THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Robert J. Bonds, Circuit Court Judge

Case No. 2022-000636

South Atlantic Forest Products, Inc. d/b/a Gaster Lumber & Hardware Appellant,

v.

GMK Associates Design Build Division, Inc. Respondent.

APPELLANT SOUTH ATLANTIC FOREST PRODUCTS, INC. D/B/A GASTER LUMBER & HARDWARE'S INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. Did the Trial Court abuse its discretion in awarding Appellant only $24,885.25 in attorney's fees and costs pursuant to its successful enforcement of its mechanic's lien and breach of contract claims and defense of Respondent's breach of contract counterclaims, with a total amount in controversy of $284,670.17, after over four (4) years of litigation and a weeklong jury trial?

2. Did the Trial Court abuse its discretion in erroneously determining that Defendant Frank Golson ("Golson") was the prevailing party on his mechanic's lien defense and subsequently awarding Golson $7,000 in attorney's fees and costs based on this erroneous conclusion without any evidentiary support for the amount of the award?

STATEMENT OF THE CASE

This is an appeal of an award of attorney's fees pursuant to a breach of contract claim and a mechanic's lien claim in connection with the construction of a residential house located in Beaufort, South Carolina ("Berry Residence"). The owner of the property, Percy M. Berry, III ("Owner"), was not a party to the litigation. The Owner's contractor was Respondent GMK Associates Design Build Division, Inc. ("Respondent"). Appellant South Atlantic Forest Products, Inc. d/b/a Gaster Hardware and Lumber ("Appellant") was a supplier for the construction of the Berry Residence. Due to non-payment, Appellant filed a mechanic's lien in the amount of $24,885.24 in September 2017 ("Lien"). (Complaint, p. 4, Ex. 2). Nine days after the Lien was filed, it was bonded off by the Owner pursuant to a bond issued under S.C. Code Ann. § 29-5-110 in the amount of $33,097.38 ("Bond") by Traveler's Casualty and Surety Company of America ("Bonding Company"). (Complaint, p. 5). On November 3, 2017, Appellant filed the instant suit against Respondent, the Bonding Company, and Frank Golson ("Golson"), Respondent's treasurer

who signed a personal guarantee for the subject materials. Appellant asserted two causes of action, breach of contract and suit on the Bond.

In response, on November 22, 2017, Respondent filed an Answer and Counterclaim demanding a jury trial and alleging breach of contract and resulting damages based upon four specific claims – (1) Appellant delivered the wrong siding; (2) Appellant delivered the wrong structural roof components; (3) Appellant delivered three wrong sliding doors; and (4) Respondent's expense of obtaining the Bond ("Counterclaims") (Respondent's Answer, pp. 1-2). No specific dollar amount was specified in the Counterclaims at the time they were filed, but Respondent stated in its Amended Pre-Trial Brief, dated January 20, 2022, that the Counterclaims were valued at approximately $237,000[1]. (Respondent's Amended Pre-Trial Brief, pp. 2-4). Appellant timely filed a response denying the Counterclaims on December 20, 2017.

Defendants Bonding Company and Golson originally retained the Finkel Law Firm, which filed a general Answer and demand for jury trial on their behalf on December 5, 2017. Thereafter, on January 25, 2018, a Consent Order for Substitution of Counsel was filed indicating that Respondent's counsel now represented all three Defendants - Respondent, Bonding Company, and Golson (collectively "Defendants").

There were only four motions filed throughout the pendency of this litigation, all of which were related to discovery. The first motion, filed on January 29, 2018, was Appellant's Motion to Compel seeking Respondent's responses to routine discovery requests. The parties were initially

[1] The value of Respondent's Counterclaims can be broken down as follows:

1.	Extra Costs v. Quote ($175,000-$105,000)	$70,000
2.	Framing Overages	$12,000
3.	Correct Error in Siding	$70,000
4.	Correct Error in Sliding Glass Doors	$85,000
	Total	**$237,000**

able to resolve this motion with a Consent Order filed on February 27, 2018. However, despite several reminders from Appellant, Respondent did not provide any discovery responses by the deadline established in the Consent Order. Therefore, Appellant was forced to file a Motion to Hold Respondent in Contempt of Court on April 9, 2018. Accordingly, Respondent was held in Contempt of Court on May 31, 2018, for its ongoing failure to provide the requested responses. The remaining three motions were filed by Appellant in connection with Respondent naming an expert witness and noticing a deposition outside the terms of the parties' consent scheduling order and Respondent's failure to timely provide responses to Appellant's second round of discovery requests. The parties were able to resolve at least one of these motions pursuant to a consent order. The parties went on to engage in extensive discovery, exchanging written discovery requests and participating in nine (9) depositions of trial witnesses without issue. Furthermore, the parties participated in a day long mediation on January 2, 2019.

After appearing on the jury trial roster numerous times, the case was called for trial the week of January 20, 2022, before Judge Robert J. Bonds ("Trial"), over four years after the original Complaint was filed. This matter took a full week to try. At Trial, each party filed multiple motions in limine, argued directed verdict motions, and zealously advocated for their clients. Prior to sending the case to the jury, the Trial Court granted Defendants Golson and Bonding Company's motions for directed verdict and dismissed both parties, over the objection of Appellant. (Trial Tr. 41:15-42:7 (Golson); Trial Tr. 40:12-21 (Bonding Company)). The jury found for Appellant in the amount of $24,885.24 ("Jury Verdict"), the full unpaid balance for the materials listed in the Complaint. The jury awarded Respondent zero ($0.00) dollars for its Counterclaims. Based on the parties' stipulation that any jury finding for Appellant would be for both causes of action, the jury thus found for Appellant on both of its causes of action, mechanic's lien and breach of contract.

(Trial Tr. 82:13-83:21). The Jury Verdict and Trial Court's dismissal of the two party Defendants was not appealed.

After the Trial, all of the parties filed Motions for Attorney's Fees and Costs (collectively "Motions for Fees"), on February 4, 2022, and February 7, 2022, respectively. The Motions for Fees were supported by affidavits submitted by counsel. Appellant's counsel submitted a detailed affidavit seeking attorney's fees and costs totaling $156,235.28, which was supported by redacted copies of Appellant's counsel's actual invoices mailed to and paid by Appellant. (Appellant's Affidavit, Exs. A & B). Respondent's counsel also submitted an affidavit seeking attorney's fees and costs totaling $57,820, on behalf of all three of his clients. Respondent's counsel's Affidavit was accompanied by a legal statement, which Respondent's counsel later admitted was rife with errors and was never sent to any of clients. (Motion for Fees Tr. 31:17:24; 63:1-68:1). A hearing on the Motions for Fees was held on February 11, 2022, at which Respondent's counsel attended virtually and Appellant's counsel attended in person.

In its March 10, 2022 Order, the Trial Court granted Appellant's Motion for Fees in the amount of $24,855.25[2], reasoning that Appellant was the prevailing party on its mechanic's lien cause of action, and granted Golson's Motion for Fees in the amount of $7,000, reasoning that Golson was also a prevailing party in the mechanic's lien cause of action ("Order Awarding Fees"). (Order Awarding Fees, p. 3). Respondent and Bonding Company's Motions for Fees were denied.

Subsequently, on March 21, 2022, Appellant timely filed a Motion to Reconsider the Order

[2] Throughout the Order Awarding Fees and Order Denying MTR, the Trial Court repeatedly mistakenly concludes that the jury awarded Appellant $24,885.25 and that the value of Appellant's lien was $24,885.25. (Order Awarding Fees, p. 5; Order Denying MTR, p. 2). The Jury Verdict was in fact $24,885.24 and Appellant's lien was for $24,885.24. (Jury Verdict, Complaint, p. 5). It seems logical based on the language of the Order Awarding Fees to assume this $0.01 difference is merely a typographical error, rather than an intentional decision by the Trial Court. (Oder Awarding Fees, p. 2&5).

Awarding Fees, asking the Trial Court to reconsider its award of only $24,885.25 in attorney's fees and costs to Appellant, it decision not to award Appellant any attorney's fees under its breach of contract claim, and its award of $7,000 in attorney's fees and costs to Golson. (Motion to Reconsider, p. 1). Appellant's Motion to Reconsider was denied on April 27, 2022, wherein the Court stated that its award of $24,885.25 in attorney's fees and costs to Appellant was a collective award that was not attributed to any specific cause of action and upheld its award of $7,000 in attorney's fees and costs to Golson ("Order Denying MTR"). (Order Denying MTR, pp. 2-3).

Appellant timely filed the instant Appeal on May 11, 2022, appealing the Trial Court's Order Awarding Fees and Order Denying MTR (collectively "Orders").

STANDARD OF REVIEW

Appellant's action to recover attorney's fees lies both in contract and in statute, while Defendant Golson's action to recover fees lies only in statute.

"When there is a contract, the award of attorney's fees is left to the discretion of the trial judge and will not be disturbed unless an abuse of discretion is shown." *Seabrook Island Prop. Owners' Ass'n v. Berger*, 365 S.C. 234, 240, 616 S.E.2d 431, 434 (Ct. App. 2005) (*quoting Baron Data Sys., Inc. v. Loter*, 297 S.C. 382, 384, 377 S.E.2d 296, 297 (1989)). Similarly, a proceeding to enforce a mechanic's lien is an action at law and the determination of the amount of attorney's fees to be awarded is left to the discretion of the trial judge and will not be disturbed absent an abuse of discretion. *Seckinger v. Vessel Excalibur*, 326 S.C. 382, 386, 483 S.E.2d 775, 777 (Ct. App. 1997).

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING APPELLANT ONLY $24,855.25 IN ATTORNEY'S FEES.

The Trial Court abused its discretion when it awarded Appellant only $24,855.25 in

attorney's fees and costs because this decision was based upon an error of law, without the support of any competent evidence, and is wholly inadequate. In support of its Motion for Fees, Appellant's counsel submitted a very detailed Affidavit of Attorney's Fees ("Appellant's Affidavit") indicating the total fees and costs incurred over the four (4) years of litigation was $156,235.28, $9,976.28 of which is attributable to costs. (Appellant's Affidavit, p. 5). Appellant's Affidavit was supported by redacted copies of Appellant's counsel's actual invoices mailed to and paid by Appellant. (Appellant's Affidavit, Ex. A&B). Appellant's Affidavit also walked through all six (6) *Blumberg* factors and provided a detailed analysis of how Appellant's counsel satisfied these factors.[3] (Appellant's Affidavit, pp. 2-4). *See Blumberg v. Nealco, Inc.,* 310 S.C. 492, 494, 427 S.E.2d 659, 660 (1993).

Specifically, as discussed below, the Trial Court incorrectly ruled that the verdict form was unclear as to what causes of action Appellant prevailed upon. The Trial Court then relied on that ruling to incorrectly determine the amount of attorney's fees and costs Appellant was entitled to receive under both its breach of contract and mechanic's lien causes of action. (Order Awarding Fees, p. 2; Order Denying MTR, pp. 2-3).

Throughout the Order Denying MTR, the Trial Court repeatedly notes that its award of attorney's fees to Appellant is not associated with any one specific cause of action. (Order Denying MTR, pp. 2-3). This conclusion is an error of law. It is well established in South Carolina that "attorney's fees are not recoverable unless they are authorized by contract or by statute." *Blumberg* at 493, 427 S.E.2d at 660. A party is not entitled to recover attorney's fees merely for winning a case. *Seabrook Island Prop. Owners' Ass'n* at 239, 616 S.E.2d at 434. The Trial Court's award of

[3] Appellant is not seeking any type of double recovery or an award of attorney's fees and costs in excess of those fees and costs it actually incurred.

attorney's fees to Appellant must be founded in a specific contractual provision or statute in order to be valid as a matter of law. *Id.* Here, Appellant is entitled to recover attorney's fees under both the terms of its contracts with Respondent and by statute in connection with its mechanic's lien claim. Because it is unclear under which basis, contractual, statutory, or both, the Trial Court awarded Appellant attorney's fees and costs, Appellant shall discuss the rationale for each basis separately below.

A. Any Decision by The Trial Court to Not Award Appellant Attorney's Fees and Costs Associated with Its Breach of Contract Claim Was an Abuse of Discretion.

Any decision by the Trial Court to not award Appellant attorney's fees and costs associated with its breach of contract claim was an abuse of discretion.

In an action at law, such as a breach of contract, the factual findings of the trial judge regarding an attorney's services and their value will not be disturbed unless an abuse of discretion occurs. *Baron Data Sys., Inc.*at 384, 377 S.E.2d at 297. An abuse of discretion occurs when the trial court's ruling is based upon an error of law or, when based on factual conclusions, is without the support of any competent evidence, or is wholly inadequate. *Seabrook at 240, 616 S.E.2d at 34; Bayle v. S.C. Dep't of Transp.,* 344 S.C. 115, 128, 542 S.E.2d 736, 742 (Ct. App. 2001)*; Shipp v. Richardson Corp. of S.C.,* 285 S.C. 460, 462-63, 330 S.E.2d 291, 292 (1985) (an award of $400.00 for the legal services rendered in the preparation and participation in an adversary trial proceeding in 1985 was so low as to be patently inadequate and an abuse of discretion).

1. The Trial Court's Failure to Rule that Appellant Was Entitled to Attorney's Fees on Its Breach of Contract Claim Was an Error of Law.

The Trial Court's failure to rule that Appellant was entitled to recover attorney's fees and cost on its breach of contract claim was an error of law. Based on the Jury Verdict and the parties' stipulation, Appellant was clearly successful in its breach of contract claim against Respondent

and in its defense of Respondent's Counterclaims. (*See* Trial Tr. 82:13-83:21).

In both of its Orders, the Trial Court erroneously stated that it was unclear if the Appellant was successful on both its mechanic's lien and breach of contract causes of action, or only a single cause of action. (Order Awarding Fees, p. 2; Order Denying MTR, pp. 2-3). These rulings are in error. At Trial, the parties had an extensive discussion on the record regarding the verdict form and ultimately stipulated that any jury finding for Appellant would be a finding under both the mechanic's lien and breach of contract causes of action. (Trial Tr. 82:13-83:21).

Here, it is undisputed that the jury awarded Appellant one hundred (100%) percent of the claimed principal amount of $24,885.24 and awarded Respondent zero ($0.00) dollars on its counterclaims seeking $237,000 in damages. (Jury Verdict). The only issue Appellant did not succeed on was its request for pre-judgment interest under both causes of action. Based on the stipulation referenced above, the Jury's Verdict is a finding for Appellant on both its mechanic's lien and breach of contract causes of action. *See Bodkin v. Bodkin*, 388 S.C. 203, 228, 694 S.E.2d 230, 243 (Ct. App. 2010) (the court must accept stipulations as binding); *C.A.N. Enterprises, Inc. v. S.C. Health & Human Servs. Fin. Comm'n*, 292 S.C. 556, 559, 357 S.E.2d 714, 715 (Ct. App. 1987), *aff'd* 296 S.C. 373, 373 S.E.2d 584 (1998) (stipulations are binding upon parties who make them).

The record is clear that Appellant's three (3) contracts with Respondent authorized Appellant's recovery of reasonable attorney's fees and costs. *See Blumberg* at 493, 427 S.E.2d at 660 (attorney's fees are not recoverable unless they are authorized by contract). The three (3) separate contractual documents explicitly entitle Appellant to attorney fees from Respondent, none of which require that Appellant be the "prevailing party" in order to recover its attorney's fees and costs. First, the Commercial Business Account Application, in the first paragraph on page 2,

expressly provides that Respondent "agrees to be liable for all indebtedness plus interest and reasonable attorney fees should any litigation be incurred for nonpayment of the account." (Tr. Ex. 1). Second, the numerous Delivery Tickets, all signed by Respondent's on-site representative, Bruce Williamson, also provide for the recovery of reasonable attorney fees. (Tr. Exs. 49, 51, 55, 56, 78, and 94). Each Delivery Ticket states: "The purchaser agrees to pay any reasonable attorney fees in the event of default of payment of this invoice." Finally, each invoice sent by Appellant to Respondent, including all past due invoices making up the outstanding balance of $24,885.24 awarded by the jury, expressly provide for the recovery of attorney fees. (*See e.g.* Tr. Ex. 18). These invoices state: "The Purchaser agrees to pay all reasonable attorney fees in the event of default of payment of this invoice." Thus, Appellant's contracts with Respondent allowed Appellant to recover its reasonable attorney's fees and costs associated with any litigation related to nonpayment of the account, including Appellant's breach of contract claim and Appellant's defense of Respondent's Counterclaims.

Because Appellant's three (3) separate contractual documents entitled it to attorney's fees and costs, the Trial Court should have conducted, at a minimum, an analysis of the amount of reasonable attorney's fees and costs Appellant was entitled to pursuant to its contracts. The Trial Court's failure to do so amounts to an abuse of discretion and should be reversed.

2. Any Failure by the Trial Court to Award Appellant Attorney's Fees and Costs Under Its Breach of Contract Claim Was an Abuse of Discretion.

Any failure by the Trial Court to award Appellant attorney's fees and costs associated with its breach of contract claim was an abuse of the Trial Court's discretion because an award of zero ($0.00) dollars is not supported by any evidence and is wholly inadequate. Alternatively, assuming the Trial Court's award of $24,885.25 is attributed fully to Appellant's breach of contact claim, this minimal award was also an abuse of discretion because it also is not supported by any evidence

and is wholly inadequate.

In considering an award of attorney's fees and costs, a court must evaluate six factors: (1) the nature, extent, and difficulty of the legal services rendered; (2) the time and labor necessarily devoted to the case; (3) the professional standing of counsel; (4) the contingency of compensation; (5) the fee customarily charged in the locality for similar legal services; and (6) the beneficial results obtained (collectively "*Blumberg* Factors"). *Blumberg* at 494, 427 S.E.2d at 661. The Trial Court must make specific findings of fact on the record for each of the *Blumberg* Factors. *Id*. Absent sufficient evidentiary support on the record for each *Blumberg* Factor, the award should be reversed, and the issue remanded for the trial court to make specific findings of fact. *Id*.

In its Order Awarding Costs and Order Denying MTR, the Trial Court discusses each of the *Blumberg* Factors, but fails to make the requisite specific findings of fact. (Order Awarding Costs, pp. 3-5; Order Denying MTR, pp. 3-4). Instead, the Trial Court made conclusory statements regarding the *Blumberg* Factors with no factual support. (Id.). The Trial Court's analysis recognized that while Appellant's initial causes of action, mechanic's lien foreclosure and breach of contract, are fairly routine, the litigation became more difficult and complex due to the assertion of Respondent's Counterclaims totaling $237,000. (Id., p. 3). These counterclaims transformed the litigation from a simple collection action into a construction defect action. The Trial Court also recognized that each party spent extensive time on this matter. (Id., pp. 3-4). Additionally, the Trial Court acknowledged the professional standing of counsel[4] and the reasonableness of all parties' fees. (Id., pp. 4-5). Finally, the Trial Court acknowledged that Appellant did receive a beneficial

[4] The Trial Court's statement that Appellant did not submit an affidavit addressing the professional standing of counsel is not supported by the evidence in the record because Appellant's Affidavit contained a section specifically devoted to Appellant counsels' professional standing. (Order Awarding Fees, p. 4; Appellant's Affidavit, p. 3).

result in this litigation. (Id., p. 5). Despite these findings, it is unclear if the Trial Court awarded Appellant any attorney's fees in connection with the breach of contract claims. Regardless of whether the Trial Court's award was associated with the breach of contract claims or not, the minimal amount of the award of $24,885.24 is ostensibly due to the Trial Court's *sua sponte* conclusion that the attorneys were to blame for the excessive cost of this litigation. (Order Awarding Fees, pp. 3-4; Order Denying MTR, pp. 4-5). This conclusion is factually and legally incorrect, without the support of any competent evidence, for five main reasons.

First, the Trial Court mistakenly concludes that the time spent on the case by both parties far exceeds the value of each parties' damages. (Order Awarding Fees, p. 3). The total amount in controversy in this litigation is approximately $284,670.17[5], with at least $237,000 directly associated with the Respondent's breach of contract claims. (Complaint, p. 5; Respondent's Amended Pre-Trial Brief, pp. 2-4); Appellant's attorney's fees totaled $156,235 and the attorney's fees for Respondent, Defendant Golson, and Defendant Bonding Company allegedly totaled $57,820[6], for a total of $214,055. (Appellant's Affidavit, p. 5; Respondent's Counsel's Affidavit, p. 5). Thus, the parties' total attorney's fees of $214,055 are in line with the total amount in controversy of $284,620.17 in this litigation. South Carolina courts have routinely held that there is no requirement that an award of attorney's fees be less than or comparable to a party's monetary judgment. *Baron Data Sys., Inc.* at 385, 377 S.E.2d at 297-98 (holding an award of $26,000 in

[5] Appellant's Claimed Damages (Tr. Ex. 102) $47,670.17
a) Outstanding Invoices $24,885.24
b) Interest $22,784.93
Respondent's Claimed Damages Per Amended Pre-Trial Brief $237,000.00
Total Amount in Controversy **$284,670.17**

[6] As discussed in detail in Section II(B) below, Respondent's counsel's legal statement was admittedly rife with errors, was not an actual final bill, was not paid, and was not sent to any of Respondent counsel's three clients in this litigation. (Motion for Fees Tr. 31:17:24; 63:1-68:1).

attorney's fees was reasonable compared to an award of $16,151 for actual damages); *see also Taylor v. Medenica*, 331 S.C. 575, 582, 503 S.E.2d 458, 462 (1998) (there is no requirement that an attorney's fee be less than or comparable to a party's monetary judgment); *Rice v. Multimedia Inc.*, 318 S.C. 95, 101, 456 S.E.2d 381, 385 (1995) (it was not an abuse of discretion to award attorney's fees in excess of the verdict); *Laser Supply & Servs., Inc. v. Orchard Park Assocs.*, 382 S.C. 326, 341, 343, 676 S.E.2d 139, 147-48 (Ct. App. 2009) (disparity of $87,000 attorney fee award with $24,000 damages award did not demonstrate abuse of discretion). Thus, our courts have routinely approved awards of attorney's fees where the fee substantially exceeded the actual recovery. To conclude otherwise amounts to an error of law.

Second, the Trial Court mistakenly concludes that Appellant should be penalized for having two attorneys represent it throughout this litigation and at trial. (Order Denying MTR, p. 5). This Court has stated that a party should not be penalized or criticized for hiring more than one attorney, provided their work is not duplicated and the complexity of the case demands it. *Mallett v. Mallett*, 323 S.C. 141, 154, 473 S.E.2d 804, 812 (Ct. App. 1996). This Court went on to recognize the inherit benefit in having an associate and partner working on a case together. *Taylor v. Taylor*, 333 S.C. 209, 216, 508 S.E.2d 50, 54 (1998). With an associate and partner, a client may be able to save legal fees because the less experienced associate bills at a lower rate and can perform time-consuming duties at a lower cost than the more-experienced, higher priced partner. *Id*. Here, the Trial Court recognized the complexity of this case in its Order Awarding Fees, before stating the case was not complex enough for two attorneys at Trial in its Order Denying MTR. (Order Awarding Fees, p. 3; Order Denying MTR, p. 5). The conclusion that this Trial was not complex enough to warrant two attorneys on behalf of Appellant is without evidentiary support. During the full week of Trial, Appellant introduced 126 exhibits, argued over five (5) pre-trial

motions, and both attorneys participated in the examination of witnesses. Based on a review of the record in this matter, it is erroneous to conclude that it was unreasonable to have an associate and partner representing Appellant during the week-long jury Trial. The detailed invoices attached the Appellant's Affidavit confirm there was no significant duplication of services. (Appellant's Affidavit, Exs. A&B). To penalize Appellant for having two attorneys billing and participating at Trial and throughout the pendency of this matter without material duplication is not supported by any competent evidence.

Third, the Trial Court repeatedly asserted there was a "breakdown of communication between the attorneys" and that the attorneys approached this matter with a "combative nature" leading to unreasonable attorney's fees and costs being incurred. (Order Awarding Fees, pp. 3-4; Order Denying MTR, p. 5). These findings are without factual basis and contrary to the actual record and procedure of this case. As shown in Exhibit A to Appellant's Affidavit, Appellant's counsel sent numerous emails and letters and participated in multiple phone calls with Respondent's counsel throughout this litigation. (Appellant's Affidavit, Ex. A). Furthermore, Appellant's counsel initiated numerous settlement offers, including offers made prior to filing litigation, and throughout the over four (4) years of litigation. (Appellant's Affidavit, Ex. A). At no time was there a breakdown of communication between the attorneys or were any settlement offers made that were not responded to timely by either party. Furthermore, it is unclear what conversation the Trial Court is referencing when it says, "the attorneys only addressed each other in raised voices." (Order Denying MTR, p. 5). Counsel for both parties treated each other with respect and professionalism throughout the four (4) year pendency of this litigation, including throughout the five (5) days of Trial. At no time was the Court asked to intervene in any of the nine (9) depositions, or at any other time during the four (4) years this case was pending, except

for the one occasion Respondent simply failed to provide discovery responses as ordered by the court. There were no improper arguments or disputes between counsel during the Trial. All counsel acted professionally at Trial. There simply is no evidentiary support for this finding because no communication breakdown or unprofessional conduct ever occurred. For the Trial Court to make findings that have absolutely no factual basis is an abuse of discretion.

Fourth, the Trial Court's finding that the "attorneys themselves made this case more complicated than it had to be" is also not supported by the record. (Order Awarding Fees, p. 3). Appellant's witnesses and cross-examination focused entirely on its fairly direct and simple breach of contract and mechanic's lien causes of action and the large Counterclaims ($237,000) asserted by Respondent. Appellant's counsel pre-marked and negotiated a stipulation as to the blanket admissibility of virtually all of the Appellant's 126 exhibits for judicial expediency during Trial, preparing exhibit notebooks for the Court, the witnesses, and opposing counsel. Also, all of the witnesses Appellant's counsel deposed in discovery appeared and testified at Trial. There is simply nothing in the record that any action by Appellant's counsel made the case more complicated than necessary.

Fifth, the Order states that the attorneys allowed this case to "spiral out of control." (Order Awarding Fees, p. 4). Similar to the reasoning outlined above, there is no evidence in the record to support this finding. All discovery and depositions taken in this litigation were of witnesses who appeared and testified at Trial. There were relatively few motions filed throughout the over four (4) years of litigation. As stated above, the amount in controversy was over $284,000. Respondent exercised its legal right to request a jury trial. (Respondent's Demand for Jury Trial). This request significantly contributed to the length and costs of this litigation, especially during COIVD, with this trial being placed on the trial roster numerous times prior to actually being called for trial.

There is simply no evidence in the record to support the Trial Court's conclusion that either counsel allowed this case to "spiral out of control." Thus, the Trial Court's conclusion that the attorneys were to blame for the "excessive cost" of this litigation is factually and legally incorrect and not supported by any competent evidence.

Finally, the Trial Court's award of $24,885.25 was an abuse of discretion as wholly inadequate. In *Shipp*, the court found that an award of $400.00 for the legal services rendered in the preparation and participation in an adversary trial proceeding was so low as to be patently inadequate. *Shipp* at 462-36, 330 S.E.2d at 292. The *Shipp* court concluded that this wholly inadequate award of attorney's fees and costs constituted an abuse of discretion. *Id.* Similarly, the Trial Court's award of $24,885.25 in attorney's fees and costs was patently inadequate when Appellant was one hundred (100%) percent successful on its claim after four (4) years of litigation and a weeklong jury Trial. As discussed above, Appellant's counsel submitted a detailed affidavit indicating its total fees and costs were $156,235.28. (Appellant's Affidavit, p. 5). Further, it is undisputed that the vast majority of the attorney's fees incurred in this matter were associated with Respondent's Counterclaims, valued at $237,000. (Respondent's Amended Pre-Trial Brief, pp. 2-4). The Trial Court's award of $24,885.25 is a mere sixteen (16%) percent of Appellant's total fees and costs incurred in this litigation. The actual attorney's fees and costs incurred during the five (5) day trial alone totaled over $65,330. (Appellant's Affidavit, p. 2).

Accordingly, this matter should be remanded to the Trial Court for the determination of the amount of attorney's fees and costs due to Appellant under its breach of contract claim pursuant to the terms of its contracts with Respondent and to the *Blumberg* Factors.

B. Any Decision by the Trial Court to Not Award Appellant Attorney's Fees and Costs Associated with Its Mechanic's Lien Claim Was an Abuse of Discretion.

Any decision by the Trial Court to not award Appellant attorney's fees and costs associated

with its mechanic's lien claim was an abuse of discretion.

As discussed above, the Trial Court repeatedly states throughout the Order Denying MTR that Appellant's award of attorney's fees is not associated with any one cause of action. (Order Awarding Fees, p. 2; Order Denying MTR, pp. 2-3). Under the Trial Court's prior Order Awarding Fees, it appeared that Appellant's award of attorney's fees was related solely to its mechanic's lien claim based on the Trial Court's statement that "the Court concludes that the Plaintiff was in fact a prevailing party under the mechanics' lien cause of action and is entitled to reasonable attorneys' fees and costs of $24,885.25." (Order Awarding Fees, p. 3). However, in light of the Order Denying MTR, Appellant is compelled to address the rationale for why it is entitled to reasonable attorney's fees and costs under its mechanic's lien claim as well. (Order Denying MTR, pp. 2-3). Appellant recognizes the repetitiveness of this analysis and intends to keep this section brief.

1. The Trial Court's Failure to Rule that Appellant Was Prevailing Party on Its Mechanic's Lien Claim Was an Error of Law.

The Trial Court's failure to rule that Appellant prevailed on its mechanic's lien cause of action was an error of law. As established above, based on the parties' stipulation and the Jury Verdict, Appellant was awarded $24,885.24 on its mechanic's lien claim.

Pursuant to S.C. Code Ann. § 29-5-20(A), the prevailing party in a mechanic's lien case is statutorily authorized to recover its attorney's fees and costs, in an amount determined by the court, associated with enforcing its lien. The determination of the prevailing party under the mechanic's lien statute is based on which party's settlement offer, filed with the court per the terms of S.C. Code Ann. § 29-5-20(C), is closest to the final verdict. *Id.* If there are no formal statutory settlement offers, the plaintiff's final offer of settlement is equal to the amount prayed for in the Complaint and the defendant's negative final offer of settlement is equal to the value of its Counterclaim. *Id. See also Zepsa Const., Inc. v. Randazzo*, 357 S.C. 32, 40-42, 591 S.E.2d 29, 33-

34 (Ct. App. 2004) (contractor was deemed prevailing party and awarded attorney's fees because verdict closer to its settlement offer than the value of owner's counterclaim).

Here, neither party submitted a statutory offer of settlement. Thus, the settlement offer for Appellant was equal to the amount prayed for in the Complaint, $24,885.24,[7] and Respondent's settlement offer was the negative value of its Counterclaim as set forth in its Amended Pre-Trial Brief, -$237,000. (Complaint, p. 5; Respondent's Amended Pre-Trial Brief, p. 2-3). Since the jury returned a verdict in favor of Appellant for $24,885.24, Appellant is clearly the prevailing party under § 29-5-20(A). Accordingly, the Trial Court erred as matter of law when it ruled that it could not determine if Appellant prevailed on its mechanic's lien cause of action.

Because Appellant was the prevailing party on its mechanic's lien claim, the Trial Court should have conducted, at a minimum, an analysis of the reasonable attorney's fees and costs Appellant was entitled to pursuant to this claim under the *Blumberg* Factors and the statutory attorney's fees cap found in S.C. Code Ann. §29-5-20(A). The Trial Court's failure to do so amounts to an abuse of discretion.

2. Any Failure by the Trial Court to Award Appellant Reasonable Attorney's Fees and Costs Under Its Mechanic's Lien Claim Was an Abuse of Discretion.

Any failure by the Trial Court to award Appellant attorney's fees and costs associated with its mechanic's lien claim was an abuse of the Trial Court's discretion because an award of zero ($0.00) dollars is not supported by any evidence and is wholly inadequate. However, assuming the Trial Court's award of $24,885.25 is attributed fully to Appellant's mechanic's lien claim, Appellant has no objection to said award pursuant to the statutory cap limiting the amount of

[7] Prejudgment interest is not included as part of the amount sought by Appellant in its mechanic's lien claim. *Muzingo & Wallace Architects, LLP v. Grand*, 379 S.C. 478, 486, 666 S.E.2d 267, 271 (2009) (Lienor cannot include prejudgment interest at agreed 18% when determining amount of attorney's fees capped at amount of lien.).

attorney's fees that can be awarded to the prevailing party to the amount of the lien. S.C. Code Ann. § 29-5-20(A).

A proceeding to enforce a mechanic's lien is an action at law and the factual findings of the trial judge regarding the amount of an award of attorney's fees and costs will not be disturbed unless the trial court's ruling is based upon an error of law, is without the support of any competent evidence, or the amount of the award is wholly inadequate. *Seckinger* at 386, 483 S.E.2d at 777; *Seabrook at 240, 616 S.E.2d at 34; Bayle* at 128, 542 S.E.2d at 742*; Shipp* at 462-63, 330 S.E.2d at 292. The court must evaluate and make specific findings on the record in support the *Blumberg* Factors or the award should be reversed, and the issue remanded for the trial court to make specific findings of fact. *Blumberg* at 494, 427 at 660.

Here, the Trial Court's analysis of the *Blumberg* Factors does not distinguish between Appellant's breach of contract claim and its mechanic's lien claim. (Order Awarding Fees, pp. 3-5; Order Denying MTR, pp. 3-4). Thus, Appellant raises its same five arguments regarding the Trial Court's *sua sponte* conclusion that the attorneys were to blame for the cost of this litigation. *See* Section I(A)(2).

Assuming the Trial Court's award of $24,885.25 was not associated with Appellant's mechanic's lien claim, this failure to award any attorney's fees is an abuse of discretion as wholly inadequate. *Shipp* at 462-63, 330 S.E.2d at 292. An award of zero ($0.00) dollars is patently inadequate when Appellant was one hundred (100%) percent successful on its mechanic's lien claim after four (4) years of litigation and a weeklong jury trial. Thus, an award of zero ($0.00) dollars is wholly inadequate, in violation of § 29-5-20(A), and not supported by any competent evidence in the record.

Accordingly, the Trial Court's Orders should be modified to confirm Appellant was the prevailing party on the mechanic's lien claim and is entitled to attorney's fees and costs of $24,885.24 under S.C. Code Ann. § 29-5-20(A).

II. THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING GOLSON $7,000.00 IN ATTORNEY'S FEES.

The Trial Court abused its discretion when it awarded Golson $7,000 in attorney's fees and costs because its decision was based upon an error of law and without the support of any competent evidence. (Order Awarding Fees, p. 3; Order Denying MTR, p. 3). Specifically, the Trial Court incorrectly ruled that Golson was a prevailing party under the mechanic's lien statute because no relief under the mechanic's lien statute was ever requested from Golson by Appellant. Additionally, the Trial Court's award is excessive and is not supported by any competent evidence in the record.

A. The Trial Court's Ruling That Golson Was a Prevailing Party Under the Mechanic's Lien Statute, § 29-5-20(A) Was an Error of Law.

The Trial Court erroneously ruled that Golson was a prevailing party under the mechanic's lien statute because no relief directly associated with Appellant's mechanic's lien claim was ever asserted against Golson. (Order Awarding Fees, p. 3; Order Denying MTR, p. 3). Furthermore, the Trial Court incorrectly states that Appellant's counsel admitted at trial that it was in error in naming Golson as party to the mechanic's lien claim. (Order Awarding Fees, p. 5; Order Denying MTR, p. 3). At trial and during the subsequent hearings on the Motions for Fees and Motion to Reconsider, Appellant's counsel repeatedly argued that the explicit allegations against Golson in its mechanic's lien claim were appropriate and correct. (Trial Tr. 4:20-12:3; 41:15-42:7; Motion for Fees Tr. 53:2-61:25).

The only way Golson is entitled to an award of attorney's fees and costs is pursuant to the mechanic's lien statute. The contract between Golson and Appellant did not contain any language that would allow Golson to recover attorney's fees against Appellant. Pursuant to the mechanic's lien statute, if a party defending a mechanic's lien is the prevailing party, he is entitled to an award of attorney's fees and costs of the action, as determined by the court. S.C. Code Ann. § 29-5-20(A). A defendant is a prevailing party if the trial court determines a mechanic's lien cannot be enforced against it based on a victory on the merits and not a dismissal by a mere technicality. *Jasper County Bd. of Educ. v. Jasper County Grand Jury*, 303 S.C. 49, 52, 398 S.E.2d 498, 500 (1990); *Seckinger* at 386, 483 S.E.2d at 777; *Keeney's Metal Roofing, Inc. v. Palmieri*, 345 S.C. 550, 555, 548 S.E.2d 900, 902-03 (Ct. App. 2001).

Here, Golson was dismissed as a party defendant pursuant to his motion for directed verdict at the end of Defendants' case in chief, which was based wholly on the validity of Golson's personal guarantee. (Trial Tr. 4:20-12:3; 41:15-42:7). Specifically, the Trial Court ruled that Appellant and Respondent altered the terms of the underlying contract in such a way as to invalidate Golson's personal guarantee. (Id.). Thus, Golson no longer had any interest in the case and was dismissed as a defendant. (Id.). Golson was named in the litigation based solely on his role as a personal guarantor to the underlying contract. The only reference to Golson as a party responsible for monetary damages under Appellant's Complaint was wholly separate from the mechanic's lien statute. In fact, there are only two (2) references to Golson in the mechanic's lien cause of action in the Complaint, as follows:

> 18. Plaintiff is entitled to a determination of the monies due under its Mechanic's Lien and the payment of same under the Bond. **If the Bond amount is not sufficient, Plaintiff is entitled to a judgment against Defendants GMK and Golson**. (Emphasis added)

(Complaint, p. 5). The second reference to Golson is in the prayer in the Complaint, where the following relief was requested

> 2. Second Cause of Action
>
> (a) Enter judgment foreclosing the mechanic's lien against the Bond in the principal amount of $24,885.24, plus interest at 1.75% per month and attorney's fees and costs; and
>
> (b) **If said Bond is not sufficient to pay said judgment, enter judgment against Defendants GMK Associates Design Build Division, Inc. and Frank Golson**. (Emphasis added).

(Id.).

Thus, the only reference to Golson as a party responsible for monetary damages under Appellant's mechanic's lien cause of action was in fact appropriate and wholly separate from the mechanic's lien statute. No relief directly associated with the foreclosure of the mechanic's lien claim was ever asserted against Golson. The only allegations which reference Golson accurately stated that if the mechanic's lien action was successful and the Bond amount was not sufficient to pay the full judgment amount, Golson may be liable under his personal guarantee in the contract between Appellant and Respondent. (Id.). The Trial Court's dismissal of Golson was a determination of the merits of Appellant's breach of contract claim only. (Trial Tr. 4:20-12:3; 41:15-42:7). This determination had no impact on Appellant's mechanic's lien claim because no monies or claims were ever sought directly against Golson as a party to the mechanic's lien claim. Thus, Golson cannot be a "prevailing party" under § 29-5-20(A) and is not entitled to an award of attorney's fees. S.C. Code Ann. § 29-5-20(A). Accordingly, the Trial Court erroneously ruled that Golson was a prevailing party under § 29-5-20(A) and Golson's award of attorney's fees and costs should be reversed. (Order Awarding Fees, p. 3; Order Denying MTR, p. 3).

B. <u>The Trial Court's Award of $7,000.00 in Attorney's Fees to Golson Is Not Supported by Any Competent Evidence.</u>

If Golson is somehow deemed a prevailing party under § 29-5-20(A), the amount of the award is excessive under the *Blumberg* Factors and is not supported by any competent evidence in the record or any factual findings in the Orders.

Pursuant to South Carolina law, the court must consider and make specific findings of fact for each of the *Blumberg* Factors. *Blumberg* at 494, 427 S.E.2d at 661. Here, the Trial Court's Orders lack any findings of fact relating to any of the *Blumberg* Factors as it pertains to the Golson award. (Order Awarding Fees, pp. 3-5; Order Denying MTR, pp. 3-4). Instead, the Orders merely state that the Trial Court examined the *Blumberg* Factors without making any evidentiary findings. (Id.). This is an error of law.

A thorough review of the evidence presented by Respondent's counsel in support of Golson's Motion for Fees reveals that an award of $7,000.00 in attorney's fees and costs is excessive and not supported by the evidence for three main reasons.

First, the nature, extent, and difficulty of the services rendered to Golson in connection with the mechanic's lien claim does not support an award of $7,000. Any award to Golson must be directly related to his defense of the mechanic's lien claim and cannot include fees or costs related to his breach of contract defense. *EFCO Corp. v. Renaissance on Charleston Harbor, LLC*, 370 S.C. 612, 620, 635 S.E.2d 922, 926 (Ct. App. 2006) (an award of attorney's fees is limited to those actually incurred in defending the lien); *Cedar Creek Properties v. Cantelou Assocs., Inc.* 320 S.C. 483, 487, 465 S.E.2d 774, 776 (Ct. App. 1995) (the amount of an award of attorney's fees should be limited to those actions specifically involving the lien). As previously stated, Appellant did not make any allegations against Golson in connection with its mechanic's lien claim. Furthermore, the vast majority of the weeklong trial and the four (4) years of litigation were

related to Respondent's Counterclaims. These Counterclaims did not relate in any way to Golson's defense of the mechanic's lien claim. (Respondent's Answer, pp. 2-3). Throughout this litigation Golson was never deposed, never referenced in any of the substantial discovery requests exchanged, never filed any motions, and did not appear at mediation or trial. In fact, beyond the basic Answer filed by a firm other than Respondent's counsel, there appear to be no other legal services rendered in relation to the defense of the mechanic's lien action on behalf of Golson. Thus, the nature, extent, and difficulty of Golson's defense of Appellant's mechanic's lien claim does not justify an award of $7,000.

Second, Golson's counsel presented no evidence regarding the time and labor devoted to his defense of the mechanic's lien claim. The only Affidavit submitted by Respondent's counsel in support of Golson's Motion for Fees did not contain a single mention of Golson. (Respondent's Affidavit of Attorney's Fees). Further, there was no evidence presented that Golson had any obligation to pay or had actually paid any legal fees or costs associated with this litigation at all. (Motion for Fees Tr. 31:17:24; 63:1-68:1). Finally, there was no affidavit submitted by or reference made to Golson's prior counsel in support of his Motion for Fees. (Respondent's Affidavit of Attorney's Fees).

A conclusory statement of time expended and hourly rate charged is insufficient to provide the evidentiary basis necessary to support an award of attorney's fees and costs. *Griffith v. Griffith*, 332 S.C. 630, 644, 506 S.E.2d 526, 534 (Ct. App. 1998); *Johnson v. Johnson*, 288 S.C. 270, 277-78, 341 S.E.2d 811, 816 (Ct. App. 1986) (one-half page statement of estimated time devoted to case, coupled with vague testimony of attorney as to time and labor was insufficient to support award of attorney's fees). Where there is no evidence that attorney's fees and costs were actually incurred by a party, there cannot be an award for fees and costs assessed against another party.

Williamson v. Middleton, 383 S.C. 490, 495, 681 S.E.2d 867, 870 (2009).

In *Williamson*, the defendant was the prevailing party in a contract dispute and was statutorily entitled to an award of reasonable attorney's fees and costs. *Id.* However, upon a review of record, the court found that there was no competent evidence that defendant actually incurred attorney's fees and costs based on the testimony of defense counsel that there was no fee agreement, no invoices sent to defendant, and no fees charged or collected throughout the litigation. *Id*. The court found there was no competent evidence despite defense counsel's testimony that someday defendant may pay a fee based on a moral obligation. *Id*. at 496, 681 S.E.2d at 870.

Similar to the facts in *Williamson*, at the hearing, Respondent's counsel stated that no invoice had ever been sent to Golson or any party in this litigation. (Motion for Fees Tr. 31:17:24; 63:1-68:1). The legal statement attached to his affidavit was a conclusory summary prepared solely for the Motions for Fees hearing and was not actually a real bill or account statement. (Id.) It was never sent to or paid by any party, including Golson. (Id.) In fact, as admitted by Respondent's counsel, this legal statement was rife with material, substantive errors throughout. (Id.) There were many entries where Respondent's counsel charged for depositions he admittingly did not attend, charged to travel to depositions that were conducted virtually, and charged for filing pleadings his firm did not prepare or file, among other significant errors. (Id.) Respondent's counsel even admitted that his hourly rate as stated in the legal statement was incorrect and was not applicable to all three of his clients in this matter or to all of the work listed on the legal statement. (Id.) In its Orders, the Trial Court never mentioned the numerous errors in Respondent counsel's affidavit of attorney's fees. Instead, the Trial Court relied solely on this incorrect affidavit to determine, based on its own arbitrary mathematical formula, that Golson was entitled to roughly one-third (1/3) of

the total amount of fees allegedly incurred by Respondent's counsel during trial. This award is excessive and without any evidentiary support. *Utilities Const. Co. v. Wilson*, 321 S.C. 244, 250, 468 S.E.2d 1, 4 (Ct. App. 1996) (trial court's award of fees was excessive because it included time spent defending causes of action on which counsel was not successful).

Third, as discussed above, Appellant contends that Golson was not a prevailing party in the mechanic's lien action. Therefore, the results obtained by Respondent's counsel, on behalf of Golson, do not justify an award of $7,000 in attorney's fees and costs in connection with Golson's defense of the mechanic's lien action.

Accordingly, there is no competent evidence to support an award of $7,000 to Golson. Thus, this award was an abuse of the Trial Court's discretion and should be reversed.

CONCLUSION

For the reasons set forth above, the Trial Court erred as a matter of law in failing to determine Appellant was entitled to attorney's fees and costs under both of its causes of action. Accordingly, the Trial Court's Orders should be modified to confirm Appellant was entitled to fees under both its breach of contract claim and mechanic's lien claim. Further, the Trial Court abused its discretion in awarding Appellant only $24,885.25 in attorney's fees and costs associated with its successful breach of contract claim, mechanic's lien claim, and defense of Respondent's Counterclaims. Accordingly, this matter should be remanded to the Trial Court for a determination of the appropriate amount of attorney's fees and costs Appellant is entitled to recover under each cause of action pursuant to the *Blumberg* Factors and S.C. Code Ann. § 29-5-20(A). Specifically, the Trial Court's Orders should be modified to confirm Appellant was the prevailing party on the mechanic's lien claim and is entitled to attorney's fees and costs of $24,885.24 under § 29-5-20(A).

Additionally, the Trial Court erred as a matter of law in ruling that Golson was a prevailing party in the mechanic's lien claim. Further, the Trial Court's award of $7,000 is not supported by the evidence in the record. The award of attorney's fees and costs to Golson should be reversed or in the alternative remanded to the Trial Court as excessive.

Respectfully submitted,

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