of the appeal bond even though it is posted with Court as security for rent payments and the Respondent destroyed the premises! After the Respondent destroyed Appellant's premises, only two legal issues remain alive for the Court's review: whether the award of attorney's fees and costs is supported by the evidence or law, and whether the circuit court erred in dismissing the Appellant's tort claim without prejudice.

STANDARD OF REVIEW

The family court is a court of equity and on appeals therefrom, the appellate court reviews factual and legal issues *de novo*. *Holmes v. Holmes*, 399 S.C. 499, 504, 732 S.E.2d 213, 216 (Ct. App. 2012). However, this broad standard of review does not require the appellate court to disregard the factual findings of the family court, and the appellant is not relieved of the burden of demonstrating error in the family court's findings of fact. *Id.* "Accordingly, we will affirm the decision of the family court in an equity case unless its decision is controlled by some error of law or the appellant satisfies the burden of showing the preponderance of the evidence actually supports contrary factual findings by this court." *Id. Roof v. Steele*, 413 S.C. 543, 776 S.E.2d 392 (S.C. App. 2015)

This is, of course, not a family court case, but it is a case in which the Respondent, Landlord, alleged a nuisance for which the equitable remedy is injunction. Thus, this is an equitable claim like Family Court. The Magistrate denied ejectment based on Respondent's two legal theories (failure to pay rent; failure to maintain adequate insurance), but ordered ejectment based on a finding of nuisance. An allegation of nuisance is an equitable claim since the remedy is abatement or injunction, in this case ejectment. The Appellate Court reviews findings of nuisance under the equitable standard, making its own findings of fact: "The company, however, urges this court to adopt the standard of review applied in equity cases tried without a reference. Under that standard, we would have jurisdiction to find facts in accordance with our view of the preponderance of the evidence. *Townes*. We reject the first basis of the county's argument out of hand and will proceed to the second." *Neal v. Darby*, 282 S.C. 277, 318 S.E.2d 18 (Ct. App. 1984) (Court of Appeals affirmed finding of nuisance in operation of hazardous waste site and ordered injunction.) Since the Respondent destroyed the premises while the case is on appeal, it deprived

the Court of any opportunity to provide any remedy to address the erroneous finding of nuisance, but the award of attorney's fees arising out of an abatement of nuisance is reviewed as any other equitable claim without a reference.

ARGUMENTS

1. The Respondent waived its rights to attorney's fees by destroying the subject matter of the suit during the pendency of this appeal.

While this case was on appeal and while the Appellant occupied the premises under an Appeal Bond Order (R.O.A. pages 63 and 65 [Appeal bond Order], the Respondent bulldozed the premises to the ground some time around March 21, 2019, after Appellant filed a motion to amend her tort case and asked the Court for a temporary restraining Order to prevent Respondent from interfering in the use of her building. (R.O.A. Vol. 1, pages 255 and 260 [Motion to Amend, Motion for Temporary Restraining Order, Affidavit of Benjamin Reyna]) Instead of replying to the Appellant's pleadings, the Respondent simply took matters into its own hands and bulldozed the Appellant's space—and only the Appellant's space—to the ground, destroying her valuable restaurant equipment including walk in freezer, food prep equipment, stoves and refrigerators, audio equipment, *etc.* This shocking display of contempt for court process ended the Appellant's efforts to reverse the finding of nuisance because there was no building to return to if she were successful on appeal. However, the issue of the Magistrate's award of attorney's fees survives, and in light of the Respondent's open contempt for the Court and demonstration of lawlessness, the Court should deny the Respondent an opportunity to collect attorney's fees, or, in the alternative, remand the matter to the Magistrate for redetermination in light of the Respondent's contumacious conduct. (See Appellant's Motion to Remand filed simultaneously.)

Every court that has addressed a party's willful destruction of evidence has dealt with it sternly. The courts taking up such issues consistently impose severe sanctions when the destruction of evidence is intentional. Here, the destruction was far more serious than destroying evidence. Here, the landlord destroyed the subject matter of the action, preventing the Appellant from challenging the finding of nuisance as well as destroying her property. Such intentional destruction of the subject matter not only blocked Appellant's access to the court by depriving her of the opportunity to appeal a finding of nuisance against her, but also gives rise to a tort actions for such willful destruction, including the tort of spoliation. The seminal case on this issue is from the West Virginia Supreme Court, which took pains to explain how such acts strike at heart of our judicial system:

West Virginians have a fundamental constitutional right to use the State's court system to seek justice. *See* W.Va. Const., Art. III, § 17. This Court has recognized that "[b]asic to the administration of justice is the search for the truth." *Page v. Columbia natural Resources, Inc.*, 198 W.Va. 378, 386, 480 S.E.2d 817, 825 (1996). The search for truth breaks down, however, when parties do not have the opportunity to adduce all relevant evidence at trial. "[S]poliation ... undermines the search for truth and fairness by creating a false picture of the evidence before the trier of fact." *Cedars-Sinai Medical Center v. Superior Court*, 18 Cal.4th 1, 9, 74 Cal.Rpt.2d 248, 253, 954 P.2d 511, 516 (Cal.1998). Also, it "may leave the trial record incomplete, may impact the apparent relevancy of other evidence, and may increase litigation costs as litigants scramble to `reconstruct the spoliated evidence or to develop other evidence, which may be less accessible, less persuasive, or both.'" Levine, 104 W.Va. L.Rev. at 420, quoting *Cedars-Sinai Medical Center v. Superior Court*, 18 Cal.4th 1, 9, 74 Cal.Rpt.2d 248, 253, 954 P.2d 511, 515 (Cal.1998) (footnote omitted). Therefore, "[d]estroying evidence can destroy fairness and justice, for it increases the risk of an erroneous decision on the merits of the underlying cause of action." *Cedars-Sinai Medical Center,* 18 Cal.4th at 8, 74 Cal. Rptr.2d at 252, 954 P.2d at 515.

For these reasons, intentional spoliation of evidence has been rightly characterized as highly improper and unjustifiable. *See Coleman,* 120 N.M. at 649, 905 P.2d at 189 ("[T]he intentional destruction of potential evidence in order to disrupt or defeat another person's right of recovery is highly improper and cannot be justified."); *Cedars-Sinai Medical Center,* 18 Cal.4th at 4, 74 Cal.Rptr.2d at 249, 954 P.2d at 512 (Intentional spoliation of evidence "is a grave affront to the cause of justice and deserves our unqualified condemnation."); Wilhoit, 46 UCLA L.Rev. at 663-64 ("[T]here is a need to condemn a party who takes advantage of the adversarial system by destroying evidence that is essential to an adverse party's lawsuit.... Likewise, in order to preserve the integrity of the adversarial system, courts must deter parties from destroying evidence that may

weaken their cases." (Footnote omitted)). Simply put, such highly improper and unjustifiable conduct ought to be actionable.

In defining the parameters of the tort of intentional spoliation of evidence we look to the several states that currently recognize this tort. Intentional spoliation of evidence is defined as "the intentional destruction, mutilation, or significant alteration of potential evidence for the purpose of defeating another person's recovery in a civil action." *Coleman,* 120 N.M. at 649, 905 P.2d at 189.

Most states that have adopted the tort have agreed that intentional spoliation of evidence consists of the following elements: (1) pending or probable civil litigation, (2) knowledge of the spoliator that the litigation is pending or probable, (3) willful destruction of evidence, (4) intent of the spoliator to interfere with the victim's prospective civil suit, (5) a causal relationship between the evidence and the inability to prove the lawsuit, and (6) damages.

Levine, 104 W.Va.L.Rev. at 422 (footnotes omitted). See, *e.g.*, *Coleman,* 120 N.M. at 649, 905 P.2d at 189 ("In order to prevail on an intentional spoliation of evidence theory, a plaintiff must allege and prove the following: (1) the existence of a potential lawsuit; (2) the defendant's knowledge of the potential lawsuit; (3) the destruction, mutilation, or significant alteration of potential evidence; (4) intent on part of the defendant to disrupt or defeat the lawsuit; (5) a causal relationship [584 S.E.2d 573] between the act of spoliation and the inability to prove the lawsuit; and (6) damages."(Citations omitted)); *Oliver v. Stimson Lumber Company,* 297 Mont. at 352, 993 P.2d at 22 ("[I]ntentional spoliation of evidence consists of the following elements: (1) the existence of a potential lawsuit; (2) the defendant's knowledge of the potential lawsuit; (3) the intentional destruction of evidence designed to disrupt or defeat the potential lawsuit; (4) disruption of the potential lawsuit; (5) a causal relationship between the act of spoliation and the inability to prove the lawsuit; and (6) damages."(Citation omitted)); *Smith v. Howard Johnson Company, Inc.*, 67 Ohio St.3d at 29, 615 N.E.2d at 1038 ("[T]he elements of a claim for interference with or destruction of evidence are (1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts[.]").

Therefore, we hold that the tort of intentional spoliation of evidence consists of the following 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. Once the first six elements are established, there arises a rebuttable presumption that but for the fact of the spoliation of evidence, the party injured by the spoliation would have prevailed in the pending or potential litigation. The spoliator must overcome the rebuttable presumption or else be liable for damages.

Hannah v. Heeter, 213 W.Va. 704, 584 S.E.2d 560 (2003)

Here, the willful destruction is more evil than destroying evidence; here it is the intentional destruction of the entire subject matter of litigation, to destroy both Appellant's right to judicial review and her valuable property. Such willfulness is unknown in the case law of South Carolina and should be dealt with harshly by this Court.

2. The Circuit Court failed to explain its reasons for affirming the award as required by Rule 52 and 58 of the *South Carolina Rules of Civil Procedure* and/or *South Carolina Appellate Court Rules*, Rule 220.

Unfortunately, when the circuit court reviewed the Magistrate's award, it did not share its reasoning with the parties, filing a one sentence affirmance with no explanation as to how it arrived at its conclusion. (R.O.A. Vol. 1, page 78 [order]) Appellant pointed out to the circuit court that the Appellant was entitled to some explanation so she could make an informed decision about whether to accept her loss or seek further judicial review, but the circuit court overruled this request also without explanation. R.O.A. Vol. 1, pages 262 and 80 and Vol. 3, page 1075 [Motion for Reconsideration, Order denying Reconsideration] See *South Carolina Rules of Civil Procedure* Rule 52. As explained by §2571 in Wright & Miller, *Federal Practice and Procedure* 3d: "One purpose of requiring findings of fact by the trial court, as has been recognized in a significant number of cases, is to aid the appellate court by affording it a clear understanding of the ground or basis of the decision of the trial court. Another purpose is to make definite precisely what is being decided by the case in order to apply the doctrines of esptoppel and *res judicata* in future and promote confidence."

Even though the circuit court was sitting in an appellate function, its power of review is *de novo* as Magistrate's Court is a summary court of limited jurisdiction that does not provide for discovery. Comparing the circuit court's detailed lack of explanation on affirming the award of attorney's fees with the circuit court's treatment of the appeal bond highlights the deficiency. Such

comparison illustrates the purpose of Rule 52. When the initial question of the appeal bond came before the circuit court—whether the appeal bond set by the Magistrate could include any portion of the attorney's fee award—the circuit court **explained** why it could not and remanded the case back to the Magistrate with instructions to reset the appeal bond without any consideration of the attorney's fees:

> Thereafter, the landlord moved for an entry of attorney's fees and costs in the amount of $54,340.58. After a hearing on the matter, the trial court awarded $35,887.23 in attorney's fees and costs. The defendant timely appealed this Order on March 6, 2018. On February 26, 2018, the Magistrate set an appeal bond pursuant to § 27-37-130, S. c. Code, which required the appellant to do two things as a condition of appeal: (1) pay rent on time, and (2) post a bond in the amount of $59,295.23. The defendant asked the Magistrate to reconsider this amount, which the trial court denied by Order filed March 7, 2018, and on March 12, 2018, the appellant filed a second amend notice of appeal and a motion for stay, seeking to modify or vacate so much of the bond requirement as requirement payment of $59,295.23 as a condition of appeal.
>
> The record is not clear how the trial court arrived at the figure of $59,295.23 as a condition of seeking judicial review. The appellant/tenant asserts that the entire award represents a "bond" to secure payment of attorney's fees to the landlord's lawyer. The respondent/landlord concedes that at least a part of the bond is intended to secure his attorney's fees. One thing that is clear is that the Order under review is not clear as to how the trial judge arrived at the figure of $59,295.23 as condition of appellant seeking judicial review. **The award of attorney's fees is—unless overturned by a reviewing court later—an unsatisfied money judgement**.
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> R.O.A. Vol. 1, page 61 [March 4, 2018, Order] (emphasis added)

Thus, both the Court of Appeals and the parties are left to grope in the dark as to why the circuit court affirmed the Magistrate's award of attorney's fees. The circuit court provided detailed reasons why the appeal bond was improper, but when it came to evaluating the award of an extraordinary large attorney's fee award, the circuit court simply affirmed the award with no explanation. As a result, the matter must be remanded for the Court to make specific findings of fact and conclusions of law in order for the appellate court to have something to review.

3. The Magistrate Court is a Court of limited jurisdiction and cannot enter a money judgment in excess of $7,500.00

Magistrate Courts are part of the South Carolina Unified Judicial System, and the General Assembly limited their jurisdiction in civil matters to controversies not exceeding $7,500.00. See *South Carolina Constitution* Article V, § 26, § 22-3-10, S. C. Code, ann. The Magistrate erroneously concluded that the Respondent's claim for attorney's fees involved the "possession of land" and therefore escapes this limitation. This is an error of law.

In *Mosseri, Mosseri, Castro v. Austin's at the Beach*, 372 S.C. 593, 642 S.E.2d 760 (Ct. App. 2007), the parties asked this Court to take up the same jurisdictional issue arising out of counterclaims filed by a tenant in an ejectment action. This Court determined that the Magistrate erred in retaining jurisdiction over the counterclaims because the counterclaims were not related to the "possession of land":

> While it is true this dispute is between a landlord and a tenant, Section 22-3-10(10) specifically lists an additional requirement for the magistrate's court to retain jurisdiction: the dispute must involve a "landlord and tenant *and* the possession of land." (emphasis added). Because the statute's language is clear and unambiguous and conveys a clear and definite meaning, there is no need for statutory interpretation on by this Court. See *Grant v. City of Folly Beach*, 346 S.C. 74, 79, 551 S.E.2d 229, 231 (2001)
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> . . .
>
> Because possession of property was never an issue in the underlying case, nor in the counterclaims, and Austin's counterclaimed for amounts in excess of the magistrate's court's jurisdiction limit as provided in Section 22-3-10 of the South Carolina Code (Supp. 2005), this case should have been transferred to the court of common pleas pursuant to Section 22-3-30 of the South Carolina Code (Supp. 2005)

In applying the *Mosseri* holding to this case, the Magistrate read the case expansively, reaching the erroneous conclusion that because the Magistrate's Court jurisdictional statute is "silent" on attorney's fees, Magistrate Court jurisdiction is unlimited. "However, the plain meaning of the statute indicates that this Court has jurisdiction over 'all matters' between landlord and tenant and the possession of land. The Court finds that 'all matters' includes a request for attorney's fees pursuant to a valid lease." (R.O.A. Vol. 1, page 40 [February 9, 2018, Order at page 4]) This is both an erroneous reading of *Mosseri* as well as a conflict with the circuit court's

un-appealed determination that an award of attorney's fees is a money judgment. Here, it is indisputable that the landlord's application for attorney's fees does not involve the "possession of land" because it is a claim for a money award. Moreover, when the Appellant attempted to remove the case to circuit court, the Respondent resisted and cannot now complain because it limited itself to the jurisdiction of the Magistrate's Court.

When the circuit court took up the question of whether the Magistrate erred by setting an appeal bond of $59,295.23, the circuit court remanded the case to the Magistrate to reset the bond because the Court concluded that the appeal bond cannot be established for the purpose of paying attorney's fees. The Respondent took no exception to the Court's finding that attorney's fees are a money judgment or to the Magistrate's recalculation of bond excluding any attorney's fees, and this fact serves two purposes in the present appeal. First, it emphasizes the importance of an explanation from the Court so that parties can understand the reasoning process and decide whether to acquiesce or challenge the judgment. Second, this decision that attorney's fees is a "money judgment" is now the law of the case," and therefore not involving "possession of land." As a money judgment, it is unrelated to the "possession" of land, and therefore the law of this case establishes that the Magistrate lacked jurisdiction to award a money judgment in excess of $7,500.00.

Even though the circuit court did not give the parties the benefit of its reasoning in a written order; however, at the August 6, 2018, hearing on the appeal, the circuit court expressed doubt that a Magistrate could enter a money judgment for $7,500.00:

THE COURT: Because initially my question was whether they have—whether the Magistrate has jurisdiction to award attorney's fees in excess of 7,500 dollars. I understand that the Court has jurisdiction to grant an eviction in cases where the rent exceeds 7,500 dollars.

But my interpretation of that, and I'm glad to hear what your position is on this, is that the Magistrate Court has jurisdiction pertaining to back rent [when] there is no jurisdictional limit so whether it's back rent of 7,5000 dollars or 25,000 dollars that you've got jurisdiction over that.

But this is the additional step of awarding, making an award of attorney's fees which is well over the 7,500 jurisdictional limit. So, I guess let me hear from Mr. [Abney].

Transcript of hearing page 10, line 17—page 11, line 6, R.O.A. Vol. 2, pages 696-697

What evolved from this correct oral statement of law on the record to the one sentence Order affirming the award is anyone's guess, but this procedural gap leaves this Court with only two possible alternatives for resolving this legal issue. Either the case must be remanded back for the circuit court to explain its reasoning so that the Court and the parties do not have to grope in the dark to discern the basis for the decision, or this Court must decide that it can review the record *de novo* and can decide the case based on its own view of the preponderance of the evidence without an explanation from the circuit court. However the Court of Appeals chooses to resolve this legal issue, the fact remains that Judge Young already decided the award of attorney's fees is a money judgment, and that decision is the law of this case. There is no dispute that under South Carolina's unified judicial system, a Magistrate lacks jurisdiction to award anything more than $7,500.00 money judgment.

4. The award of $34,608.00 in attorney's fees in a non-jury Magistrate Court trial is unconscionable and not supported by the evidence.

A. The award is unreasonable.

Lack of access to the Court is the paramount threat to our 240-year experiment in a constitutional republican system. Even before we were a state, or a country, the residents of South Carolina resisted the threat to them resulting from their lack of access to the courts caused by the obstacle of high attorney's fees. In asking for the necessary legal protections to allow them to survive, in 1767, the "backcountry" settlers sent a petition to the Commons House of Assembly, which Professor Edgar quotes in his book on the Revolution:

. . . Among the Regulators' requests was a law to set the fees of attorneys because those charged by Charleston lawyers were outrageous. According to Item 16, South Carolina was

"harder rode at present by Lawyers, than Spain and Italy by priests." The eighteenth request was to limit the number of lawyers in the assembly.

Walter Edgar, *Partisans and Redcoats*, (William Morrow, 2001), page 16

Almost a century later, the prayer for relief from excessive attorney's fees in 1767 came before a wider audience in Congressional debate. In 1853, the United States Congress debated the enactment of an act to regulate litigation costs, including attorney's fees:

> The abuses that have grown up in the taxation of attorneys' fees which the losing party has been compelled to pay in civil suits, have been a matter of serious complaint. The papers before the committee show that in some cases those costs have been swelled to an amount exceedingly oppressive to suitors, and altogether disproportionate to the magnitude and importance of the causes in which they are taxed, or the labor bestowed. . . .
>
> It is to correct the evils and remedy the defects of the present system that the bill has been prepared and passed by the House of Representatives. It attempts to simplify the taxation of fees, by prescribing a limited number of definite items to be allowed. . ."
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> *Alyeska Pipeline Service Company v. The Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975) (reversed award of attorney's fees to Wilderness Society)

Here, a request for $54,340.58 in a Magistrate Court action is "disproportionate to the magnitude and importance of the causes" raised in this case. This fact, never addressed by the Magistrate, or the circuit court, is the central proposition of this appeal. However, before we turn to the minimum statutory factors necessary to support an award of attorneys' fees and the lack of evidence supporting them, it is important to remember the historical/philosophical/legislative-judicial background that underpins the requisite factors and framework necessary to support such awards. This discussion is vitally important today because we live a time in which fundamental principles of American government are under threat. The fraying at the edges of the American society includes a marginalization of the judicial branch, which history teaches is a dangerous sign. Never in the history of our constitutional republic has access to the courts been as important as it is today as recent events prove *passim*. As discussed more fully below with specific citation to the record, the witnesses' testimony against Appellant demonstrated a thinly concealed racial

animosity—or in one witness' case, openly racial animosity—and it is against this background of bad faith and racial oppression that this Court must evaluate an application of attorney's fees twenty times greater than Appellant's counsel fees, a sum "swelled to an amount exceedingly oppressive to suitors, and altogether disproportionate to the magnitude and importance of the causes in which they are taxed, or the labor bestowed." *Alyeska Pipeline*, 95 S.Ct. 1612, 1619 (1975)

The purpose of the Magistrate's Court is to provide access to the judicial system for citizens who cannot afford attorneys' fees, and such a court should not be co-opted to allow a financially superior adversary to deploy disproportionate resources to bludgeon a disadvantaged party with its superior strength. Any idea that a lawyer can justify $54,380.58 worth of time in a non-jury Magistrate Court case is *per se* unconscionable. As discussed in more detail below, the Rules governing the conduct of lawyers prohibit charging an "unreasonable" fee. Rule 407, *Rules of Professional Conduct*, Rule 1.5 Fees. The purpose of Magistrate's Court is "to secure the just, speedy, and inexpensive determination of every civil case **within the jurisdiction of the magistrate's court**." *South Carolina Rules of Magistrate's Court*, "Scope and Purpose." (emphasis added) An unsatisfied attorney's fee award is a money judgment, and the Magistrate Court lacks jurisdiction to impose a money judgment in excess of its jurisdictional limit.

B. The evidence does not support the factors supporting an award.

South Carolina law requires a court to consider at **least** six factors prior to awarding attorney's fees. Here, the sole evidence presented supporting the trial court's findings was the self-serving affidavit provided by Respondent's counsel. There must be sufficient evidence in the record to support each of the six factors analyzed for an award of attorney's fees. See Rule 407, *South Carolina Appellate Court Rules,* Rule 1.5 "Fees," and *Taylor v. Medenica*, 331 S.C. 575,

580, 503 S.E.2d 458, 461 (1998). "On appeal, absent sufficient evidentiary support on the record for each factor, the award should be reversed, and the issue remanded for the trial court to make specific findings of fact." *Blumberg v. Nealco*, 310 S.C. 492, 494, 427 S.E.2d 659, 661 (1993).

Williamson v. Middleton, 374 S.C.419, 649 S.E.2d 57 (Ct. App. 2007)

This quotation is from the 4-judge dissent in the *Williamson* case. The *Williamson* case resulted in a 5-4 *en banc* decision affirming the award of attorney's fees. However, the Supreme Court reversed at 383 S.C. 490, 681 S.E.2d 867 (2009) because it found no evidence supporting an award of fees. In reversing the Court of Appeals, the Supreme Court did not articulate a standard of review, but in the light of the ultimate decision, the 4-judge dissent in the Court of Appeals became the correct formulation.

We will now turn to an application of the law controlling the award of attorney's fees.

(1) Both Parties Were Prevailing

The Respondent/Landlord brought an ejectment action premised on three grounds: 1, the failure to pay rent on time, 2, the failure to maintain adequate insurance, and 3, the creation of a nuisance. The Magistrate's December 7, 2017 ejectment Order found for the Appellant on the first two grounds and for the Landlord on ground number three and ordered ejectment. Thus, the Respondent obtained the relief it sought; however, it failed on two of its three claims, and yet the Magistrate judge rewarded the Respondent for bringing cases that lacked evidentiary support. As noted at the outset, Respondent lacked confidence in its legal position because while the appeal of the ejectment Order was pending and while Appellant held her space under an Appeal Bond Order, the Respondent took matters into its own hands and bulldozed the building to the ground before the case had run its full appellate course. By doing this, it pre-empted the appellate process and destroyed any opportunity for Appellant to obtain a final ruling on whether her ejectment was or

was not proper. It did this in spite of the fact that the Appellant **was paying rent every month** on time, which is a pretty clear manifestation of its racial prejudice because it bulldozed only the Appellant's space and left the rest of the shopping center intact. Thus, it is unconscionable that the Respondent seeks to claim an award of attorneys' fees on a case it prevented from being reviewed.

The Magistrate noted in his February 9, 2018, Order (R.O.A. Vol. 1, page 38) that Respondent was not the prevailing party throughout the case but jettisoned any analysis of determining who was the prevailing party by sidestepping the issue concluding: "This is also not a case where the unsuccessful theory so drove the evidentiary hearing and as such must in fairness be apportioned." (R.O.A. Vol.1, page 43 [Order at page 7]) This startling conclusion is not supported by the record where the timesheets demonstrate the Respondent incurred the bulk of its fees in huddling up with the City of Hanahan and creating procedural roadblocks that were resolved against it. When the Magistrate determined "it is impossible to accurately separate counsel for the Plaintiff's work on each different issue," (R.O.A. Vol. 1, page 43 [order page 7]), this is only because he declined to analyze the time sheets, which are the sole evidence of the fees before the Court. All that is required is to examine them. These time records detail how little work was spent on the ejectment action and how much work was spent on coordination with the City of Hanahan and erecting procedural barriers for Appellant, all of which failed. 7.5 hours to file a one-page form in Magistrate's Court should shock the conscience of the Court. Thus when the Magistrate concluded that $54,000.00 in fees charged in a Magistrate Court non-jury trial were not "of [the] magnitude [to] shock the conscience of the Court," this is only because the Magistrate declined to look at the evidence and failed to examine or account for the disparity between Respondent's fees 22 times higher than the fees incurred by Appellant.

2. The time records demonstrate that most of Respondent's charges resulted from unlawful coordination with the City or in pursuing unproductive procedural complications.

A single brief cannot economically analyze each entry in the Respondent's 39-page invoice. However, by analyzing representative samples, an examination of a part shines a powerful light on the whole. There is no better illustration of the unconscionable claim for attorney's fees than the very first entry of 7.5 hours for preparation of a one-page writ of ejectment. (R.O.A. Vol. 1, page 167 [invoice]) (This amount is broken down in detail above on page 15.) As the Court can see, the writ of ejectment (R.O.A. Vol. 1, page 106) is a single page form that requires nothing more than filling in basic identifying information and checking a box. The time needed to complete this task is measured in seconds. And yet, the Respondent received a 7.5. hour bill for this process because, as pointed out above, the invoices detail that Respondent's efforts were not to fill out the form, but rather to coordinate with the City of Hanahan's lawyer who was handling the business license revocation.

Another revealing example is the Respondent's 5.6 hours billed in resisting the Appellant's decision to take a nonsuit on her tort counterclaims. The Appellant had every right to take a voluntary nonsuit, a principle of law so basic that Respondent's efforts to prevent it were a demonstrably frivolous legal position. See Record on Appeal at Vol, 1, page 188 [Nelson Mullens Invoice June 7, 2017—June 13, 2017]. See *Nelson v. QHG of South Carolina, Inc.*:

> Rule 41(a)(1), SCRCP.
>
> Under Rule 41(a)(1)(A), SCRCP, a plaintiff may dismiss an action without leave of court before the defendant files an answer or motion for summary judgment. *Burry & Son Homebuilders, Inc. v. Ford*, 310 S.C. 529, 426 S.E.2d 313 (1992); *In re Morrison*, 321 S.C. 370, 373, 468 S.E.2d 651, 652-53 (1996) ("[U]nder the plain language of paragraph (a)(1), a plaintiff has an unconditional right to voluntarily dismiss an action any time before an answer or motion for summary judgment has been served."). Unless otherwise stated in the notice of dismissal or stipulation, the voluntary dismissal of an action by a plaintiff with the consent of the opposing party is without prejudice. *Gamble v. State*, 298 S.C. 176, 379 S.E.2d 118 (1989). Generally, a plaintiff is entitled to a voluntary non-suit without prejudice as a matter of right unless the defendant shows legal

prejudice or important issues of public policy are present. *Burry & Son Homebuilders*, 310 S.C. at 531, 426 S.E.2d at 314; *Bowen & Smoot v. Plumlee*, 301 S.C. 262, 391 S.E.2d 558 (1990); *Prime Med. Corp. v. First Med. Corp.*, 291 S.C. 296, 353 S.E.2d 294 (Ct. App. 1987).

Nelson v. QHG of South Carolina, Inc., 354 S.C. 290, 580 S.E.2d 171 (Ct. App. 2003), affirmed in part and reversed in part at 362 S.C. 421, 608 S.E.2d 855 (2005)

The fact that the Respondent was willing to spend over $2,000.00 to advance a patently frivolous legal position to resist a non-controversial, common procedure demonstrates two important points permeating this case: (1) that no expense is going to pause the Respondent's racial animus (it would rather bulldoze a building than collect rent), and (2) its core belief that it can overpower the Appellant and damage her through deployment of its superior financial strength to punish Appellant through dilatory and unproductive work. A perfect example of this is the Respondent's refusal to allow the Magistrate to release the Appellant's Appeal Bond of $5,500.00, which Appellant paid into the Magistrate Court to secure the payment of rent. Even though the Respondent destroyed Appellant's business and ground her restaurant equipment to dust, it will not consent to releasing the bond or allowing the Magistrate to decide on it without a personal appearance. The only possible explanation for withholding consent to release payments made as security for rent in this circumstance is racial animus.

3. The Record does not support the Magistrate's findings on the factors to be applied to the determination of reasonableness of the fee.

As stated above, the Rule governing the conduct of lawyers, Rule 407 Professional Conduct, 1.5 Fees, requires that the Court examine at least six statutory factors to determine is a fee is "reasonable" or not:

a. The fee as it relates to the time and labor required as to the novelty or difficulty of the questions presented, and the level of skill requisite to perform the legal service properly.

As the record demonstrates, this was an application for ejectment in Magistrate's Court. The procedure does not allow discovery, and the trial was a bench trial that took less than a day.

In fact, as further evidence of the lack of effort applied to trial preparation, Respondent refused to identify its witnesses until after the trial started, which it did by writing them down on a piece of paper and handing it to counsel—that is how informal was the process. This fact demonstrates not only how informal the process was, but also sheds additional light on Respondent's motivations since the witnesses were nothing more than a repeat of the City Council business license revocation. As the billing records and the trial evidence (Respondent's Exhibit 6—business license revocation hearing) demonstrate, the witnesses and evidence were handed off by the City of Hanahan to the Landlord pre-packaged and ready to go. There was no discovery. The pre-trial skirmishing resulted in decisions favorable for the Appellant. There is no evidence in the record to support the Magistrate's finding that such a large award is justified by a half-day, non-jury trial in a summary court.

b. The likelihood that the acceptance of the particular employment will preclude other employment.

This is a non-factor, and there is no evidence that Respondent's application for ejectment precluded its counsel from accepting any other work.

c. The fee customarily charged.

This factor also makes Respondent's application unconscionable. The Supreme Court licensed Appellant's counsel in 1982, Respondent's counsel in 2003. Respondent's counsel charged $380.00 per hour (discounted down from his ordinary rate of $450.00), Appellant's $250.00 per hour. In evaluating the Respondent's legal fees, the Magistrate concluded without citing authority or evidence that Counsel's normally hourly rate of $450.00 an hour is reasonable and that the reduced rate charged of $380.00 is reasonable. However, because the matter was before the Magistrate Court, the Magistrate reduced the hourly rate to $280.00 per hour, which is still above the hourly rate charged by Appellant's counsel, who has been licensed 21 years longer

than Respondent's lawyer. Respondent's total charges were in excess of $54,000.00; Appellant's $2,500.00, or 5% of Respondent's charges. The ratio of 95% to 5% is compelling evidence that the fee charged by Respondent's counsel is not "customary." There is certainly no evidence in this record to support a finding that $54,380.58 in fees for a Magistrate Court appearance is customary, and, of course, the Magistrate did not award the entire claim, but interestingly he awarded the complete hours charged, but at the "reduced" rate of $280.00 per hour. Nonetheless, the evidence does not support an award of $35,887.23. The ratio of $35,887.23 to $2,500.00 equals a charge 14 times higher rate than Appellant's fees, which is an unconscionable differential.

d. The amount involved, and the results obtained

As set forth above, both the amount of the fee claimed as well as the amount awarded are demonstrably unconscionable. Magistrate Courts are informal and do not allow discovery: "All proceedings before magistrates shall be summary or with only such delay as a fair and just examination of the case requires." § 22-3-730, S. C. Code, ann. The record demonstrates that the non-jury trial was less than a day and comprised of nothing more than a reprise of the same case presented by the City's firm, Haynsworth, in the business license revocation case. Thus, it required little preparation, involved no novel questions of law, and did not justify $54,380.58 in time devoted to a routine Magistrate Court case especially where the record demonstrates the Appellant prevailed on more issues than the Respondent.

e. The time limitations imposed on the client or by the circumstances.

This factor weakens the Respondent's claim for attorney's fees because it was the landlord who controlled the litigation and rejected numerous opportunities to streamline or resolve issues in the case, burning up unproductive hours in resisting Appellant's desire to take a non-suit, playing cagey about its witnesses, *etc.* Until the parties came to court for trial, Appellant had no

idea she was facing the same witnesses and the same evidence presented at her business license revocation. Not only did Appellant waste the Court's time by presenting the same evidence with the same witnesses, but also Respondent compounded this wastefulness by entering up the entire transcript of the City revocation hearing in the record. One or the other was sufficient. The Respondent also swelled the record with inadmissible incident reports to which Appellant objected. The Magistrate admitted them over Appellant's objection but only for the limited purpose of documenting the number of alleged police calls to the property, evidence that could have been handled by a summary or stipulation. (One salutary effect of the Respondent destroying the building is that this illegal act relieves the Court of having to decide whether there was or was not sufficient evidence to support a finding of nuisance.) Since the Respondent was relying on the same presentation of evidence, the parties could have handed up the transcript and eliminated 90% of the time spent on the case. After all, the landlord asked the Magistrate to evict a tenant who was paying rent! It was the landlord's unremitting, racially charged animus for the Appellant that kept the case going, ultimately resulting in the Respondent's ultimate act of contempt for the legal process when it chose to bulldoze Appellant's space—and all her contents—while this case was pending and while the Appellant was, as a condition of judicial review, paying rent in full and on time. Rather than collect rent and allow the judicial process to play out, the landlord destroyed the Appellant's location—and only the Appellant's location—while leaving the rest of the center untouched. This bold act demonstrates not only Respondent's arrogance and contempt for the process of the Court, but also demonstrates a racial animosity sufficient to meet the elements of the tort of outrage. When the Respondent bulldozed the Appellant's space, it had been served with a motion for contempt and an application for Temporary Restraining Order for interfering with the Appellant's use of the building, which was pending in the Berkeley County Court of Common

Pleas. (R.O.A. Vol. 1, page 255 & 260) Any yet, without notice to the Appellant and with a motion for contempt pending, it drove the building to the ground.

f. The nature and length of the professional relationship with the client.

The record is silent on whether the Respondent has a long relationship with Nelson Mullens, but in this case, that turns out to be a positive factor for the law firm because no lawyer would counsel a client to destroy the subject matter of the lawsuit. In the run-up to the destruction of Appellant's space, the Respondent asserted that the building was rife with asbestos. See Record on Appeal at Vol. 2, pages 692-693 [June 3, 2019 transcript, page 6, line 19-page 7, line 16]:

> The case went along and it rocked along and we had some, we had a considerable difficulty in preparing the transcript but ultimately the transcript got prepared and got filed. At that point, I draw the Court's attention to the two photographs that I have marked as exhibits one and two. If you look at the photograph on plaintiff's exhibit one, on or about March 18th of this year that photograph depicts what the landlord did to the building. The landlord knocked down the door, claimed that the tenant could not enter. And you can see the photograph speaks for itself.
>
> I jumped in my car and ran over there. I was met by armed police officers from the City of Hanahan who informed me that the City of Hanahan had dispatched them to stand guard over the building to make sure that neither my client nor I entered the building.
>
> At that point I filed a Motion for Temporary Restraining Order the day after this photograph was taken. While that motion was pending, and this is astonishing, the landlord demolished the building. There is no more building. The landlord demolished the building and all of my client's refrigeration equipment, bar, mirrors, food service prep equipment and all that.

In the run-up to the destruction of Appellant's space, the Landlord floated a pretext explanation that the building was a threat to the Appellant because of the presence of asbestos; however, the Court can take judicial knowledge of the fact that the remedy for asbestos mitigation is not to knock the building to the ground and release asbestos to the air. The Court can also take judicial knowledge of the fact that the Landlord bulldozed **only** Appellant's space and not the rest of the shopping center, which, presumably would be beset by the same asbestos problem. See 40 CFR § 61.145(a) *et. seq.* "Standard for demolition and renovation." The obvious point is that the Landlord demonstrated obvious contempt for the orderly procedure of court process, and thus,

under these highly unusual facts, no lawyer or law firm would rely on "nature and length of professional relationship with the client" as a basis to support an extraordinary application for fees as requested in this case.

g. The experience, reputation, and ability of the lawyer providing services.

This factor does not support the extraordinary fee awarded in this case. The coordination between the landlord and the City as documented by the time records in order to drive the Appellant out of the City raises troublesome questions, especially given Hanahan's at-large government structure excludes minority representation in City government. And, as demonstrated by the record, the Magistrate awarded the Respondent all its hours, including demonstrably irrelevant and unsuccessful work, but at a reduced hourly rate. The excessiveness of unproductive procedural fencing demonstrated in this case is not the type of "reputation and ability" that supports a large award, especially in Magistrate's Court. Moreover, there is case law documenting Respondent's counsel, the largest law firm in the State, employing strategies that resulted in published judicial criticism. Appellant identified this evidence in her January 17, 2018, written objections to the attorney's fee request. (R.O.A. Vol. 1, page 206) This written objection cited such cases as *Bates v. Michelin North America*, 1:09-cv-03280-AT, where the district court judge detailed the misconduct of Nelson Mullens:

> On September 19, 2011, the Court conducted a full day evidentiary hearing on Plaintiff's second request for sanctions. Extensive argument was heard, and the parties submitted additional exhibits including hundreds of pages of documents produced by Michelin after Plaintiffs filed their second sanctions request. Michelin's national discovery counsel Ms. Helm took the stand as the sole witness at the hearing to testify in Michelin's defense and to accept personal responsibility for all the alleged discovery "errors."

The Court imposed sanctions and costs, and the parties settled the case prior to trial. In South Carolina federal court, the district court judge imposed sanctions against the firm in *Sanders v. Cim Industrial Machines*, 64 F.3d 659 (4th Cir. 1995). The Fourth Circuit reversed but noted:

> Although the manner in which the defendants and their attorneys conducted discovery is not commendable, there is insufficient evidence of intentional misconduct to warrant the district courts rather severe remarks.

Aside from some history of questionable practices, this case raises troubling ethical concerns arising out of: (1) the Landlord's coordination with the City, (2) the Landlord's decision to take matters into its own hands and destroy the building and Appellant's property, (3) dilatory procedural tactics, (4) and the refusal to allow the release of Appellant's bond to secure rent payments despite destroying Appellant's property. In all these questionable decisions, none is more troubling than counsel's decision to call Ron Newman to the stand for his openly racist testimony. Fortunately for Respondent, Mr. Newman's testimony is not as offensive on the printed page as it was being delivered in open court, but even on the printed page, the testimony of Mr. Newman, whose only connection with the case is that he owns and operates a mobile home park near Appellant's business, voiced strenuous objections to Appellant's business that are shocking for their racial animus. Also troubling is the fact that the City called Mr. Newman as a witness in its business license revocation hearing, and Respondent's counsel interviewed him on June 8, 2017, before he put him on the stand in October. (R.O.A. Vol. 1, page 188 [timesheet June 8, 2017]) And yet, Counsel still called him to the stand where he delivered testimony such as:

Q. Where do you reside?

A. Where do I reside? Currently?

Q. Well, for the last three years, say.

A. My—in North Charleston.

Q. In North Charleston.

A. Yes, sir.

Q. So, these complaints that you're telling us about today, these are complaints that have come to you from other people; nothing you've witnessed yourself?

A. Well, I've watched the—I've seen the poop that they put in the yard. How about that? Is that called seeing it? And the tenant explained it to me, but I witnessed the poop. Is that enough?

Q. Did you do a DNA analysis to determine the species?

A. I'm not a DNA guy. I can take my client's word because they have nothing to lose or gain.

Q. Okay. So what you're telling the Court under your sworn testimony is that based on a pile of excrement that your tenant pointed out to you, your testimony here today is that originated with some client or customer of El Alamo?

A. Not every one. One of them was—I witnessed him urinating in the yard, yes.

Q. Okay.

A. But most of them were by somebody else. But I did see one.

R.O.A. page 455-456 [transcript page 189, line 7 - page 190, line 11]

In light of the fact that Mr. Newman testified in the business license revocation case and in light of the fact that counsel interviewed him before trial, counsel was aware that: (1) Mr. Newman had no first-hand information about anything, and (2) he is a bigot, and yet still called him as a witness. The days of lawyers vouching for their witnesses ended with the adoption of the *Rules of Evidence* (Rule 607), but the fact that counsel called this superfluous witness to elicit his opinion testimony about examining excrement does not support the Magistrate awarding a gigantic attorney's fee award five times above the jurisdictional limit based on counsel's "experience, reputation, and ability."

h. Whether the fee was fixed or contingent

There is nothing in the record to support a finding either way, but the time sheets establish that the fee was hourly at an hourly rate far in excess of prevailing or customary rates, especially since Appellant's counsel has 21 years more experience than Respondent's lawyer and bills at a lower hourly rate than even the "discounted" rate the Magistrate applied. In light of the factors discussed above, the application of this factor to the case does not support the generous award.

C. The circuit court's lack of review

When presented with all of these factors, the circuit court simply ignored them, affirming the Magistrate's award by a form Order with no explanation. (R.O.A. Vol. 1, page 78 [June 6, 2019 Order]. The Appellant timely pointed out to the Circuit Court that Rules 52 and 59 to provide some explanation for its decision (and likewise Appellate Rule 220 requires the same). R.O.A. page [June 14, 2019 Motion for Reconsideration] Four days later, the Court denied this motion by Form 4 Order. As a result, as discussed above, the Court and the parties are left to grope in the dark as to what factors the circuit court gave what weight in arriving at her decision to affirm the Magistrate's award. There is no explanation of how the circuit court found the Magistrate had jurisdiction to issue a money judgment in excess of $35,000.00 or how she determined the award to be appropriate under the necessary factors. As the Appellant said in her Motion for Reconsideration: "Without a statement from the Court as to how it arrived at its decision, a party is precluded from seeking further judicial review." (R.O.A. Vol. 3, page 1075)

Because the State Rule 52 is identical to the federal Rule 52, analysis of the federal rule is helpful. In § 2571, the Wright & Miller *Federal Practice & Procedure 3d* treatise explains the purpose of Rule 52:

One purpose of requiring findings of fact by the trial court, as has been recognized in a significant number of cases, is to aid the appellate court by affording it a clear understanding of the ground or basis of the decision of the trial court. Another purpose is to make definite precisely what is being decided by the case in order to apply the doctrines of estoppel and res judicata in future cases and promote confidence in the trial judge's decision making. The final, and possibly, most important, function of the requirement that findings of fact be made is to evoke care on the part of the trial judge in ascertaining and applying the facts. All three of these important purposes are served by Rule 52.

The rule is the same for appellate courts. See Rule 220, *South Carolina Appellate Court Rules:* "In every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and must, with the reason for the court's decision, be preserved in the record of the case." What is so frustrating here is that in colloquy with the lawyers, the Court seemed skeptical of the Magistrate's ability to enter up such a large money judgment as well as her skepticism that a party could run up such a large bill in Magistrate's Court. Yet, her written Order gives no indication of the basis for her ruling, despite the Appellant pointing out this deficiency and requesting that the Court state its reasons. This is a critical deficiency and it leads to an inefficient use of limited judicious resources because it leaves the Appellant groping in the dark as to why she lost and it leaves this Court unable to review the decision below to determine if it is correct or not. This deficiency in and of itself is sufficient to require a remand to the circuit court with instructions to explain the basis for the decision.

In summary, the statutory factors, which the circuit court ignored, are designed to ensure that a fee charged, especially when being assessed against an opposing party, are "reasonable."

For a lawyer to run up a bill of $54,340.58 in a Magistrate's Court case is unconscionable, especially since it was more than 20 times than the opposing party incurred. Likewise, there is no evidence in the record to support a conclusion that $380.00, or even $280.00, an hour is a reasonable hourly rate to charge in a summary court proceeding. The trial court's award of $35,887.23 is not supported by the evidence and has the additional unintended consequence of rewarding sharp practice and should be reversed.

5. The Court erred in dismissing the Appellant's tort claims (1008 case) because if they were improperly joined to the appeal from Magistrate's Court, Appellant cured that alleged improper joinder by volunteering to dismiss her appeal in the 1008 case and re-file it in the 266 case as required by the parties consent Order signed by Judge Buckner.

After the Magistrate set the Appeal Bond on May 17, 2018, on June 1, 2018, the Appellant filed an amended Notice of Appeal and combined it with three tort claims of conspiracy, violation of civil rights under the South Carolina Constitution, and tortious interference with business relations. This new case, 2018-CP-08-01008, combined the Amended Notice of Appeal with new tort claims against the Landlord. The Respondent objected to the consolidation of new tort claims with the appeal, and the Appellant acquiesced and voluntarily refiled her Third Amended Notice of Appeal under the 266 case number. (See transcript of hearing August 6, 2018, R.O.A. Vol. 2, page 682 [transcript page 18, lines 14-21]:

> I have discussed his matter with the parties in chambers. Mr. Goldstein now has agreed to mark 2018-CP-08-1008, which is his second notice of appeal, for which you have a motion to dismiss.
>
> He now agrees to withdraw his second notice of appeal. You will also, accordingly withdraw your motion to dismiss, makes the second notice of appeal moot. And your motion to dismiss is moot.

Appellant complied with their agreement as stated by Judge Buckner in his oral Order on August 13, 2018. Two months later, after Appellant had already complied, on October 2, 2108, Judge Buckner filed his Order memorializing the above quoted oral order. (R.O.A. Vol. 1 pages

216 and 263 [Third Amended Notice of Appeal, cover letter, and Order] However, the Respondent pressed the same issue with Judge Curtis on June 3, 2019, which resulted in the Court's Order for non-suit without prejudice filed June 6, 2019. (R.O.A. Vol. 1, page 72) Because Respondent hopes to obtain a procedural advantage and get a second bite at the apple at removing Appellant to federal court, Respondent ties up the court with a meaningless objection to an improper joinder cured by the Appellant's voluntarily severing her Appeal. This is the same kind of procedural fencing that drove up the fees in the Magistrate Court case. Judge Curtis erred by rewriting Judge Buckner's Order, which required that Appellant dismiss **the appeal**, not the tort case, and re-file it under the old case number, which she did before he entered a written Order. Judge Curtis rewrote Judge Buckner's Order to require Appellant to dismiss her tort case, relying on the following language from Judge Buckner's October 2, 2018, Order:

> Santos will dismiss the Second Appeal without prejudice, and HIH will withdraw its Motion to Dismiss the Second Appeal without prejudice.
> (R.O.A. Vol. 1, page 69 [Order of Judge Buckner October 2, 2018])

As stated above, if the circuit court found Judge Buckner's Order ambiguous, the proper procedure is to ask the issuing judge for clarification, not re-write the Order to accord with a second judge's interpretation. Before the matter ever came before the circuit court the second time, Appellant previously complied with the parties' agreement precisely by refiling even prior to Judge Buckner filing the Court's written Order on October 2, 2018. Appellant refiled her appeal, entitled "Third Amended Notice of Appeal" on August 13, 2018. The cover letter to the Clerk of Court explained: "Pursuant to Judge Buckner's Order, I enclose the original and an extra copy of the appellant's third amended complaint and proof of service." (R.O.A. Vol. 1, page 263, Vol 3, page 1074)

Notwithstanding the fact that the Appellant previously complied, the Respondent still insisted that Judge Curtis rehear the same motion and, essentially overruling Judge Buckner and dismiss the case. On June 6, 2019, the Court, rewrote Judge Buckner's Order, deciding that the Appellant had to dismiss her tort action, and refile it under a new case number. Had the Order said only this, Appellant was prepared to accept this loss and refile—the effect of the Order being nothing more than requiring Appellant to pay an additional $150.00 filing fee to the Clerk of Court. However, as pointed out in Appellant's June 14, 2019, Motion for Reconsideration (R.O.A. Vol. 1, page262), the filed Order goes far beyond the narrow, single issue of an alleged improper joinder before the Court and contains provisions unrelated to the issue before the Court but calculated to cause the Appellant trouble on a separate track. The most egregious example is the gratuitous, unsupported, and harmful statement in the footnote 2: "Moreover, the Court notes that, contrary to her counsel's statements at the hearing, Santos did not seek to amend her complaint in this action until March 19, 2019, and she **did so then for the purpose of attempting to add additional parties to this action.**" (emphasis added) The entire colloquy is in the Record on Appeal at pages 687-715, and so is the Appellant's Motion to Amend and Motion for Temporary Restraining Order (R.O.A. Vol. 1, pages 260-261). Not only does the transcript contain no misstatements to the Court, but also, the record shows how hard the Appellant was working **to prevent the destruction of her building** as the Respondent was becoming more aggressive it its interference. See affidavit of Benjamin Reyna, March 19, 2018 in the Record on Appeal at Vol 1, page 258. Respondent cannot identify any putative misstatements to the Court and simply tried to paper over his client's contumacious conduct by inserting a gratuitous slap at Appellant's counsel, which is both unsupported by the record and erroneous. As set forth in Appellant's June 14, 2019, Motion for Reconsideration (R.O.A. Vol. 1, page 262): "The plaintiff is prepared to accept this decision and

refile under a new case number provided the Order entered June 6, 2019, is corrected to set forth the correct procedural history of the case," especially concerning the Court's gratuitous statement that the appeal remained pending in the circuit court after Judge Young remanded the case to Magistrate Court to redetermine the appeal bond. The case cannot be pending simultaneously in two courts. As for the alleged misstatement to the Court, neither the Court nor opposing counsel made a referral to Disciplinary Counsel for alleged misstatements to the Court, and thus there is little doubt that both the *dicta* and the footnote in the Court's Order should be vacated. In short, the court erred by dismissing the plaintiff's case.

In short, the trial court erred by rewriting Judge Buckner's Order, essentially overruling his Order, to add in a condition that is not found in it. Even if it were proper to require the Appellant to refile her tort case, it was improper and unsupported by anything in the record to make findings that Appellant's counsel made misrepresentations to the Court or that the appeal remained pending in circuit court after Judge Young remanded it to the Magistrate to re-determine the appeal bond. Unless corrected, we can count on Respondent attempting to create more procedural complications arising out of this language. For either or all of these reasons, the Order should be reversed. As stated above, the entire colloquy with the Court is contained in the Record on Appeal at pages 687-715, and the Court can see it contains no evidence of allegedly misleading statements. The transcript makes clear that the purpose for the Appellant's filing tort claims against her landlord was an effort to prevent the Respondent from doing what it did—taking matters into its own hands and thumbing its corporate nose at the Court:

> . . . I draw the Court's attention to the two photographs that I have marked as exhibits ne and two. If you look at the photograph on plaintiff's exhibit one or appellant's exhibit one on or about March 18th of this year that photograph depicts what the landlord did to the building. The landlord knocked down the door, claimed that the tenant could not enter. And you can see the photograph speaks for itself.

I jumped in my car and ran over there. I was met by armed police officers form the City of Hanahan who informed me that the City of Hanahan had dispatched them to stand guard over the building to make sure that neither my client nor I entered the building.

At that point I filed a Motion for a temporary restraining Order the day after this photograph was taken. While that motion was pending, and this is astonishing, the landlord demolished the building. There is no more building. The landlord demolished the building and all of my client's refrigeration equipment, bar, mirrors, food service prep equipment and all that.

I thought that was a rather unique resolution to a landlord tenant dispute, and as a result I filed a new lawsuit at 2018-CP-10-1008.

R.O.A. Vol. 2, page 692 [transcript page 6, line 22-page 7, line 19]; R.O.A. Vol. 1, page 260 for March 19, 2018 Motion for Temporary Restraining Order.

Of course, any discussion of whether the Appellant is entitled to stay in her space is now moot by the landlord's destruction of the building, which obliterated any chance of judicial review of the Magistrate's ejectment. The only issue left from the ejectment action is whether the circuit court erred in affirming the Magistrate's award of attorney's fees. However, the Court never identified why the Appellants tort case must be dismissed and refiled other than rewriting Judge Buckner's Order, which required nothing more than the appeal of the ejectment action be separated from the Appellant's tort claims.

CONCLUSION

This record depicts a shocking state of affairs. However, two things are clear, the award of attorney's fees cannot stand, and the circuit court erred in dismissing the Appellant's tort case without prejudice because it is based on nothing more than one circuit court judge rewriting another circuit court judge's Order. Based on the foregoing, the Appellant respectfully submits that the award of attorney's fees should be vacated, and the Order dismissing Appellant's tort claim should be vacated and remanded for disposition in the normal course.

Respectfully submitted,

February 16, 2021

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CERTIFICATE OF COUNSEL

I certify that this Final Brief and Final Reply Brief each complies with Rule 211(b), *South Carolina Appellate Court Rules.*

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