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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen Mullen, Circuit Court Judge

Appellate Case No. 2021-000862

Zachary Z. Zoul and Zoul Hospitality, LLC d/b/a Hospitality Advisors Group, Respondents,

V.

Lawrence Leary and Old Town Bluffton Inn, LLC, Appellants

Corrected
Appellant's Initial Brief

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STATEMENT OF THE CASE

The Defendant, Lawrence Leary, built a luxury hotel, the Old Town Bluffton Inn, LLC ("OTBI") in Olde Towne Bluffton (which is actually a newly built area in Bluffton). Lawrence Leary spent his life as a contractor and has overcome much of his life with two main issues. Mr. Leary is a Seventy-Six (76) year old man who has a severe case of dyslexia (Leary Transcript, Page 9) and he only reads at a Third Grade (3rd) level (Leary Transcript, Page 10). Over Seventy years ago (70) the education system did not know how to teach people with dyslexia and therefore, he struggled so badly that he did not even graduate from grade school. As a result, just general business transactions are at best, extremely difficult for Mr. Leary.

Mr. Leary has been able to make a living performing various construction projects. His plan for the construction of the OTBI was to construct and run the hotel with his daughter, Dannielle Harrison (the 49% co-owner of OTBI, Mr. Leary owned 1% individually and 50% through his trust). Before the hotel opened, Mr. Leary's daughter and her husband contacted Zachary Zoul, the Plaintiff, for help in obtaining a loading zone from the Town of Bluffton. Mr. Zoul sent an invoice dated June 27, 2018 and charged the Old Town Bluffton Inn, LLC, One Thousand Three Hundred Fifty Dollars ($1,350.00) for his work on the loading zone. Zoul and Hotel Associates Group (collectively "HAG") was paid for his work under this contract. (Trial Transcript Page 85) This contract for the loading zone was successful and is not the subject of this litigation.

Next, on September 17, 2018, OTBI through Lawrence Leary, its manager, hired HAG under a Consulting Services Agreement to sell the OTBI. Under this agreement HAG would charge Six Percent (6%) of the sale of the hotel, but HAG would only receive compensation if they found a buyer for the hotel. (Trial Transcript, Page 87) Under the Consulting Services Agreement,

HAG "will be responsible for all professional services and expenses which it incurs." (Trial Transcript, Page 163) Further, HAG agreed to "visit the property with a representative of a qualified investor group to the property as early as September 2018 or in the near term thereafter." (Trial Transcript, Page 163)

At trial, Mr. Brooks, an employee of HAG testified that

> ".. once we were engaged in September [under the Consulting Service Agreement], my first step was to understand the market, understand the amenities that surrounded the Inn, what would be attractive to potential guests, and, you know, I saw that the Inn itself was -- had been done in a very high quality -- as a very high quality product. So, using those factors as a basis, I created a, a, a conservative, since it was a just opening property, a conservative proforma, three year proforma, for the operation of, of the Inn. And that, that becomes the touchstone going forward because, in order to do the, the proforma, and I used the uniform system of accounts for the lodging industry, which is a universe -- a, a standard system, you know, you have to think through what the staffing will be. You have to have a very good understanding of the market so that you can estimate what your occupant -- annual occupancy and your average rate is going to be. And since this was an opening property, it would step up over three years. And so that was my, that was my first step." (Testimony of Eric Brooks, Page 22)

HAG was unable to sell the inn and the agreement expired on December 31, 2018[1] (Trial Transcript, Page 103). Mr. Zoul testified that HAG is not seeking, or entitled to any damages under the Consulting Services Agreement (Trial Transcript, Page 103). The first proforma was dated September 28, 2018 and the later proforma was dated October 2, 2018. As you can see from the chart below, the proformas were drafted before HAG offered its management services to OTBI.

Date	**Event**
September 17, 2018	Consulting Services Agreement is Signed

[1] It is noted that without any legal basis Mr. Zoul believed that the Consulting Services Agreement expired on September 20, 2018. (Trial Transcript, Page 103).

September 28, 2018	Pro-forma is prepared by HAG
October 2, 2018	Second Proforma is issued by HAG
October 8, 2018	HAG sends email stating they would be proud to manage the property and makes a written offer requiring written acceptance to manage the property
October 26, 2018	OTBI informs HAG that they do not want to engage HAG to manage the OTBI

The most interesting finding in the entire case, is that the trial court awarded damages for the preparation of the proforma under the contract and learning the details of the local real estate market which HAG was not entitled to any monies and which occurred before HAG even made the offer to manage the inn.

Shortly after entering into the Consulting Services Agreement, HAG informed Mr. Leary that it could manage the hotel. HAG informed Leary that if HAG got the hotel running it would sell to a higher price to a new purchaser.

HAG claims that they discussed all of the terms of the proposed agreement and Leary agreed orally to the terms of the agreement, but Mr. Leary adamantly disputes any allegation that he orally accepted the contract, but he does note that there were discussions about the potential of having HAG run the inn. On October 8, 2018, HAG met with Mr. Leary at the hotel. During this meeting HAG continued to attempt to sell Mr. Leary on allowing them to run the hotel. After meeting Mr. Leary on October 8, 2018, Mr. Zoul, on behalf of HAG sent Mr. Leary a draft of the proposed contract and stated that "Attached, please find a Draft Agreement for your review. Please let me know if you have any questions or comments." Further, the email finished stating that "We [HAG] would be proud to manage your property and meet and exceed your standards and expectations." (Trial Transcript, Page 110). When the offer was sent, it was sent as a "draft agreement". (Trial Transcript, Page 111).

The draft agreement which was sent was not signed by HAG and sought the signature of Mr. Leary on behalf of the Old Town Bluffton Inn, LLC. There is no allegation that Mr. Leary, or anyone on behalf of Old Town Bluffton Inn, LLC signed the management agreement.

At the meeting and thereafter, Mr. Leary became suspicious of HAG because initially they indicated that they would have their staff on site to manage the hotel. However, at the meeting on October 8, 2018, HAG informed Mr. Leary that they would hire an innkeeper, at OTBI's expense. At this point the offer did not make sense to the inn because they would incur a significant amount of management fees and then be required to hire the staff to run the inn. As a result, Mr. Leary began to question if he accepting HAG's offer made sense. (Leary Transcript 16) As a result, he asked his advisors to investigate HAG and determine if the offer made business sense. One of the advisors, Mr. Richard Ulbrich, attempted to research HAG and advised Mr. Leary to decline their offer to manage the property.

The Plaintiffs allege that they attempted to pick up a copy of the signed agreement from Mr. Leary, but he was not available.

On October 24, 2018, Mr. Leary informed HAG that he was not going to hire HAG to manage the hotel and he would manage the hotel himself. HAG claims that Mr. Leary agreed to pay HAG's invoice, but Leary adamantly disputes that he ever agreed to pay any invoice.

On October 29, 2018, HAG issues a bill to Mr. Leary for all of their services under the contract claiming that they are owed Eleven Thousand Seven Hundred Fifty-Three and 15/100ths Dollars ($11,753.15) for their costs and services. (See Plaintiff's Trial Exhibit "13")

Before the trial, the Defendants learned that the Plaintiffs intended to introduce an expert witness, five days before trial. As a result, the Defendants filed a Motion in Limine (See Motion in Limine). This motion was denied and the Court did not perform any analysis into the prejudice

suffered by the Defendants, or even hold a hearing. Later, in the Court's ruling it exclusively relied on the expert to find a damage amount far in excess from the amount sought by the Plaintiffs.

After the trial, the Defendants filed a Motion for a new trial and later due to a scrivener's error, they amended the motion. The Court denied the Motion for Reconsideration/Motion for a New Trial without any analysis.

STANDARD OF REVIEW

Quantum meruit is an equitable doctrine to allow recovery for unjust enrichment. Columbia Wholesale Co., Inc. v. Scudder May N.V., 312 S.C. 259, 261, 440 S.E.2d 129, 130 (1994). "When reviewing an action in equity, an appellate court reviews the evidence to determine facts in accordance with its own view of the preponderance of the evidence." Boykin Contracting, Inc. v. Kirby, 405 S.C. 631, 637, 748 S.E.2d 795, 798 (Ct. App. 2013). Rose Elec., Inc. v. Cooler Erectors of Atlanta, Inc., 418 S.C. 424, 429, 794 S.E.2d 382, 384 (Ct. App. 2016)

ARGUMENT

This case is elementary. The plaintiff provided two written contracts, one for the sale of the property, the Consulting Services Agreement and a proposed contract (which was never signed) for the proposed management of the inn, the Proposed Management Agreement.

Under the Consulting Services Agreement and pursuant to this agreement, the Plaintiff, HAG, performed a pro forma analysis in order to sell the OTBI at its highest market value. Under the Consulting Services Agreement, HAG never sold the OTBI, therefore he testified that he was not entitled to any monies. The majority of HAG's work was performed pursuant to the Consulting Services Agreement, which he was not owed any monies because HAG was unable to sell the inn.

About a month after entering into the Consulting Services Agreement, OTBI, provided the Defendant OTBI with a written offer to manage the inn. This written contract required a written

acceptance of the contract due to the signature lines for both HAG and OTBI and thus the offer required written acceptance.

There is no dispute that the Appellants never provided a written acceptance of the offer and the work which the trial court awarded the plaintiff their damages arose from the Consulting Services Agreement, a written contract which the plaintiff had contractually agreed that no monies would be owed, or were owed. Instead, the Court awarded HAG monies for work which they agreed they would not receive compensation.

At trial, the plaintiff disclosed his expert five days before the trial of the matter. The judge allowed the expert witness to not only testify, but based all of her damages on his testimony alone. Further, the Court did not consider that the pro-forma work which was performed was done at no cost under the real estate commission contract. In addition, the judge awarded damages under a theory of quantum merit and her award amount exceeded the monetary amount of damages the plaintiff sought in damages.

Allowing this ruling to stand will allow parties to strategically disclose experts on the eve of trial in an effort to leave the other party without the ability to refute the expert's findings. In addition, since South Carolina does not require experts to provide reports of their testimony, unlike the federal court, the defending party is left defenseless to dispute the expert testimony, further, before the expert testifies, the defending party does not even have an idea on the expert findings because they are entirely unknown until the expert testifies. Further, OTBI could not even send a subpoena to discover the background of the expert, his work history, his discipline history, his financial status, or find an expert to dispute the findings of this newly discovered expert.

If this tactic is allowed to become precedent, this ruling will promote gamesmanship that will ultimately disintegrate the aims to provide the parties with the ability to properly defend

themselves in any civil litigation running from circuit court to family court litigation. In addition, if parties are able to obtain higher amounts under the theory of quantum merit than they contracted for under a written agreement, this will cause significant disruption to South Carolina commerce. If these tactics become law, Plaintiffs will be able to seek a jackpot lottery amount of damages which are higher than the amount they agreed to perform the services when negotiating any contract. If this is allowed to stand, especially in a hyper-inflationary time, parties will be smart to seek damages under quantum merit and forego any claim for breach of contract because they can seek significantly higher damage awards, under a theory of quantum merit and Plaintiffs can get the benefits of these increased prices.

I. THE COURT ERRED IN NOT EXCLUDING THE PLAINTIFF'S EXPERT WITNESS FROM TESTIFYING WHEN THE EXPERT WAS DISCLOSED ONLY FIVE DAYS BEFORE TRIAL

The circuit court's order is riddled with problems, primarily stemming from the court's misguided finding that an expert witness can be disclosed five days before trial. This expert testimony was the sole basis for the award of damages and even conflicted with the Plaintiff's own calculation of their damages. In the Order of Judgment, the Court found "The value conferred by the Plaintiffs and retained by the Defendants was established by expert testimony and is considerable." (Order of Judgment, June 10, 2021, Page 6).

When allowing the expert to testify, the Court did not provide reasoning for allowing the expert except that the Defendants could have deposed the expert even though in discovery the Defendant sent a discovery almost Two (2) years before the trial. The Defendant sent interrogatories requesting that the Plaintiff identify all witnesses (Defendant's Motion in Limine, Interrogatory Number 7 and all expert witnesses (Defendant's Motion in Limine, Interrogatory

Number 6). These requests were answered on November 15, 2019 and in the almost two (2) years before the trial and were never updated. (Defendant's Motion in Limine).

When dealing with a similar issue of failure to appear for a deposition, the Court reversed a trial court who allowed the witness to testify. The Court of Appeals explained:

> However, there is no indication she knew what he was going to say when he testified. An abiding maxim of the successful trial lawyer, like the motto of the Boy Scouts, is "Be Prepared." See I. Younger, The Art of Cross-Examination 23 (A.B.A. Section of Litigation Monograph Series No. 1, 1976) ("The fourth commandment is that you must be prepared. On cross-examination, you should never ask a question to which you do not already know the answer."). The rights of discovery provided by the Rules give the trial lawyer the means to be prepared for trial. Where these rights are not accorded, prejudice must be presumed and, unless the party who has failed to submit to discovery can show a lack of prejudice, reversal is required.
>
> Downey v. Dixon, 294 S.C. 42, 45-46, 362 S.E.2d 317, 318 (Ct. App. 1987)

The significance of the prejudice in the case at bar is even more daunting. In Downey, the attorney was dealing with facts surrounding a car wreck which he would have at least some knowledge as a layman and had a pretty good idea of the witness testimony. In this matter, the Defendant's counsel was dealing with the analysis of difficult financial statements, underlying bias of the expert, prior opinions of the expert which were unavailable and the need to try to chip away at expert testimony without his own expert, or even anyone to consult. Even with plenty of time, the examination of experts is a difficult task, but to nakedly examine an expert is an impossible task. Additionally, even if a deposition was taken of the expert, five days does not allow the defendants' attorney adequate time to digest the upcoming potential testimony and find a competing expert to help chip away at the testimony itself. The prejudice in this case was not a small ding in the boat, but was the gaping hole which caused the ship to sink.

"[T]he entire thrust of the discovery rules involves full and fair disclosure, "to prevent a trial from becoming a guessing game or one of surprise for either party.'" Samples v. Mitchell, 329 S.C. 105, 110, 495 S.E.2d 213, 215 (Ct. App. 1997) (citing Flanagan, supra note 50, at 216).

Because discovery provides the means for an attorney to prepare for trial, any denial of discovery rights results in a presumption of prejudice. Id. at 113-14, 495 S.E.2d at 217 (citing Downey v. Dixon, 294 S.C. 42, 46, 362 S.E.2d 317, 319 (Ct. App. 1987). It is the burden of a party who failed to comply with a discovery request to show a lack of prejudice to overcome this presumption. Id. at 114, 495 S.E.2d at 217 (citing Downey, 294 S.C. at 46, 362 S.E.2d at 319).

The Trial Court did not apply the proper standards when determining whether to allow the expert to testify. The Trial Court did not perform any analysis on the prejudice to the parties and instead only focused on the illusory contention that the Plaintiff could depose the expert immediately before trial. This allegation that the Defendant could depose the expert before trial was illusory, as explained below, because there was not even proper time to send a subpoena with a request for all documents necessary to examine the witness.

In general, the rules of discovery in South Carolina mandate disclosure of the identity of persons who may have knowledge about the facts of the case and whom a party will call as a witness. SCRCP Rule 33(b), SCRCP; Rule 26(f). The trial court is under a duty, when the late disclosure arises, to delay the trial for the purpose of ascertaining the type of witness involved and the content of his evidence, the nature of the failure or neglect or refusal to furnish the witness's name, and the degree of surprise to the other party, including prior knowledge of the name by that party. Callen v. Callen, 365 S.C. 618, 620 S.E.2d 59 (2005)

The trial court is under this duty regardless of whether the proponent of the testimony is allegedly in violation of a pretrial order or a court rule. Callen v. Callen, 365 S.C. 618, 620 S.E.2d 59 (2005).

"Disclosure of information between the parties before trial is designed to avoid surprise and to promote decisions on the merits after a full and fair hearing." Reed v. Clark, 277 S.C., 310, 316, 286 S.E.2d 384, 388 (1982).

Respondent's failure to ascertain and inform appellant of his damage claims prior to trial clearly undermines the policy that every party should have the opportunity to fully prepare and develop their case for trial.

Even if the Respondent were unable to adequately calculate his damages when interrogatories were served, he was still obliged to inform the Defendant of these figures when they became finalized, as "[t]he duty to provide the requested information continues from the initial request until the time of the trial of the case." Reed, 277 S.C. at 316. The Plaintiff never supplemented their interrogatories.

This reasoning ignores the clear direction of SCRCP, Rule 30(b)(1) which states that "A party desiring to take the deposition of any person upon oral examination shall give ten (10) days' notice in writing to every other party to the action… [and if]… a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice. SCRCP, Rule 30(b)(1). Under the rules, the Defendant did not have ten days' notice to issue a subpoena, nor require the production of any records under oath. Even if this time period was waived, the Defendant cannot hire an expert in to refute any testimony he learns just hours before trial. There is prejudicially reversible error when "the objecting party might well have taken some action to protect himself had he had

timely notice of the witness [of documents required to be disclosed] and that there exist no other alternatives to alleviate the prejudice." King Pest Control v. Binger, 379 So. 2d 660 at 663 (Fla. Dist. Ct. App. 1980), affd, 401 So. 2d 1310 (Fla. 1981).

This tactic is in clear violation of the rules themselves. Further, the Court applied the wrong standard when they did not presume prejudice of the late introduction of an expert and when the Court did not require the showing that OTBI was prejudiced. Instead, the Court simply allowed the expert to testify and relied on the report as its sole pillar as its reasoning to award Thirty Thousand Dollars ($30,000.00) for work which the Plaintiff believed he was only entitled to Twenty Thousand Dollars ($20,000.00).

The Court's decision violates, "the entire thrust of the discovery rules involves full and fair disclosure, "to prevent a trial from becoming a guessing game or one of surprise for either party.'" Samples v. Mitchell, 329 S.C. 105, 110, 495 S.E.2d 213, 215 (Ct. App. 1997) (citing Flanagan, supra note 50, at 216).

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At the trial court, the trial judge failed to apply the presumption of prejudice. Further, the clear prejudice standard was not applied at the trial court and the justification that a defendant can take the deposition of an expert witness five days before trial, prepare for the deposition by researching the expert's underlying reasoning and then find an expert to refute these newly discovered facts is pure fantasy and establishes a very dangerous precedent which erodes the

underlying pillars of justice. This tactic erodes at the heart of the discovery rules. "The entire thrust of the discovery rules involves full and fair disclosure, "to prevent a trial from becoming a guessing game or one of surprise for either party.'" (quoting S.C. State Highway Dep't v. Booker, 260 S.C. 245,. In this case, not only was the trial a guessing game, but the ability to even hazard a guess at what the expert would say left the defendant's counsel in a position where he was forced to play a shell game at trial and could not even present expert testimony to refute what he uncovered during the trial itself.

If the Trial Court's reasoning is allowed to stand, this decision encourages the late introduction of an expert witness because even if a deposition can be taken, the opposing party cannot research the background of the expert, find other opinions of the expert, send discovery to find out what the expert relied upon, or even send a subpoena to the expert to review all relevant information. Instead, the opposing party cannot even issue a subpoena for the expert's deposition.

II. THE COURT ERRORED WHEN IT AWARDED DAMAGES FOR WORK WHICH WAS DONE PURSUANT TO A CONTRACT WHICH ONLY REQUIRED PAYMENT ON THE CONDITION THAT THE PROPERTY WAS SOLD

The order of judgment's sole reasoning for the award of $30,000.00 is detailed when the Court found that "[t]he value conferred by the Plaintiffs and retained by the Defendants was established by expert testimony and is considerable" (Order of Judgment, Page 6).

Assuming that allowing the introduction of the expert's testimony was proper, the basis of the expert witnesses' opinion was clearly flawed. First, the Plaintiff testified that he was only entitled to approximately $20,000.00 (Trial Transcript, Page 98), a figure which mirrored his interrogatory response. The Plaintiff, Zachary Zoul, explained his calculation of damages as follows:

> Furthermore, after our services were terminated, Mr. Brooks had to transition with the staff that Mr. Leary had hired all of the documents and all of the relationships and all of the communications, including reservations that he had taken, because he had negotiated a -- two group bookings for April of 2019. And, and, in that capacity, he was functioning really in a fiduciary role. But he had to turn over all that data to the, to the, the new team, and, and I put that value at $2,000. So, we are roughly, at, at that time, seeking $20,000.
>
> (Trial Transcript Page 98)

The Plaintiff's expert next testified about how he determined the value of the Plaintiff's services.

> **Q**: It's, it's -- it's your opinion that the – you you testified that you thought that the value of the services that they provided you think they're in (indiscernible)[2]. Is that right?
>
> **A**: Yes.
> (Trial Transcript Page 143)

The Court clearly errored because the Consulting Services Agreement clearly stated that unless a commission was owed, no monies were owed unless the property was sold. If the property was sold, a six (6) percent commission would be paid. The property was never sold. "Generally, where an agreement is clear and capable of legal interpretation, the court's only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it.") Heins v. Heins, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App. 2001))

At trial and during the testimony of the plaintiff's employee and witness, Erik Brooks agreed that the proforma was performed in an attempt to sell the property. The work was performed in order to sell the property at no charge, pursuant to the plain terms of the Consulting Services Agreement. When Mr. Brooks was questioned at trial, the exchange was as follows:

[2] [Note: The indiscernible should say proforma]

Q. How about if you were just to sell the property, that was the only thing you were hired to do, you would have to prepare a proforma, correct?

A. That would be part of the process, yes.

(Trial Transcript, Page 44).

The Court relied on the testimony of an expert, who attributed the bulk of the value of the plaintiff's services, even though these services were the part of a contract which no money was owed unless the property was sold. The precedent in this case could be earthshattering to typical homeowners who are looking to sell their house. They engage a real estate agent to attempt to sell their home at a sic (6) percent commission. When the home does not sell, the realtor then claims that they are entitled to a quantum merit level of damages for their expertise in market conditions which they claim were part of an oral agreement. At trial, the plaintiff can introduce an expert five days before trial and claim huge sums of damages for monies which benefited the customer and the consumer will have no ability to protect himself/herself.

III. THE COURT ERRORED WHEN IT AWARDED DAMAGES IN EXCESS OF THE PROPOSED CONTRACTED AMOUNT AND THE COURT'S DECISION WAS INEQUITABLE

The Plaintiff's only successful cause of action was on the cause of action for Quantum Merit. The Plaintiffs testified that their damages were approximately Twenty Thousand Dollars ($20,000.00) and they had issued a statement for their work claiming that they were owed Eleven Thousand Seven Hundred Fifty-Three and 15/100ths Dollars ($11,753.15). Pursuant to Johnston v. Brown, 290 S.C. 141, 148-49, 348 S.E.2d 391, 395 (Ct. App. 1986) the South Carolina Court of Appeals explained:

> Even if we assume, as Johnston argues, that Brown breached an agreement to make him a partner, the result is the same. Although Johnston alleges a contract

> in his pleadings, he elected to sue, not on the contract for his expectancy damages, but in quantum meruit for the fair value of the services already rendered. Cf., Riddle v. George, 181 S.C. 360, 187 S.E. 524 (1936) (complaint alleged matters as to a contract between parties, but cause of action was in quantum meruit, not on contract); Coens v. Marousis, supra. **While a recovery may be had in quantum meruit for services fully performed under an express contract, the plaintiff's recovery is limited to the amount the parties agreed should be paid for the services**. United States Potash Co. v. McNutt, 70 F. (2d) 126 (10th Cir. 1984); Atkins v. County of Barnstable, 97 Mass. 428 (1867); Higgins v. Desert Braemer, Inc., 219 Cal. App. (2d) 744, 33 Cal. Rptr. 527 (1963) **(plaintiff who has rendered services agreed to may recover such sum as the services were worth, not exceeding the contract price**) [Emphasis Added]
>
> Johnston v. Brown, 290 S.C. 141, 148-49, 348 S.E.2d 391, 395 (Ct. App. 1986)

Under the Johnson v. Brown analysis, the judgment amount is limited to the Eleven Thousand Seven Hundred Fifty-Three and 15/100ths ($11,753.15), or the amount charged in the statement issued on October 29, 2021. Quantum Merit does not allow a recovery is limited to the amount the parties agreed should be paid for the services.

Quantum Merit only allows the recovery of services expended which inequitably benefited the Defendant. However, the case reveals that the Plaintiffs knew that they did not have a signed contract, demanded a signed contract and decided to perform work even without a signed contract. The Plaintiffs took the risk that the Defendant would not enter into a contract when they chose to begin work. The evidence presented at trial revealed that the Defendants were reviewing the contract and had not chosen to hire the Plaintiffs.

Further, the Court recognized that there was not a meeting of the minds when the Defendants realized that the Plaintiff was going to charge for both its services, plus the cost of the innkeeper. With this misunderstanding and until the in-person meeting, it is unjust to punish the Defendants for reviewing the contract and determining whether the Defendants wanted to hire the Plaintiffs.

The Court also failed to analyze which work was performed under the contract for the sale of the business. This work was done with the hope of a large commission payment and pursuant to

the sales contract, the Plaintiffs were not entitled to recover any monies for the work which was performed pursuant to the sales contract.

IV. THE COURT ERRORED WHEN IT FAILED TO APPORTION THE DAMAGES

If the Court at trial had proved that Mr. Leary owned the inn One Percent (1%) personally and Fifty Percent (50%) through his trust. The other owner of the inn is Mr. Leary's daughter, Dannille Harrison. Ms. Harrison as a 49% owner of the inn would have received Forty Nine Percent (49%) of any benefits like Mr. Leary. However, Ms. Harrison was not named as a party and as a result, the Court errored in apportioning the damages One Hundred Percent (100%) to Mr. Leary, individually. Instead, at best, Mr. Leary should have received One Percent (1%) of the judgment to him personally. Mr. Leary's trust was not a named party and he was only named individually. As a result, if any of the damages are apportioned against Mr. Leary personally, they should only amount to One Percent (1%) of the award since Mr. Leary only owned One Percent (1%) of the inn.

To establish a claim for Quantum Merit the Plaintiff must prove the following: "(l) benefit conferred by plaintiff upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value." Myrtle Beach Hosp. v. City of Myrtle Beach,341 S.C. l, 8-9, 532 S.E .2d 868,872 (2000)

This cause of action fails as well because the Plaintiff cannot show that the Defendant's received valuable services. First, the services provided were to benefit the sale of the property under the sales contract. Additionally, the only services that the HAG provided were in an attempt to provide the OTBI with enough proposed value to convince them to hire HAG. Further, it is not

unjust for a party to decline an offer of services. Even if HAG can show that they provided some value, which the Defendants do not believe is possible, it would be unjust to allow HAG to collect on a contract which they knew had not been accepted.

In addition, as noted in the trial transcript, Lawrence Leary did not even own the inn. His trust was the owner of 50% of the inn. Therefore, if he received any benefits, he only received 50% of the benefits which were provided. However, as noted previously and as explained at trial, Mr. Zoul agreed that his services did not benefit Mr. Leary individually in anyway whatsoever. At trial, Mr. Zoul testified that the services he provided were for the benefit of OTBI and not Mr. Leary. (Trial Transcript, Page 123).

V. THE COURT ERRORED WHEN IT AWARDED DAMAGES IN EXCESSIVE OF THE CONTRACT AMOUNT

At trial, the Plaintiff agreed that the Plaintiff only sought Eleven Thousand Seven Hundred Fifty-Three and 15/100ths Dollars ($11,753.15) in the statement sent to the inn. Further, at trial the Plaintiffs testified that they only sought approximately Twenty Thousand ($20,000.00) in damages. However, the Court found that the Plaintiffs were entitled to Thirty Thousand Dollars ($30,000.00). At trial the expert, which was named Five (5) days before trial, testified that the majority of the benefit conferred upon the Defendants was the pro forma which was prepared. However, the verdict failed to recognize that the Plaintiffs testified that the pro forma was performed pursuant to the signed contract for the sale of the business. It was not disputed by the Plaintiffs that the Plaintiffs would only recover on the signed contract if they procured a buyer. The Plaintiffs never procured a buyer and as a result were not owed any monies for preparing the pro forma.

The Court sat in the position as the jury and as a result would be subject to the same review as a jury sitting trial. Under this analysis, the Plaintiffs testified that their damages were

approximately Twenty Thousand Dollars ($20,000.00) and they only sought approximately Twenty Thousand Dollars ($20,000.00) in damages. However, the Court provided the Plaintiffs with an additional Ten Thousand Dollars ($10,000.00) in damages, which were not even sought, or believed to be owed to the Plaintiffs.

When a verdict is so grossly excessive and the amount awarded so shockingly disproportionate to the injuries as to indicate that the jury was moved or actuated by passion, caprice, prejudice, or other consideration not found on the evidence that it becomes the duty of this court, as well as of the trial court, to set aside the **verdict** absolutely. Ray v. Simon, 245 S.C. 346, 140 S.E. (2d) 575. Young v. Warr, 252 S.C. 179, 187, 165 S.E.2d 797, 800-01 (1969)

The verdict in this matter does not bear any rational view of the evidence since Quantum Merit only allows recovery in the contract amount. The Plaintiffs testified that they only sought Twenty Thousand ($20,000.00) in damages, but the Court awarded Thirty Thousand Dollars ($30,000.00), or Ten Thousand Dollars ($10,000.00) in excess of the damages sought by the Plaintiffs.

The Court also errored when it examined the testimony of the expert. The expert testimony should not have been allowed due to the late notice. However, an analysis of the testimony of the expert revealed that the work which he believed was valuable was the preparation of the pro forma (a few pages document). The Court errored when it failed to recognize that the Plaintiff testified that no monies were owed for the pro forma preparation since it was performed under business sale agreement which the Plaintiffs would only be owed a commission if the property sold. The Plaintiffs testified that they were not owed money for this work.

CONCLUSION

For these reasons, this Court should review the facts presented at trial and find for the Defendants. In the alternative, the Court should vacate the judgment and reverse the decision of the trial court, limit the damages to Eleven Thousand Seven Hundred Fifty-Three and 15/100ths Dollars ($11,753.15) and remand the case for a new trial without the introduction of the expert witness.

Respectfully submitted,

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