THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen Mullen, Circuit Court Judge

Case No. 2019-CP-07-00117
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, LLC, Appellants.

FINAL BRIEF OF RESPONDENTS

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RESPONDENTS' STATEMENT OF THE CASE

1. Respondents Zachary Z. Zoul and Zoul Hospitality, LLC d/b/a Hospitality Advisors Group commenced a lawsuit in the Beaufort County Court of Common Pleas against multiple South Carolina companies and/or individuals involved in a Bluffton, South Carolina business enterprise called the Old Town Bluffton Inn. Respondents filed a Summons and Complaint on January 22, 2019 and served parties shortly thereafter. The claims were breach of express or implied contract, breach of contract accompanied by fraudulent act, promissory estoppel, *quantum meruit,* and violation of the S.C. Unfair Trade Practices Act.

2. Respondents are a company consisting of individuals that, without limit, engage in consulting in the hospitality and tourism trades, starting up and even managing small hotels, inns, bed and breakfasts and the like. Among the principals, they have many years of experience in that trade. Respondents were approached in September 2018 by Appellants Lawrence Leary and Old Town Bluffton Inn, LLC. The Appellants initially wanted Respondents to find a buyer for the Inn, which was not then operating. Within a very short time, Appellants determined that the Inn would market better *if it was in operation,* so Respondents were requested to take steps to cause a start-up of the Old Town Bluffton Inn by Thanksgiving 2018. The parties had executed a Consulting Services Agreement in September 2018 whose express terms reference selling the Inn. The expanded services subsequently sought by Appellants from Respondents involved actions outside the scope of the signed agreement and much more immediate attention. Respondents started work required to open the Inn. However, also, Respondent Zoul prepared and presented to Appellant Lawrence Leary in early October

2018 a proposed Management Agreement to govern the new set of duties, including management, which Appellants sought from Respondents.

3. The Appellants did not sign the Management Agreement, but accepted numerous services from Respondents with Respondents performing under the belief that they were going to open and oversee management of the Old Town Bluffton Inn until some time in the future when a buyer may be found. When Respondents insisted in late-October 2018 that Appellants return the signed Management Agreement, Appellants refused, and terminated their relationship with Respondents. Appellants kept Respondents' work product, and did not pay Respondents for any services provided in September and October 2018.

4. Appellants raised multiple defenses to the claims, including that some of the named Defendants were new companies uninvolved in the matter, that Respondents' work had little value, and that there was no contract under which Respondents were owed. Prior to trial Appellants filed a Motion in Limine to exclude an expert witness for the Respondents.

5. On May 18, 2021 a Beaufort County circuit court bench trial was held. At the time of trial the Appellants were the only remaining Defendants in the case. Respondents presented four witnesses, including Dr. John Salazar, who was determined to be an expert in hospitality and tourism. Appellants submitted the deposition transcript of Appellant Lawrence Leary, who did not appear at trial. The witnesses explained numerous details, and Dr. John Salazar described the hospitality and tourism industries, testified that Respondents' work performed was competent, and testified that the value of the services Respondents bestowed on Appellants was worth $30,000.00 to

$50,000.00. The bench trial was completed in one day. The testimony of Dr. Salazar was given over the objection of Appellants.

6. The court issued an Order of Judgment in favor of Respondents and against the Appellants for $30,000.00, the Appellants being determined jointly and severally liable. The Order of Judgment was issued on May 24, 2021 and filed on June 10, 2021.

7. Appellants' Motion to Reconsider Order Denying to Dismiss Counterclaims was denied on June 7, 2021, and an Order denying Appellants' Motion to Alter or Amend, and for a New Trial filed June 10, 2021 were denied by an Order dated July 13, 2021 and filed on July 19, 2021. Appellants filed and served a Notice of Appeal on August 11, 2021. An additional ruling was made by the Master In Equity a substantial time before the trial, in which the Master dismissed three Defendants and dismissed two of Respondents' claims that asserted fraudulent conduct. The Master In Equity's ruling narrowed down the parties and claims to the configuration which went to trial on May 18, 2021.

RESPONDENTS' STATEMENT OF FACTS

Respondents prevailed at the May 18, 2021 bench trial in the Beaufort County Court of Common Pleas, presided over by the Honorable Carmen T. Mullen, Circuit Judge. A Judgment Order dated May 24, 2021 and filed on June 10, 2021, clearly and unequivocally states that relevant facts and law were introduced by Respondents to fulfill the requisite degree of proof entitling Respondents to a judgment against Old Town Bluffton Inn, LLC and Lawrence Leary, jointly and severally, in the amount of Thirty Thousand and No/100ths Dollars ($30,000.00).

Appellants, in the trial court, filed a written Motion in Limine seeking to exclude Respondents' experts, Dr. Brumby McLeod and Dr. John Salazar. The Appellants were neither surprised nor unfairly prejudiced by Respondents' experts.

Respondents' had identified both men in writing to Appellants before the May 18, 2021 trial. Respondents identified Dr. Brumby McLeod on April 23, 2021 in a supplement to Respondents' Answer to Appellants' Interrogatory 6. This supplementation was 25 days before the May 18, 2021 trial scheduled on the trial roster. Mr. McLeod was an expert in hospitality and tourism scheduled to, without limit, testify to the reasonable value of Respondents' services provided Appellants. (R. pp. 72-74) Appellants did not seek to take Dr. McLeod's deposition although they propounded a subpoena *duces tecum* upon him. Before trial, Dr. McLeod withdrew as Respondents' expert without any stated reason. Respondents made calls and secured another expert witness, Dr. John Salazar, with equal or better credentials than their prior witness. Dr. Salazar was retained to be an expert in hospitality and tourism exactly as Dr. McLeod, and was to provide the same opinions and testify as to the reasonable value of Respondents' services. Dr. Salazar was to utilize exactly the same information in support of his conclusions as Dr. McLeod. Dr. Salazar was identified to Appellants on May 13, 2021 – five days before trial. Respondents invited Appellants to speak with or depose by ZOOM Dr. Salazar. (R. pp. 82-83) Appellants did not ask to depose Respondents' expert but instead sought his exclusion via Motion in Limine. Appellants chose to use their Motion in Limine as a sword and not a shield.

Early during the trial on May 18, 2021, Appellants requested to "put two things on the record." (R. p. 287, lines 20-21) First, Appellants wanted to use Lawrence Leary's deposition transcript given in New Jersey, since he was not present for trial. (R. p. 289,

line 10 – p. 292, line 22) The judge's exchange with Appellant's counsel and her discussion of dates and procedural measures reflect considerable weighing of issues dealing with the Motion In Limine, including determination of possible unfair prejudice, which was in the Court's discretion. The judge did not acknowledge favorably that Appellants were allegedly surprised or unfairly prejudiced by Respondents' expert under the circumstances. The judge was seemingly well informed of the circumstances pertaining to Respondents' expert. Subsequently, before Respondents' expert was examined, Appellants revisited Appellant's Motion in Limine and the Court had decided how it was handling Respondents' expert witness. (R. p. 405, line 10 - p. 408, line 15 and R. p. 411, line 18 - p. 413, Line 10) The expert subsequently, and without limit, testified to a reasonable degree of expert certainty that Respondents' work was valued at $30,000.00 to $50,000.00. (R. p. 420, line 19 – p. 421, line 12)

Three separate contracts were alleged to have existed in the case. The first, in May 2018, involved Respondents' firm clearing up a loading zone matter for Old Town Bluffton Inn, LLC at the request of Danielle Harrison (daughter of Appellant Lawrence Leary) and Vincent Harrison. The matter was addressed before this lawsuit, trial and appeal. This contract was referenced at trial principally for background and foundation for other evidence, and Respondents were not seeking any recovery for the transaction described in Trial Exhibits 13, 14 and 15. (R. pp. 239-241)

Appellants have referenced two other actual, or alleged, contracts and have sought to sow confusion about them, and about the absolutely reasonable decision reached by the trial court in this case. In September 2018, Respondents entered into a written Consulting Services Agreement with Appellants. (R. p. 243) By the wording

of the Consulting Services Agreement, whose terms speak for itself, the Consulting Services Agreement was an executed document tasking the Respondents to find a buyer for Old Town Bluffton Inn, out of which Respondents would be paid a percentage of sale should a buyer be found. No buyer during the Consulting Services Agreement term, no paid percentage. The Consulting Services Agreement's wording was not prepared with the intent to describe services needed to bring about opening or operating the Inn. (R. p. 367, line 9 – p. 368, line 1) Nonetheless, shortly after executing the Consulting Services Agreement, Appellants changed their mind, and wanted Respondents to include as a dual objective, rendering open and serviceable the still unopened Old Town Bluffton Inn by Thanksgiving 2018. Mr. Leary thought the Inn would be more marketable if it were in turnkey condition on Thanksgiving 2018. As Respondents had favorable communication with Mr. Leary about operating the Inn, they resolved to drop other projects and pitch in to get the Inn up and running.

The Respondents did not hesitate or delay as they were under a tight deadline. However, the altered scope of performance being called for by Appellants from Respondents prompted Respondent Zachary Zoul to *draft* a MANAGEMENT AGREEMENT BETWEEN HOSPITALITY ADVISORS GROUP AND LARRY LEARY, a copy of which being delivered to Appellant Lawrence Leary on October 8, 2018. Appellants encouraged Respondents to produce paperwork *(pro formas,* action list, etc.) and engage in vendor interactions concerning the Inn during the month of October 2018. To Respondents' knowledge, Appellants, or either of them, did not execute the management agreement. (R. p. 368, line 5 – p. 370, line 14) That did not stop Appellants from accepting Respondents' work product or encouraging continued

service. When Respondents finally insisted to have the management agreement signed, on or about October 26, 2018, Appellants terminated Respondents.

While selling the Old Town Bluffton Inn and opening and managing the Inn are related matters, *they are not the same thing and do not require the same services.* The Consulting Services Agreement was *not* written to identify what multiple acts Respondents were going to take to prepare the Old Town Bluffton Inn for opening by Thanksgiving 2018. The Consulting Services Agreement was written to describe an entirely different set of acts by Respondents to bring a viable buyer to Appellants to buy the Old Town Bluffton Inn. Nonetheless, Appellants are trying to sell the Appeals Court the sophistry that the preparation of financials, vendor contracts, a booking company, innkeeper, etc. were *delivered exclusively under the Consulting Services Agreement,* under which there would be no payment because there was no buyer and sale. As to the Management Agreement, Appellants argue the agreement was never made and so there is no payment due. This would result in a disingenuous windfall outcome for Appellants – and not very equitable.

The Court and the Respondents recognized that Respondents also had sued in *quantum meruit.* The Management Agreement was deemed to not be an enforceable contract in and of itself. Respondents nonetheless provided numerous services to Appellants thinking they had a contract duty under the Management Agreement. Respondents pleaded and proved their claim in *quantum meruit,* an equitable remedy tried to conclusion in a bench trial. Respondents proved by a preponderance of the evidence (1) benefit conferred by Respondents upon the Appellants; (2) realization of that benefit by the Appellants; and (3) retention of the benefit by the Appellants under circumstances that make it inequitable for

them to retain it without paying its value. Myrtle Beach Hospital, Inc. v. City of Myrtle Beach, 341 S.C. 1, 8-9, 532 S.E.2d 868 (2000).

STANDARD OF REVIEW

"An action based on a theory of *quantum meruit* sounds in equity. [citation omitted] 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. Absent an express contract, recovery under *quantum meruit* is based on quasi-contract. [citation omitted] The elements of a *quantum meruit* claim are: (1) a benefit conferred upon the defendant by the plaintiff; (2) realization of that benefit by the defendant; and (3) retention by the defendant of the benefit under conditions that make it unjust for him to retain it without paying its value." Columbia Wholesale Co.,, Inc. v. Scudder May N.V., 312 S.C. 259, 261, 440 S.E.2d 129, 130 (1994). "... [T]he standard of review in appeals from the family court may be traced to two common features found in our earlier jurisprudence concerning appeals in equity cases. The primary one is the familiar mantra that the appellate court is not required to disregard the findings of the trial judge who was in a superior position to make credibility determinations. The second concept is the tenet that de novo standard of review does not relieve an appellant from demonstrating error in the trial court's findings of fact." (Emphasis supplied) Lewis v. Lewis, 392 S.C. 381, 709 S.E.2d 650 (2011).

ARGUMENT

I. NOTWITHSTANDING MISSTATEMENT OF FACT BY APPELLANTS, THEY HAVE FAILED TO SHOW ERROR OR ABUSE OF DISCRETION BY THE TRIAL JUDGE IN PERMITTING PLAINTIFFS' EXPERT'S TESTIMONY AT TRIAL.

At the circuit court bench trial from which this appeal is taken, Respondents here were then Plaintiffs. Plaintiffs were constituted of a business and personnel that specialized in the hospitality and tourism trade such as setting up and operating unique inns and bed and breakfasts and similar establishments. The Appellants were the Defendants in the circuit court from which this appeal is taken. The Appellants initially wanted to build and sell the Old Town Bluffton Inn, and decided to open and operate that Inn before its sale. The Respondents provided materials and services to the Appellants, and the Appellants knowingly and willfully accepted material and services from Respondents without paying for it.

Upon learning of the trial date, Respondents located and immediately identified a proposed expert witness in hospitality and tourism. While those activities may require knowledge that some assume to possess, the hospitality and tourism business is curriculum at many colleges, and a career for many people. Digging into specifics, many informed people do not know the specifics of hospitality and tourism, and Respondents therefore considered an expert in those fields to be useful for trial. Respondents were able to secure an expert with college background in hospitality and tourism. He was to give opinion testimony rather than to function as a fact witness. His name was Dr. Brumby McLeod, who was identified in Respondents' April 23, 2021 *supplementation* of their answer to Appellants' Interrogatory 6, inquiring about

testifying experts.[1] Subsequently, Dr. McLeod resigned without a known reason. Respondents located an expert in hospitality and tourism, Dr. John Salazar, and via e-mail Respondents informed Appellants on May 13, 2021 of what had happened, and the substituted witness. Dr. Salazar was to be an expert in the same things as Dr. McLeod, he was to base his opinions on the same information, and he was to provide the same opinions. Documents used for preparation were shared with Appellants. Respondents offered to make Dr. Salazar available for a ZOOM deposition ahead of trial. Appellants did not seek an expedited deposition of Dr. McLeod or Dr. Salazar.

Appellants' reference to Downey v. Dixon, 294 S.C. 42, 362 S.E.2d 317 (Ct. App. 1987) bears virtually no factual similarity and legal relevance to this case. Here, Respondents did not refuse to be available for deposition. They answered multiple sets of interrogatories and document requests propounded by Appellants. They did supplement an answer to Appellants' Interrogatory 6 notwithstanding Appellants' assertions to the contrary. The comparison of the circumstances of Downey to Respondents in this case stands equity on its head.

The trial judge in this case did not shirk her responsibility or claim to be boxed in by the presence or absence of a scheduling order. She made her position on exercising discretion clear, and decided there had been time for Appellants to depose Respondents' expert. *(See,* Callen v. Callen, 365 S.C. 618, 620 S.E.2d 59 (2005)), which is distinguishable from this case in that the Court in Callen was influenced, erroneously,

[1] According to Appellants' Initial Brief, The Defendant sent interrogatories requesting that the Plaintiff identify all witnesses. (R. pp. 73-74) These requests were answered on November 15, 2019 and in the almost two (2) years before the trial and were never updated. (R. pp. 61-92) The claim that there was no supplementation by Respondents, to Interrogatory 6 concerning experts is inaccurate, and the supplementation to Interrogatory 6 is ironically an exhibit to Appellant's Motion in Limine. Exhibit E to the same Motion in Limine of Appellants is an explanation that Dr. McLeod suddenly withdrew, but we had a new expert we would make available to Appellants.

by the absence of a pre-trial [scheduling] order. Moreover, the Judge in this case having reviewed the then-existing record, thought there *was* adequate time for Appellants to take a deposition on the schedule that existed. Appellants did not try. A portion of the discussion in court is below.

> "[Judge] "All right. I will also tell you, because this is a bench trial, it won't be quite as formal as it normally would be if we had a jury. I'm certainly sitting as both the fact finder and the judge of the law. We can be a little bit more relaxed in how we're handling this.
>
> "All right. But it is a Court of record. Everything is being written down. I told the attorneys, if you need a break or you need anything, just go ahead and just ask your lawyer to take a break, okay, and we're certainly happy to do that.
>
> "All right. So, with that said, I have told the attorneys that we are not doing opening arguments. I will tell you that I have read all the filed discovery in this case as well as the Summons and Complaint, the Answers so, I am well versed on the issue in this case,
>
> "I also, of course, - read Judge Dukes Order where he dismissed the two claims, the fraud claim, breach of contract accompanied by the fraud, and also the SCUPTA claim of Unfair Trade Practices Act. So obviously those are not in this case more.
>
> "So we're gonna go on and go forward just with the witnesses to begin.
>
> "So, yes, Mr. Galvin.
>
> "[Mr. Galvin] I, I just wanted to put two things on the record. One I -
>
> "[Judge] Yes, sir.
>
> "[Mr. Galvin] --- have a transcript of Mr. Leary and his testimony, and I submitted that up to the Court. I think we're, we're probably gonna use that in lieu of his testimony today. I think we got to call him after, the the plaintiff finished their case.
>
> "The second thing is, that---

"[Judge] You just need to go ahead and put on the record that Mr. Leary the defendant in this case is not here.

"[Mr. Galvin] Correct.

"[Judge] For the record, we had a discussion about this on a conference call last week. It was my understanding that Mr. Borden agreed that he could just come by this transcript and didn't want to require him to be here in person and I understand that was the agreement to be made.

"[Judge] Is that correct?

"[Mr. Galvin] Well, I think what I, what I stated is that Mr. Borden was gonna - I was planning to just use the transcript but I thought the, possible ability to have him call in may - he might, he might have that ability but --

"[Judge] So which one do you want to choose to do because we're not doing both? He's not both calling and giving his statement So, you need to---

"[Mr. Galvin] We're gonna use the transcript, Your Honor.

* * *

"[Mr. Galvin] The second thing is, is that I filed a motion in limine---

"[Judge] Okay.

"[Mr. Galvin]---with regards to Mr. Salazar being named as an expert. He, he was named very, very late in the trial and I filed that with, with all of my exhibits and everything. I think the Court probably reviewed that. I'm happy to argue it but I think my, my motion speaks for itself.

"[Judge] Okay.

"[Mr. Galvin] And--.

"[Judge] Give me – I just need to look here. Sorry.

"[Judge] All right. Well, what we can do as far as that is concerned, as I told You, because this is a bench trial, obviously we would normally have to do a proffer of that witness' testimony. However, what we can do is I can just hear it, and once I once I've heard it, I can decide whether or not it's appropriate to consider in any way.

"[Judge] As far as the lateness though, I can tell you it's my understanding that, and correct me if I'm wrong, Mr. Borden, that plaintiff's counsel had a previous expert to testify as to hospitality standards and reasonableness on charges, and that that expert then subsequently declined to go forward. And so you hired a new expert.

"[Judge] I don't think there's any surprise for Mr. Galvin. It's my understanding and what's going to be testified to, I think what you stated was pretty much – his opinions remain the same as the previous one.

"[Mr. Borden] That, that – that's correct, Your Honor.

* * *

"[Mr. Borden] So – at which, which I, I had not. But, but the person who is scheduled to be here today fits the same description-

"[Judge] Okay.

"[Mr. Galvin] And ---

"[Judge] And is giving the same opinion, correct?

"[Borden] I beg your pardon?

"[Judge] and is giving the same opinion, correct?

'[Borden] Yes, Your Honor.

"[Judge] Okay.

"[Mr. Galvin] Just for the record –

"[Judge] Uh-huh. (Affirmative)

"[Mr. Galvin] – I was not able to depose the first expert, and with regard to the First expert, I didn't get a written report or anything.

"[Judge] Right. Well, you could of deposed this new expert.

"[Mr. Galvin] I – he was provided five days before the trial, Your Honor.

"[Judge] But you could have deposed him. All you had to do was call and ask and you could have deposed him.

"[Mr. Galvin] Well, I couldn't have obtained a, a expert to review what he had said.

"[Judge] Again though, nothing prohibited you – we take depositions all the time during the middle of trials, two days before trial. Again, its within my discretion whether or not to allow this expert to testify. I don't even know if I will need his testimony.

"[Mr. Galvin] Thank you."

[Excerpts from Trial Transcript, Page 9, Line 10 – Page 12, Line 13; R. pp. 289, Line 10 - P. 292, Line 13]

"The interrogatories shall be deemed to continue from the time of service, until the time of trial of the action so that the time of service, until the time of trial of the action so that information sought, which comes to the knowledge of a party, or his representative or attorney, after original answers to interrogatories have been submitted, shall be promptly transmitted to the other party." Rule 33(b), SCRCP (2022).

In Baughman v. American Telephone and Telegraph Co., 306 S.C. 101, 108, 410 S.E.2d 537, 541, the court observed, "When Dr. Panitz's identity became known to them, Plaintiffs promptly notified Nassau. Thus, Plaintiffs did not violate the requirements." (emphasis added) Very similarly, when Respondents learned of an expert witness they wished to use, they notified Appellants without delay - 25 days ahead of trial. Moreover, when that expert had to be replaced through no fault of Respondents, the Respondents notified Appellants of their new expert immediately and offered to make him available to Appellants along with his preparatory material. The Appellants were not prevented by surprise or time to depose Respondents' witness, they chose to seek his exclusion instead. "When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred. "Samples v. Mitchell, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct.App. 1997) *quoting* Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987). The dialogue above during the trial reflects that the Judge had considerable familiarity of issues and witnesses. To the extent that she wanted to know more, she asked counsel. When she decided to allow Respondents' expert to testify to the extent that she considered it useful, she made clear why. There was no error or abuse of discretion by the Court.

II. THERE IS NO ERROR IN THE BASIS OR AMOUNT OF THE JUDGMENT GRANTED THE RESPONDENTS. RESPONDENTS' JUDGMENT WAS NOT BASED UPON THE CONSULTING SERVICES AGREEMENT. RESPONDENTS DID NOT INCLUDE OR REFERENCE IN THEIR COMPLAINT THEIR CONSULTING SERVICES AGREEMENT SIGNED BY LARRY LEARY, AND DID NOT SEEK RECOVERY UNDER THAT CONTRACT; THE RESPONDENTS' AWARD IS CLEARLY BASED UPON THEIR *QUANTUM MERUIT* CLAIM.

Appellants have misleadingly argued that Respondents failed to perform under an express contract, the Consulting Services Agreement and that the Respondents were allegedly therefore not entitled to be compensated. There *was* a fully executed Consulting Services Agreement signed by both parties, which did not result in the successful outcome of sale of the Old Town Bluffton Inn.

The terms set forth in the Consulting Services Agreement (R. p. 243) were not drawn by its drafter to cause performance or compensation for the services ultimately performed by the Respondents and accepted by the Appellants. (R. p. 366, line 20 – p. 368, line 4) Appellants changed their objectives and Respondents tried to oblige the changed scope of work, seeing a need to prepare a separate Management Service agreement that was not fully executed. (R. p. 368, line 14 – p. 374, line 21)

The trial court here granted Respondents a judgment based upon *quantum meruit.* The elements of quantum meruit are: (1) a benefit conferred upon the defendant by the plaintiff; (2) realization of that benefit by the defendants; and (3) retention by the defendant of the benefit under conditions that make it unjust for him to retain it without paying its value. Earthscapes Unlimited, Inc. v. Ulbrich, 390 S.C. 609, 616, 703 S.E.2d 221, 225 (2010), *quoting* Columbia Wholesale Co., Inc. v. Scudder May N.V., 312 S.C. 259, 261, 440 S.E.2d at 130 (1994).

Respondents, in an effort to get their conflict with Appellants resolved, made admittedly discounted demands to attempt to get the matter concluded. Respondents' conservative estimates were based on a quick conclusion. (R. p. 376, line 9 – p. 379, line 24) Respondents' hopes of a quick resolution with Appellants proved unattainable.

Respondents introduced evidence by Dr. John Salazar, who was accepted as an expert in *hospitality* and *tourism.* Dr. Salazar used to live in Bluffton. He described his review of the work of Respondents and the facts and circumstances. Dr. Salazar opined that the reasonable value of Respondents' work was $30,000.00 to $50,000.00. When asked whether that was to a degree of expert certainty, he responded, "I would put it in that range, maybe the upper end...." (R. p. 415, line 18 – p. 421, line 12)

"The measure of recovery for quantum meruit is the reasonable value of the performance" United States v. Algernon Blair, Inc., 479 F.2d 638, 641 (4th Cir. 1973) *quoting* Restatement of Contracts § 347 (1932). "...[T]he standard for measuring the reasonable value of the services rendered is the amount for which such services could have been purchased from one in the plaintiffs position at the time and place the services were rendered." Id. (Other citations omitted)

The Court's ruling (R. pp. 1-6, pp. 14-19) is entirely consistent with the law and the evidence.

III. UNDER CONTROLLING LAW AND THE FACTS OF THIS CASE RESPONDENTS WERE PROPERLY AFFORDED THEIR RELIEF *IN QUANTUM MERUIT* IN THE AMOUNT OF $30,000.00.

Respondents in this controversy performed multiple activities for the Appellants to facilitate getting the Old Town Bluffton Inn up and operating by Thanksgiving 2018. Knowing that such activities were not the same as work described in a Consulting

Services Agreement the parties *had* fully executed, Respondent Zoul drafted a Management Agreement for the new services sought by Appellants.

The Management Agreement was not executed by Appellants and their position remained that there was no agreement covering the Respondents' start-up services. Respondents sent Appellants an invoice for $11,753.15 as a reduced rate simply to get the matter over.

Apparently, there was no true meeting of the minds because Appellants paid the Respondents nothing for post-September 2018 services provided in good faith. The trial court cannot be faulted for finding a valid claim in *quantum meruit* in the circumstances.

On these issues, Appellants have cited Johnston v. Brown, 290 S.C. 141, 148-149, 348 S.E.2d 391, 395 (Ct.App. 1986). The major difference in this case and Johnston is that in Johnston the court found the parties had agreed upon a sum for services rendered, when that was not the holding in this case. Moreover, Johnston, when appealed to the Supreme Court of South Carolina, encountered a different reception than in Appeals Court.

> "Implicit in the jury's verdict is a finding that there was no contract expressed or implied relative to the compensation which the plaintiff was to receive for his services from 1980 to 1982." Johnston v. Brown, 292 S.C. 478, 480, 357 S.E.2d 450, 451 (1987).

Coming to a different fact conclusion than the Court of Appeals, the Supreme Court of South Carolina reversed the Appeals Court ruling cited by Appellants.

IV. WHILE APPELLANTS MAINTAIN IT WAS ERROR TO ORDER JUDGMENT JOINTLY AND SEVERALLY, APPELLANTS HAVE PRESENTED NO FACTS OR LAW SUPPORTING THEIR OPPOSITION.

According to Appellants, Old Town Bluffton Inn, LLC has multiple owners. Upon best information Old Town Bluffton Inn, LLC owns Old Town Bluffton Inn. It is argued

that at some time Appellant Lawrence Leary put 50% of his member interest in the limited liability company in trust and retained 1% personally. Leary's daughter Danielle Harrison owns 49% of the Old Town Bluffton Inn, LLC interest. Initially, if Appellant Leary has a revocable trust to which he is trustee, a point for him to prove or disprove, he is in all practical respects the member controlling 51% of the limited liability company. Moreover, the trial transcript reflects Lawrence Leary to have held himself out as the decision-maker and managing member of the limited liability company.

Old Town Bluffton Inn, LLC and Lawrence Leary at relevant times held themselves out to being in charge of Old Town Bluffton Inn. When Respondents prepared a Management Agreement, they sought to have Lawrence Leary sign it.

Finally, to follow Appellants' arguments that joint and several liability was error is refuted by the trial transcript created in the bench trial. The trial transcript and appellate arguments are not entirely consistent - certainly in inferences drawn by Appellants.

Under a tort matter regarding parties being jointly and severally liable, the S.C. Court of Appeals opined, "International Pavilion also asserts the trial court erred in finding that it was jointly and severally liable for Fernanders' damages, arguing the doctrine of joint and several liability is `obsolete' and `unjust' under a comparative negligence system. We disagree.

" The concept of joint and several liability is deeply grounded in tort law. (citations omitted) ... Under this rule, if A is ten percent negligent and B is ninety percent negligent, and together they combine to injure C, they are both liable to C. C can recover

one hundred percent of his or her damages from either one." Fernanders v. Marks Construction of South Carolina, Inc., 330 S.C. 470, 475-476, 499 S.E.2d 509,(Ct.App.1998).

V. AS RESPONDENTS WERE NOT SEEKING A MONEY RECOVERY UNDER THE CONSULTING SERVICES AGREEMENT BETWEEN THE PARTIES, AND THE MATERIALS AND SERVICES SUED FOR WERE NOT DELIVERED UNDER THAT CONTRACT, APPELLANT'S ARGUMENT IS INVALID AND IRRELEVANT.

The Complaint filed by the Plaintiffs/Respondents in this case did not change during the duration of the case in circuit court. Exhibit 1 to the Complaint, entitled MANAGEMENT AGREEMENT BETWEEN HOSPITALITY ADVISORS GROUP AND LARRY LEARY, was alleged to be an unsigned contract that was nonetheless a writing because it was orally accepted. That allegation did not change during the case.

Consistent with provisions in that Exhibit 1 were numerous services provided by Plaintiffs to Old Town Bluffton Inn, LLC and Lawrence Leary.

In addition to a claim for breach of contract and other claims, Plaintiffs sued in *quantum meruit.* Dr. John Salazar appeared as an expert witness for Plaintiffs/Respondents in the areas of *hospitality* and *tourism.* After describing the industry and analyzing the work performed by Plaintiffs, Dr. John Salazar testified that to a reasonable degree of expert certainty the materials and services delivered to Appellants and retained by Appellants had a value between $30,000.00 and $50,000.00. (R. p. 423, lines 1-12)

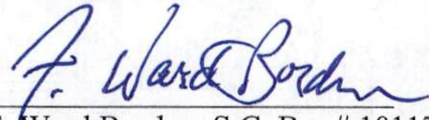
The trial court determined that the Management Agreement Respondents had asserted to be a contract was *not* a contract. The Consulting Services Agreement was *not* being sued upon and recovery under that document was *not* an issue. However, the court ruled that Plaintiffs had established their claim of *quantum meruit.* The measure of recovery for *quantum meruit* is the reasonable value of the performance. United States v. Algernon Blair, Inc., 479 F.2d 638, 641 (4[1h] Cir.1979).

CONCLUSION

For the foregoing reasons, this Court should affirm the Trial Court Judgment Order.

Respectfully submitted,

JONES, SIMPSON & NEWTON, P.A.

By: 

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May 19, 2022

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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

Case No. 2019-CP-07-00117
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, LLC, Appellants.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Respondents complies with Rule 211(b), SCACR.

Signature Page Follows

Respectfully submitted,

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May 19, 2022