

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas, 3RD Circuit

R. Ferrell Cothran, Jr., Circuit Court Judge

COMMON PLEAS CASE NOS.: 2018-CP-45-00258 and 2019-CP-45-00193

Appellate Case No. 2023-001087

Bank of Newington, Appellant-Respondent,

v.

LHSC, Inc., Williamsburg County Development Corporation,
Viking Fire Protection, Inc. of the Southeast, and HBC, Inc.,
Defendants,

of which Williamsburg County Development Corporation and
HBC, Inc. are the Respondents-Appellants,

AND

HBC, Inc., Cross-Claimant, Respondent-Appellant,

v.

LHSC, Inc., Cross-Claim Defendant,

AND

HBC, Inc., 3rd Party Plaintiff, Respondent-Appellant,

v.

Louis Hornick, II, Bank of Newington, and Blake Fickling,
3rd Party Defendants,

AND

Williamsburg County Development Corporation, Cross- Claimant, Respondent-

Appellant,

v.

LHSC, Inc., Cross-Claim Defendant,

AND

Williamsburg County Development Corporation, 3rd Party Plaintiff,
Respondent-Appellant,

v.

Louis Hornick, II, and Blake Fickling, 3rd Party Defendants.

INITIAL BRIEF OF RESPONDENT-APPELLANT HBC, INC.

Wesley D. Few (S.C. Bar # 15565)
Wesley D. Few, LLC
Post Office Box 9398
Greenville, SC 29604
(864) 527-5906 | wes@wesleyfew.com

Attorney for Respondent-Appellant HBC, Inc.

November 6, 2023

Greenville, South Carolina

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STATEMENT OF ISSUES

- I. DID THE TRIAL COURT COMMIT ERROR BY NOT RULING ON HBC'S CLAIMS FOR INTERFERENCE WITH CONTRACT AND PUNITIVE DAMAGES WITH RESPECT TO BANK OF NEWINGTON AND BLAKE FICKLING, IN VIEW OF ITS EXTENSIVE FINDINGS OF FACT IN SUPPORT OF THE SAME.

- II. DID THE TRIAL COURT COMMIT ERROR IN ITS JUNE 2, 2023 ORDER IN GRANTING WINDFALL TO THE BANK OF NEWINGTON IN SETTING OFF HBC'S JUDGMENT AMOUNT BY SUBSTANTIALLY MORE THAN THE BANK OF NEWINGTON PAID VIKING TO GET VIKING OUT OF THE CASE, AS PART OF ITS 11TH HOUR TRIAL STRATEGY TO PORTRAY VIKING AS THE "ONLY INNOCENT" PARTY ?

- III. DID THE TRIAL COURT COMMIT ERROR IN ITS JULY 25, 2023 ORDER BY AMENDING THE JUDGMENT ENTERED JUNE 2, 2023 AS IT RELATED TO THE DATE AT WHICH POST-JUDGMENT INTEREST WAS OWED TO HBC EVEN THOUGH NO ISSUES WERE RAISED RELATED TO HBC AFTER ENTRY OF THE JUNE 2, 2023 ORDER, AND (SIMILARLY) BY NOT RULING ON HBC'S RULE 59 MOTION, FILED AUGUST 2, 2023, AS IT RELATED TO SAID CHANGES TO THE JUNE 2, 2023 ORDER?

STATEMENT OF CASE

Procedural History

Viking Mechanics Lien Action (2018-CP-45-00258)

On June 8, 2018 Viking Fire Protection, Inc., of the Southeast ("Viking"), filed its Mechanics Lien action (2018-CP-45-00258) against the property known as 77 Commerce Drive, Kingstree, South Carolina 29556 (the "Property"). Viking was a sub-contractor to Respondent-Appellant HBC, Inc. ("HBC"). Viking joined the following parties in its '258 action: (i) LHSC, Inc. (property owner, hereafter "LHSC"); (ii) HBC, Inc. (general contractor); (iii) Bank of Newington (lender and construction loan servicer pursuant to USDA Business and Industry Guaranteed Loan No. 46-045-***-**-5705, hereafter "BON"); and (iv) Williamsburg County Development Corporation (2nd mortgage holder and seller of the subject property to LHSC,

hereafter “WCDC”). On July 10, 2018, LHSC and Bank of Newington filed their Answer, Cross-Claim, and Counter-Claim, seeking “indemnity” against HBC for Viking’s claims against LHSC.

On July 31, 2018, Viking filed its Summons and Amended Complaint in the ‘258 Mechanics Lien action. On August 22, 2018, HBC filed its Answer to Defendant LHSC, Inc.’s Cross-claim and HBC, Inc.’s Counterclaim for Foreclosure of Mechanics Lien. On August 30, 2018, HBC filed its Answer to Viking’s Amended Complaint.

On August 17, 2022, Viking obtained summary judgment against HBC on its claim for breach of contract for failure to pay Viking for its work on the sprinkler system at the Property. HBC conceded at a hearing on August 4, 2022 on Viking’s Motion for Summary Judgment (filed Dec. 12, 2021), it had no direct defenses to the claim. On August 17, 2022, Viking obtained an order granting it judgment against HBC in an amount of \$257,538.00, consisting of \$181,479.00 in principal / contract balance and pre-judgment interest in an amount of \$76,059.00. Viking recorded its Transcript of Judgment in an amount of \$257,538.00 on August 22, 2022.

On September 22, 2022, the trial court entered its order on HBC’s Motion to Reconsider, filed July 7, 2022, and ordered the BON to provide additional discovery. The discovery order included the identities of the investors in the 90 % guaranteed portion of the USDA Loan, communications and documents related to the USDA, and privilege logs. BON provided an additional 5,000 + pages of documents and information in October 2022. The parties conducted a 30(b)(6) deposition of the BON on Dec. 1, 2022.

Bank of Newington Foreclosure Action (2019-CP-45-00193)

On June 8, 2019, Bank of Newington filed its foreclosure action (2019-CP-45-00193) naming the following defendants: LHSC, Inc. (property owner), Williamsburg County Development Corporation (seller and 2nd mortgage holder), Viking Fire Protection, Inc. of the

Southeast (sprinkler system sub-contractor), and HBC, Inc. (general contractor). On June 3, 2019, HBC filed its Answer, Cross Claims and 3rd Party Claims. HBC brought eleven (11) claims as follows: (1) Lien Subordination (in Equity against BON and WCDC); (2) Intentional Interference with Contract (against BON, Louis Hornick, II and Blake Fickling); (3) Breach of Contract Accompanied by Fraud (against LHSC and Hornick); (4) Breach of Contract - Covenant of Good Faith Fair Dealing (against LHSC, Fickling, and BON); (5) Veil Piercing (in Equity against LHSC and Hornick); (6) Unjust Enrichment (in Equity against BON, LHSC and Hornick); (7) Alter Ego (in Equity against BON, LHSC, Hornick and Fickling); (8) Civil Conspiracy (against Hornick and Fickling); (9) Conversion (against Hornick and Fickling); (10) Fraud (against Hornick and LHSC); and (11) Promissory Estoppel (against Hornick and LHSC).

On Nov. 21, 2022, WCDC filed its Motion to Amend in the '193 case to add claims against BON, as follows: (i) Lien Subordination (In Equity against BON and LHSC); (ii) Breach of Contract Accompanied by Fraud (against BON, Hornick and LHSC); (iii) Veil Piercing (in Equity versus BON, LHSC and Hornick); (iv) Unjust Enrichment (in Equity versus BON, LHSC and Hornick); (v) Fraud and Misrepresentation (versus BON, LHSC and Hornick); (vi) Constructive Trust (in Equity versus BON, LHSC and Hornick); (vii) Conversion (versus BON, LHSC, Fickling and Hornick); and (viii) Tortious Interference with Contract (versus BON, Fickling, LHSC and Hornick).

Bank of Newington Settles with Viking

On Dec. 2, 2022, Viking filed its Motion to Amend in the '193 case to add claims against BON, as follows: (i) Lien Subordination (In Equity against Bank of Newington); and (ii) Negligent Loan Servicing. On Dec. 9, 2022, the trial court entered its order allowing Viking and WCDC to amend their answers to assert counterclaims against the BON. On Dec. 9, 2022,

Viking accepted a settlement whereby it received \$181,500.00 from BON in exchange for dismissal of its proposed Amended Answer and Counterclaims, and also agreed to assign its judgment against HBC to BON. On Dec. 21, 2022, BON recorded its Notice of Assignment of Judgment in Williamsburg (2018-CP-45-00258) and Aiken Counties (2022-CP-02-01957). BON has not released or satisfied the judgment.

HBC's Offer of Settlement Under S.C. Code Ann. § 29-5-10

On Jan. 17, 2023, HBC filed its Offer of Settlement under S.C. Code Ann. § 29-5-10(b) in an amount of \$262,496.50 in the Consolidated Cases.

Non-Jury Consolidated Trial, Jan. 23-25, 2023

On Monday, Jan. 23, 2023, HBC, Viking and BON began a bench trial before The Honorable R. Ferrell Cothran, Jr., in Williamsburg County. Counsel to Viking appeared at the start of the trial and advised the trial court of its settlement with BON. No witnesses were called to testify at trial from Viking, but BON did offer some deposition testimony from Viking employee(s). Following conclusion of the testimony at trial, on Jan. 25, 2023, Judge Cothran asked the parties to each submit their Post-Trial Memoranda on Damages Amounts. HBC submitted its Post-Trial Memoranda on Damages Amounts on Jan. 30, 2023.

On Feb. 7, 2023, Judge Cothran instructed counsel to WCDC to prepare an initial draft of the order. That email stated, "HBC is entitled to recover a total of \$620,150.15. This figure represents \$390,212.92 for the mechanics lien plus interest, and \$229,937.22 for attorneys' fees and costs." On March 13, 2023, the trial court entered its order awarding HBC in summary, as follows:

Escrowed foreclosure proceeds shall thereafter be released to HBC, Inc. in the amount of \$620,150.14, plus interest from and after entry of this order and judgment at the statutory rate. However, this amount is to be offset in the amount of \$181,479.00 for the Viking Fire Protection, Inc. of the Southeast judgement, plus interest from and after entry of this order and judgment at the statutory rate, which was purchased by The Bank of Newington on or about December 9, 2022.

Id. at p. 22 of 24.

On March 22, 2023, BON and Blake Fickling filed their Motion to Amend for a New Trial and to Reconsider. On May 12, 2023, a hearing was held on the BON's Motion to reconsider filed March 22, 2023. On June 2, 2023, The trial court entered its Amended Order increasing the offset of the Viking judgment against HBC from \$181,479.00 to \$257,538.00, thereby also reducing the amount HBC was to receive from the escrowed funds from \$438,671.14 with interest from March 13, 2023 to \$362,612.14 with interest from June 2, 2023. Neither HBC nor BON challenged the June 2, 2023 order by way of any timely filed Motion under Rule 59. WCDC filed its Motion to Alter/Amend Judgment on June 12, 2023.

On June 29, 2023, BON filed its Notice of Appeal of the trial court's March 13, 2023 and June 2, 2023 orders.

On July 25, 2023, the trial court entered its order Denying (1) Bank of Newington's Motion for Stay of Enforcement of Order, and (2) Williamsburg County Development Corporation's Motion to Alter/Amend Judgment, and to Disburse all Funds in Escrow. In its July 25, 2023 order, the trial court changed the date at which interest would accrue by 53 days for HBC from June 2, 2023 to July 25, 2023.

On July 26, 2023, HBC filed its Notice of Cross-Appeal in the Consolidated Cases, seeking appeal of the trial court's orders dated: (1) March 13, 2023, (2) June 2, 2023, and (3) July 25, 2023. On July 26, 2023, WCDC also filed its Notice of Appeal.

On August 2, 2023, HBC filed its Motion to Alter or Amend, seeking redress of the changed interest accrual date in the July 25, 2023 order.

Undecided Claims Remain in Trial Court

As of the filing of this Initial Brief, the trial court has yet to rule on ten of HBC's eleven claims set forth above in the '193 action. The trial court has also yet to rule on seven of WCDC's eight claims above in the '193 action. The only claims resolved by the trial court are the Lien Subordination claims of HBC and WCDC.

Defaults and Judgments

The BON obtained a judgment against Louis Hornick, II on the USDA Guaranty on Sept. 25, 2019 in an amount of \$3,932,124.68 (2019-CP-45-00325). Hornick and LHSC are in default on all claims in the '193 action as to all parties and LHSC is in default in the '258 action for no longer having legal counsel.

Background Facts / Project Timeline

LHSC obtained a Conditional Commitment from the USDA on Feb. 1, 2017, for a 90 % guaranteed loan in an amount of \$3,535,535.00. The loan was to be funded by the BON. On Feb. 2, 2017, HBC and LHSC entered into a contract for HBC to provide construction services in an amount of \$1,600,000.00. On Feb. 24, 2017, the BON, and representatives of LHSC met in Columbia to close on the USDA guaranteed loan.

Prior to closing on the loan on Feb. 24, 2017, the BON arranged for a sale of the 90 % guaranteed portion to approximately 6 other financial institutions. The sale of the 90 % portion closed financially on March 8, 2017, resulting in the BON receiving approximately

\$3,630,640.90 in exchange for a 90 % share of the loan, or \$3,181,981.50. This represented a net gain to the BON in an amount of \$448,659.40. At that point in time, the BON still had a 10 % share in the USDA loan, or \$353,535.00, and had received a 1 % origination fee at closing in an amount of \$35,353.50. Over the course of servicing the loan pursuant to the USDA required provisions from Feb. 2017 to approximately April 2018, when it declared the loan in default, the BON received its 10 % share of the interest payments made from the Borrower's loaned funds in an amount of approximately \$25,472.32. (*See e.g., HBC Trial Exs.* 11 and 24, BON April 20, 2018 letter to USDA).

On or about July 28, 2017, the WCDC representative sent a check to the BON in an amount of \$350,000.00 representing grant funds as set forth in the USDA's Conditional Commitment as follows: (i) \$150,000.00 from the S.C. Dept. of Commerce, and \$200,000.00¹ from the WCDC.

HBC completed the construction in November 2017 to the point that the Williamsburg County Building Inspector advised all that he needed to do was verify that the installed sprinkler system would adequately cover the manufacturing equipment to be installed once paid for from the Bank's funds. The equipment was never paid for, delivered or installed. The equipment manufacturer eventually sued LHSC and Louis Hornick, II in Greenville County and obtained a judgment in an amount of \$291,858.19 (Case No. 2020-CP-23-02080).

In late 2017, the BON withheld payment to HBC on an invoice it initially submitted on Nov. 28, 2017. During that time period, the BON advised there were not enough funds in the

¹ According to the Feb. 1, 2017 Conditional Commitment from the USDA (*HBC Trial Ex.* 1), \$100,000.00 of this \$350,000.00 was to come from an entity identified as Palmetto Development Group, however, testimony established the WCDC paid that amount instead of the Palmetto Development Group.

USDA loan account to pay HBC and its sprinkler contractor, Viking. Everyone knew that Viking was owed roughly 2/3 of the amount of HBC's Invoice no. 8 in an amount of \$273,975.00.

Negotiations transpired as to how to get the contractors paid. It was agreed that the WCDC would fund an additional amount of \$80,000.00 to pay HBC and its sub-contractor, Viking. The WCDC provided those loan funds in early 2018. The BON's documents show a net credit to the LHSC Control Account for the USDA loan in an amount of \$79,855.00 in Feb. 2018.

HBC and Viking remained unpaid until Dec. 9, 2022, when the BON settled with Viking as described above. Viking served its Notice of Lien on March 14, 2018. In response, on March 27, 2018, the BON and LHSC, who were each represented by the Haynesworth Sinkler Boyd Law Firm at the time, sent a proposed letter to HBC, asking HBC to advocate on behalf of LHSC and BON in laying the blame for the failed project on Viking. (HBC Trial Ex. 18). HBC refused. (HBC Trial Ex. 19). The litigation as set forth above ensued.

STANDARD(S) OF REVIEW

“In an action in equity, tried by the judge alone, without a reference, on appeal the Supreme Court has jurisdiction to find facts in accordance with its views of the preponderance of the evidence.” *Townes Assoc., Ltd. v. Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976) (citing *Crowder v. Crowder*, 246 S.C. 299, 143 S.E.2d 580 (1965)). “However, an appellate court still affords a degree of deference to the trial court because it was in the best position to judge the witnesses' credibility.” *Sullivan v. Brown (In re Estate of Kay)*, 423 S.C. 476, 480, 816 S.E.2d 542, 544-545 (2018) (citing *Lewis v. Lewis*, 392 S.C. 381, 391, 709 S.E.2d 650, 655 (2011)).

“In an action at law, ‘we will affirm the master’s factual findings if there is any evidence in the record which reasonably supports them.’” Johnson v. Little, 426 S.C. 423, 428, 827 S.E.2d 207, 210 (Ct. App. 2019) (citing Query v. Burgess, 371 S.C. 407, 410, 639 S.E.2d 455, 456 (Ct. App. 2006)). “An action seeking damages for breach of contract is also an action at law and the trial judge's findings of fact will be upheld unless without support.” Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 589, 538 S.E.2d 15, 20 (Ct. App. 2000) (citing Brown v. Allstate Ins. Co., 337 S.C. 499, 523 S.E.2d 807 (Ct. App. 1999)).

The “jurisdiction of the court to set off one judgment against another is equitable in its nature, and should be exercised so as to do justice between parties.” Green v. Bauerle, 2023 S.C. App. LEXIS 122*; 2023 WL 6450954 (Oct. 4, 2019) (citing Riley v. Ford Motor Co., 414 S.C. 185, 195, 777 S.E.2d 824, 830 (2015) (quoting Rookard v. Atlanta & Charlotte Air Line Ry. Co., 89 S.C. 371, 71 S.E. 992, 995 (1911))).

“This Court reviews questions of law *de novo*.” Santoro v. Schulthess, 384 S.C. 250, 272, 681 S.E.2d 897, 908 (Ct. App. 2009) (citing Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 564, 658 S.E.2d 80, 90 (2008)). “In other words, a reviewing court is free to decide questions of law with no particular deference to the trial court.” Id. (citing Hunt v. Forestry Commission, 358 S.C. 564, 569, 595 S.E.2d 846, 848-49 (Ct. app. 2004)).

SUMMARY OF ARGUMENT

- I. The trial court committed error in making its extensive findings of fact, yet failing to rule on all claims in the case, including HBC's legal claims against the BON, Blake Fickling, LHSC and Louis Hornick, II.
- II. The trial court committed error by granting the BON a windfall based on its newfound trial strategy to pay Viking and take an assignment of Viking's judgment.
- III. The trial court acted outside of its jurisdiction and committed error in altering its judgment after the ten day period expired for filing a motion to alter or amend.

ARGUMENT

I. The trial court retained jurisdiction of legal and equitable claims

As set forth above, HBC filed and served eleven separate claims in its Answer, Counterclaim and 3rd Party Claim filed June 3, 2019. However, the trial court has only ruled on the issue of Lien Priority / Lien Subordination, leaving ten of HBC's claims unresolved.

This Court should remand the case back to the trial court to decide the unresolved claims in view of its extensive Findings of Fact. (Order dated March 13, 2023, at pp. 4-18). *See e.g., Dawkins v. Union Hosp. Dist.*, 408 S.C. 171, 179, 758 S.E.2d 501, 505 (2014) (remanding case for consideration of claims not ruled upon due to misclassification of the same by trial court).

II. Bank of Newington cannot be allowed to reap benefits of its malfeasance

As is shown in HBC's Trial Exhibits 18 and 19, BON sent HBC a letter on March 27, 2018, that in no uncertain terms attempts to place the blame on the failed project on Viking, despite the issuance of a Certificate of Occupancy (HBC Trial Ex. 21) and 100 % approval of the

sprinkler system it installed. For example, the BON's March 27, 2018 letter stated, "Viking Fire Protection appears to have contributed significantly to the approximately 6 month delay of Substantial Completion." (*Id.*). In contrast, at trial, counsel to the BON actually argued to the trial court that Viking, which it had since settled with and taken an assignment of Viking's judgment against HBC, was the "only innocent party." (Trial Transcript, arguments of counsel).

The record shows the BON had sufficient funds to pay HBC's Pay Application No. 8 (submitted Nov. 28, 2017) in their LHSC Control Account for the subject USDA loan in Dec. 2017. However, instead of paying the amounts due and approved by their 3rd party review company, Partner (HBC Trial Ex. 14), the BON and its former employee, Blake Fickling, actively feigned good-faith negotiations with HBC and Viking, including tricking WCDC to loan an additional \$80,000.00 to the project. This additional \$80,000.00, bringing the WCDC's total cash contributions to the project up to \$280,000.00, was for the sole purpose of paying HBC and Viking, allegedly without violating the terms of the USDA Conditional Commitment. HBC and Viking received none of those additional funds. Instead, the BON and Fickling squandered the remaining funds in the LHSC Control Account on matters clearly outside the scope of the USDA's allegedly sacred Conditional Commitment categories. (HBC Trial Exs. 1, 7, 10 and 43; see e.g., FOF 35, March 13, 2023 order at pp. 14 of 23).

By March 8, 2017, BON had received gross revenues on this USDA loan in an amount of at least \$484,012.90, and still owned a 10 % share in the loan, valued at \$353,535.00. Instead of paying the contractors for the work that was undeniably complete as far as they could take it without equipment delivery, the BON continued to pay itself and its "investors" interest at 6.5 % from the same pool of funds the money to pay HBC was to come from. (HBC Trial Ex. 7). In addition, the BON inexplicably continued to pay Louis Hornick, II his \$200,000.00 annual salary

from the LHSC Control Account, necessarily depleting the funds that were previously available to pay HBC (and Viking). (See e.g., FOF's 26, 28, 30, 33 and 37, March 13, 2023 order). The BON also paid out Hornick's continued expense requests, even though it knew the equipment was not paid for and was not going to ever be delivered. (See e.g., FOF 31, March 13, 2023 order).

Despite all of the above and the other facts as set forth in the trial court's orders, the BON jumped on the opportunity in Dec. 2022 to settle with Viking and to attempt to re-cast Viking as the "only innocent party" at trial. (HBC Trial Exs. 18 and 19). In doing so, the BON, obviously a bank with more liquidity than any of the other parties, not to mention profits from sale of the 90 % guarantee and funds in their LHSC Control Account, decided to pay Viking a "discounted" amount of \$181,500.00, and claim the full amount of Viking's \$257,538.00 judgment back against HBC at trial.

HBC respectfully requests that the amount of the setoff applied to its judgment amount against the BON and Fickling be reduced to be in line with the equitable principles recently set forth in Green v. Bauerle, 2023 S.C. App. LEXIS 122, *6; 2023 WL 6450954, App. Case No. 2020-00046, Opinion No. 6029 (Oct. 4, 2023) (stating, the "jurisdiction of the court to set off one judgment against another is equitable in its nature, and should be exercised so as to do justice between parties."). Here, however, the BON has forced these parties in to litigation for over five years, and then, at the 11th hour, decides it will pay Viking, not coincidentally immediately after Viking filed its Motion to Amend to add claims against the BON for Lien Subordination and Grossly negligent Loan Servicing on Dec. 2, 2022.

The entire premise behind baiting HBC and Viking into seeking the additional \$80,000.00 from the WCDC in late 2017 and early 2018 was that everyone knew and understood

HBC, as a small general contractor did not have the funds to advance \$181,479.00 to Viking without first being paid by LHSC from the funds the BON had on hand from the USDA loan. If HBC had been the one to pay Viking \$181,500.00 in December, 2022, it would have received the benefit of the difference between the full amount of the judgment, \$257,538.00 plus interest since August 17, 2022, and would not also be dealing with a bank like the BON who still will not release or satisfy their assignment of judgment against HBC.

This result is grossly unfair to HBC in comparison to the benefits reaped by the BON, which also avoided the need to have to also pay Viking for its attorneys' fees and costs related to the '258 action and its mechanics lien claim. HBC respectfully requests that the issue of set off be decided by this Court based on the record before it, so as not to reward parties like the BON who cause litigation and then seek to buy their way out of it with the funds of others and in so doing, receive the benefit of the use of the funds improperly withheld. In the alternative, the issue of set off could be remanded for reconsideration in view of principles of justice and equity. HBC submits the original setoff amount in an amount of \$181,479.00 in the March 13, 2023 order was more equitable as between the parties in view of BON's conduct creating the situation.

III. Trial Court lacked jurisdiction to alter June 2, 2023 order as related to HBC

In this part 3 of HBC's appeal, the Standard of Review is *de novo*, as set forth above. In *Overland v. Nance*, 423 S.C. 253, *255; 815 S.E.2d 431, 433 (2018), our Supreme Court made it abundantly clear, a "trial court does not have the power to alter or amend a final order if more than ten days passes and no Rule 59(e) motion has been served." Here, the trial court issued its first dispositive order on the claims tried in January 2023 on March 13, 2023. The BON challenged that order in its March 22, 2023 Rule 59 Motion. The trial court then issued its

Amended Order on June 2, 2023. The only issue raised by any party in response to the Amended Order issued on June 2, 2023 was by WCDC, in its June 12, 2023 Rule 59 Motion.

Accordingly, without a timely filed Rule 59 motion before the trial court as it related to the June 2, 2023 order and the award to HBC, the trial court was without jurisdiction to alter any portion of that order other than on the specific issues raised by the WCDC. Therefore, interest is to run on HBC's judgment amount as against the BON from June 2, 2023, and not from July 25, 2023. These same issues were raised by HBC in its August 2, 2023, Rule 59 Motion, but have not yet been ruled upon by the trial court.

CONCLUSION

This Court should remand the case back to the trial court for a decision on the record on all pending claims of HBC, including its legal claims for Intentional Interference with Contract by the BON and Blake Fickling, as well as for judgment to be entered as against LHSC and Louis Hornick, II, each of which are in default on HBC's equitable and legal claims.

HBC respectfully requests that the setoff amount to be applied in favor of the BON be applied equitably and in view of the principles set forth in *Green v. Bauerle*, specifically so as not to encourage future litigants to engage in the type of conduct the BON has displayed here, namely creating a dispute and then taking multiple inconsistent positions, while enjoying the benefit of holding on to its funds. In this instance, the BON has enjoyed the full benefit of its conduct, at a discount not available to HBC.

On the third and final issue of this appeal, HBC respectfully requests remand with instructions to award post-judgment interest from June 2, 2023, at a minimum, as the trial court lacked jurisdiction to change the June 2, 2023 order as it related to HBC.

WESLEY D. FEW, LLC

s/Wesley D. Few/
S.C. Bar Id. No. 015565
P.O. Box 9398
Greenville, South Carolina 29604
wes@wesleyfew.com | 864-527-5906

ATTORNEYS FOR RESPONDENT-
APPELLANT HBC, INC.

November 6, 2023
Greenville, South Carolina