

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM UNION COUNTY
Court of Common Pleas

SC Court of Appeals

Daniel D. Hall, Circuit Court Judge

Appellate Case No. 2023-000572

Fast Formliners Company Appellant / Respondent,

vs.

Construction Resource Group, Inc. Respondent / Appellant,

**INITIAL OPENING BRIEF OF RESPONDENT / APPELLANT
IN RESPONSE TO THE APPEAL TAKEN BY APPELLANT / RESPONDENT**

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STATEMENT OF THE ISSUES ON APPEAL

- I. Whether Formliners has waived its right to contractual attorneys' fees.
- II. Whether Formliners' appeal of the denial of contractual attorneys' fees and prejudgment interest is timely.
- III. Whether Formliners' appeal as to contractual attorneys' fees is preserved for review.
- IV. Whether the trial court's denial of Formliners' request for an award of contractual attorneys' fees should be affirmed, in light of the fact that Formliners' request for attorneys' fees was not properly and procedurally supported.
- V. Whether the trial court's denial of Formliners' request for statutory costs should be affirmed, in light of the fact that Formliners' request did not comply with the requirements of Rule 54(d), SCRCP.

STATEMENT OF THE CASE

Following a three-day jury trial in August 2022, the jury returned a verdict in favor of Appellant / Respondent Fast Formliners Company (“**Formliners**”) against Respondent / Appellant Construction Resource Group, Inc. (“**CRG**”) in the amount of \$112,792.60 on a breach of contract claim. Thereafter, Formliners submitted a post-trial motion seeking: (1) an award of contractual attorneys’ fees; (2) an award of prejudgment interest; and (3) an award of statutory costs, pursuant to Rule 54(d), SCRPC. The trial court denied Formliners’ post-trial motion in its entirety. Formliners then filed a second, successive motion pursuant to Rule 59(e), seeking reconsideration of the trial court’s decision. This, too, was summarily denied. This appeal follows.

STATEMENT OF FACTS

In 2019, Formliners brought suit against CRG on a breach of contract action, in which it was alleged that Formliners supplied CRG with certain construction materials that CRG failed to make payment for. CRG denied the allegations, contending that the materials Formliners' supplied were non-conforming to project specifications; CRG also filed a counterclaim seeking its own damages in connection with Formliners' putative breach.

The matter proceeded to trial before a jury in August 2022. After three days of trial, the jury rendered a verdict in favor of Formliners against CRG in the amount of \$112,792.60.

Within ten days after verdict, Formliners submitted a post-trial motion to the court seeking three additional forms of relief: (1) an award of contractual attorneys' fees, for an amount in excess of the judgment itself; (2) an award of prejudgment interest; and (3) an award of statutory costs, pursuant to Rule 54(d). In relevant part, in support of its demand for contractual attorneys' fees, Formliners submitted only the affidavit of John T. Crawford, Esq. Formliners' counsel did not submit their own affidavit, nor did they submit their own invoices to either CRG's counsel or the trial court for inspection; those invoices were not attached to Mr. Crawford's affidavit. Additionally, Mr. Crawford did not offer testimony at any live hearing on this matter. The only information presented to the trial court in furtherance of Formliners' request for contractual attorneys' fees was Mr. Crawford's affidavit—and nothing more. Likewise, in support of the request for statutory costs, Formliners relied exclusively on the affidavit of Mr. Crawford, who opined that—in his estimation—the amount of costs incurred by Formliners was “reasonable.”

By order dated September 2022, the trial court denied Formliners' post-trial motion in its entirety, and did not make any additional award of damages to Formliners' beyond what the jury found.

Formliners subsequently filed a second, successive motion pursuant to Rule 59, asking the trial court to reconsider its decision to not make any additional award of contractual attorneys' fees, prejudgment interest, or statutory costs. The trial court summarily denied Formliners' second Rule 59 motion, and this appeal followed.

ARGUMENT

I. FORMLINERS HAS WAIVED ITS RIGHT TO CONTRACTUAL ATTORNEYS' FEES.

Formliners' opening brief contends that the trial court was obliged, by virtue of the parties' contract, to render a post-jury-trial award of contractual attorneys' fees, and that the trial court's failure to do so constitutes an abuse of discretion. (Formliners' Op. Br., § I.) However, as explained below, and for purely procedural reasons, by the time that Formliners made its request for an award of contractual attorneys' fees, it had already waived its right to that relief, and had left the trial court with no other decision than to deny the request.

A. The right of trial by jury is "preserved inviolate."

This is explicitly established by the South Carolina Constitution, Article I, Section 14. "Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions." Lester v. Dawson, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997) (citation omitted). By contrast, when a case presents "no features of equitable cognizance, the parties are entitled to a trial by jury." Peeples v. Hornik, 153 S.C. 321, 337, 150 S.E. 802, 808 (1929) (citing Smith v. Bryce, 17 S.C. 538 (1881)). Accordingly, when the right to trial by jury is available and has been demanded, as it was in the underlying case, all issues that are capable of being tried by the jury must be so tried.

B. An action for breach of contract is an action at law.

The appellate decisions of this State are replete with support for this proposition. See, e.g., McCall v. IKON, 380 S.C. 649, 658, 670 S.E.2d 695, 700 (Ct. App. 2008) ("An action for breach of contract seeking money damages is an action at law.")

C. Contractual attorneys' fees are a component of damages in breach of contract actions.

“The general rule is that[,] for a breach of contract[,] the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach.” Fuller v. E. Fire & Cas. Ins. Co., 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962). For purposes of this appeal, this is a particularly important point. When a party has a right to seek reimbursement of attorneys' fees for prevailing in litigation, and that right is based exclusively in contract, the remedy of reimbursement is part and parcel of the monetary damages sought for breach. Cf. Stecker v. TALX Corp., 384 S.C. 224, 681 S.E.2d 890 (Ct. App. 2009) (holding that a declaratory judgment action for contractual indemnification is an action at law).

D. To recover contractual attorneys' fees from CRG, Formliners should have sought such relief from the jury.

In contract actions, it is the exclusive province of the trier of fact to determine whether there has been a breach, and if so, the amount of damages. The action between Formliners and CRG was tried to a jury. Accordingly, in this case, the jury—and only the jury—should have decided whether CRG had breached its contract with Formliners, and to what amount of damages Formliners was entitled. In that connection, the jury should have been the body to determine whether and to what extent to award reimbursement of attorneys' fees. To hold otherwise would yield bizarre conclusions that are inconsistent with other provisions of applicable law.

For example, as noted above, the South Carolina Constitution preserves the right to trial by jury as to all actions at law, including actions for breach of contract. However, if it were not the exclusive province of the trier of fact to determine the amount of damages

in a breach of contract action, then a party in CRG's position could be subjected to an assessment of liability (for contractual attorneys' fees) by a judge—not the jury, despite the fact that contractual attorneys' fees are a component of the direct and proximate monetary damages claimed. In short, when the judge, acting alone after a jury trial, awards contractual attorneys' fees, the party facing payment of those fees is very much divested of its "inviolable right" to a trial by jury on a material part of an action at law.

Perhaps the problem could be avoided by contending that contractual attorneys' fees are something different than ordinary monetary damages. But this, too, breaks down on further consideration. From time to time, lawyers are forced to file collection actions against their own clients. When those cases have arisen, the courts of this State have been steadfast in holding that such suits "constitute actions in law," for which the right to trial by jury is available. See, e.g., Lester v. Dawson, 327 S.C. 263, 269, 491 S.E.2d 240, 243 (1997).¹ This presents a strange circumstance: *Why should Formliners have a right to trial by jury on a contract claim brought by its own legal counsel for payment of legal fees, and CRG have no right to trial by jury on a contract claim brought by Formliners for repayment of the same legal fees to the same legal counsel?*

If contractual attorneys' fees are not part of the monetary damages flowing from a proximate breach of the contract that would entitle a party to trial by jury, there must be some intelligible principle at play that would explain the difference: why one form of monetary damages for breach of contract may be decided by a jury, and why another form

¹ The only exception has been limited to the circumstance when an attorney has an equitable lien upon proceeds that he or she may obtain on behalf of a client. See, e.g., Eleazer v. Hardaway Concrete Co., 281 S.C. 344, 315 S.E.2d 174 (Ct. App. 1984). This circumstance has no bearing on the instant analysis.

of monetary damages for the same breach of the same contract cannot be submitted to the jury. The undersigned is not aware of any such principle that has yet been articulated in the body of our State's laws.

Consequently, it would seem that to give faithful honor the constitutional right for a party to have a trial by jury on actions at law, in cases where a trial is had by jury, the total monetary damages recoverable for breach—including for contractual attorneys' fees—must be submitted to the jury for decision.

E. Formliners did not submit the question of contractual attorneys' fees to the jury.

At no time during the course of trial did Formliners present evidence to the jury of the amount of attorneys' fees incurred in the prosecution of its claim. The first time that Formliners' counsel mentioned contractual attorneys' fees was immediately after the verdict was returned. (Trial Tr. at 376:14-22.) Shortly thereafter, Formliners' counsel advised the trial court that it would be submitting "a written motion on the prevailing party's attorneys' fees issue." (Trial Tr. at 378:2-5.) The jury was not charged on awarding contractual attorneys' fees. (Trial Tr. at 361:22-374:7.) Formliners' counsel did not propose an instruction regarding contractual attorneys' fees, and did not object to the omission of such an instruction. (Trial Tr. at 333:16-345:21.)

F. Formliners has waived its right to seek collection of contractual attorneys' fees.

Consistent with the foregoing discussion, because this case was tried to a jury, because contractual attorneys' fees are a part of a breach of contract action, for which the right of trial by jury is "inviolable," because no evidence of fees was submitted to the jury, and because the jury was not requested to consider contractual attorneys' fees as part of

their deliberations, and no objection was made to the omission of charges to that effect, Formliners has waived any right it may have had to seek collection of contractual attorneys' fees, and its appeal on this point must be denied.

II. FORMLINERS' APPEAL OF THE DENIAL OF CONTRACTUAL ATTORNEYS' FEES IS UNTIMELY.

Even if Formliners were not required to present evidence of contractual attorneys' fees to the jury, but instead, could allow the trial court to unilaterally decide the matter, Formliners' appeal as to the trial court's denial of an award of contractual attorneys' fees would nonetheless be untimely.

At the outset, it is worth noting that, under South Carolina law, there does not appear to be any well-established procedural device that contemplates a post-jury-trial motion for an award of contractual attorneys' fees. No mechanism is found in Rule 54, SCRCP,² though there is authority to suggest that Rule 59(e), SCRCP, is the mechanism by which such fees are properly requested post-trial, see Elam v. SCDOT, 361 S.C. 9, 22-23, 602 S.E.2d 772, 777 (2004) (citing Osterneck v. Ernst & Whinney, 489 U.S. 169, 174 (1989)).

Understanding the mechanism by which Formliners requested an award of contractual attorneys' fees has critical bearing on this appeal. The jury's verdict was returned on August 17, 2022. Formliners filed its motion for attorneys' fees on August 26, 2022. The motion does not state the procedural rule it was filed under; however, the fact that it was filed within ten days after verdict suggests that Formliners perceived that it was

² Appellate decisions suggest that Rule 54 is the appropriate procedural mechanism for seeking statutory—not contractual—attorneys' fees. See Harris-Jenkins v. Nissan Car Mart, Inc., 348 S.C. 171, 557 S.E.2d 708 (Ct. App. 2001); see also Black v. Roche Biomed. Labs., 315 S.C. 223, 433 S.E.2d 21 (Ct. App. 1993).

acting under Rule 59(e). If this assessment is correct, then Formliners' appeal regarding contractual attorneys' fees is untimely.

As a general proposition, a party is entitled to file only one motion pursuant to Rule 59(e). When a second Rule 59(e) motion is filed, requesting alteration of the first Rule 59(e) motion, which itself "d[id] not result in a substantial alteration of the original judgment," the second motion is considered "successive," and its filing does not suspend the time to file a notice of appeal. See, e.g., Elam v. SCDOT, 361 S.C. 9, 20, 602 S.E.2d 772, 777 (2004) (citations omitted).

These are the circumstances regarding Formliners' appeal of the contractual attorneys' fees issue. The original judgment of the trial court (in the form of the jury verdict) was entered on August 26, 2022; that judgment did not contemplate an award of contractual attorneys' fees. Nine days later, Formliners filed its first Rule 59(e) motion, requesting an award of contractual attorneys' fees; that motion was denied by order dated September 22, 2022. The order was entered as a Form 4, which, in relevant part, simply stated that Formliners' "Motion for Attorneys' Fees, Costs, and Interest is DENIED." In short, the trial court's disposition of Formliners' first Rule 59(e) motion did not alter the original judgment, at all. Regardless, instead of filing a notice of appeal of that decision, Formliners filed a second Rule 59(e) motion. That, too, was denied by a simple Form 4. It was only after the disposition of this second, successive Rule 59(e) motion (which was entered on February 23, 2023) that Formliners filed the notice of appeal for these proceedings.

When Formliners filed its notice of appeal, it was five months too late. With respect to the issue of contractual attorneys' fees, the notice should have been filed within thirty

days after the entry of the order on the first Rule 59(e) motion, which would have occurred on October 21, 2022. Instead, the notice was not filed until March 27, 2023. Consequently, the issue of the trial court’s decision to refrain from awarding contractual attorneys’ fees is not timely and is not preserved for appellate review.

III. FORMLINERS’ APPEAL OF THE DENIAL OF PREJUDGMENT INTEREST IS UNTIMELY.

The analysis in support of this argument largely tracks the analysis set out in the preceding section. There is authority to suggest that, under South Carolina law, the filing of a motion for prejudgment interest after the entry of judgment constitutes a Rule 59(e) motion to alter or amend. See Hentges v. Hentges, Op. No. 2011-UP-513, at ¶ 6 (S.C. Ct. App. Nov. 28, 2011) (unpublished opinion) (citing Osterneck v. Ernst & Whinney, 489 U.S. 169, 175 (1989)). If that is, in fact, the applicable procedural mechanism, then, consistent with the foregoing discussion, Formliners’ recourse after the denial of its first Rule 59(e) motion for prejudgment interest was to file a notice of appeal—not file a second, successive motion under Rule 59(e). Formliners’ decision to file a second Rule 59(e) motion, rather than to file a notice of appeal, necessarily results in this appeal being deemed untimely, to the extent that it seeks a decision on prejudgment interest.

IV. FORMLINERS’ APPEAL AS TO CONTRACTUAL ATTORNEYS’ FEES IS NOT PRESERVED FOR REVIEW.

Assuming—for the sake of argument only—that it was not procedurally improper for Formliners to file a second, successive Rule 59(e) motion on the issue of contractual attorneys’ fees, the issue is still not preserved for appellate review.

When attorney’s fees are requested and authorized by contract or statute, the court should make specific findings of fact regarding certain factors including (1) the nature, extent, and difficulty of the legal services rendered; (2) the time and labor 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 services; and (6) the beneficial results obtained. See, e.g., Blumberg v. Nealco, Inc., 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993).

In its opening brief, Formliners asserts that “[t]he trial court erred in declining to award fees . . . and failing to make findings of fact as to the factors relevant to an attorneys’ fee award.” (Formliners’ Op. Br. at 7.) However, Formliners failed to raise this issue in its second, successive Rule 59(e) motion.

On this point, CRG feels it appropriate to call specific attention to pertinent aspects of the post-trial procedural history. In its first Rule 59(e) motion, Formliners advised the trial court of the necessity of making certain findings-of-fact to sustain an award of attorneys’ fees. (Formliners’ 1st Rule 59(e) Mot. at 3.) The trial court’s order denied Formliners’ request without explanation. (Or. Sept. 22, 2022.) Formliners then filed its second, successive Rule 59(e) motion, but—importantly—did not anywhere in that motion advise the trial court of its ostensible error in failing to consider the factors appropriate in making an award of attorneys’ fees. (See Formliners’ 2nd Rule 59(e) Mot.) It merely reiterated the factors that ought to be considered.

This was not an accidental omission. The transcript of the hearing on Formliners’ second, successive Rule 59(e) motion also does not contain any suggestion of error by the trial court in failing to evaluate the appropriate factors for awarding attorneys’ fees. The first time that issue has been raised as a basis of appeal is in Formliners’ opening brief. See, e.g., Creech v. South Carolina Wildlife & Marine Res. Dep’t, 328 S.C. 24, 491 S.E.2d 571 (1997).

Therefore, even if Formliners' appeal of the trial court's denial of the request for contractual attorneys' fees were timely, Formliners cannot evade the fact that it never raised the trial court's failure to consider factors relevant to such an award to the trial court, for the trial court's primary determination of that issue, prior to taking this appeal. The consequence of this procedural circumstance is well-established under the appellate decisions of this State: Formliners has neglected to preserve the issue of the trial court's failure to consider factors relevant to an award of contractual attorneys' fees for purposes of this appeal. See, e.g., I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (holding that, if an aggrieved party has raised an issue in the trial court, but the court fails to rule upon it, the party must file a Rule 59(e) motion to alter or amend the judgment in order to preserve the issue for appellate review); see also Shealy v. Aiken County, 341 S.C. 448, 460, 535 S.E.2d 438, 444-45 (2000) (holding that a trial court's "general ruling is insufficient to preserve the specific issue for appellate review," and if no Rule 59(e) motion is filed requesting a ruling on a particular issue, the appellate court may not address it).

V. THE TRIAL COURT'S DECISION TO REFRAIN FROM AWARDING CONTRACTUAL ATTORNEYS' FEES MUST BE AFFIRMED.

Even if Formliners' appeal were timely, and even if the issue of contractual attorneys' fees were preserved for appellate review, the trial court's decision to refrain from making an award of attorneys' fees to Formliners must nonetheless be affirmed.

Formliners contends that the trial court's failure to make an award of contractual attorneys' fees constitutes an abuse of discretion. However, in making this assertion, Formliners has neglected to consider the plank in its own eye while complaining of the speck in the trial court's. As the party seeking an award of attorneys' fees, it is Formliners'

foundational burden to provide sufficient evidentiary support for the amount sought. See, e.g., Gainey v. Gainey, 279 S.C. 68, 301 S.E.2d 763 (1983). If that burden is not carried, there is no authority of the trial court to make any award of attorneys' fees whatsoever.

That is the circumstance facing Formliners. The only evidence that Formliners offered to justify its demand of more than \$100,000 in attorneys' fees was the affidavit of John T. Crawford, Esq. (Formliners' 1st Rule 59(e) Mot., Exhibit 2.) Mr. Crawford was not Formliners' trial counsel; he was merely a third-party brought in to opine about the reasonableness of fees charged by Formliners' counsel.

In nothing more than a cursory manner, Mr. Crawford opined that Formliners' fees were reasonable and ought to be paid in full. There is no discussion or analysis of the time entries asserted by Formliners' counsel. In fact, those time entries were never made available. Mr. Crawford affirmed that he had reviewed them. But they were not attached to his affidavit; they were never provided to CRG's counsel for review; and, perhaps most importantly, they were never provided to the trial court.

Certainly, there is authority under South Carolina decisions to suggest that the propriety of the amount of attorneys' fees may be established by affidavit. See, e.g., Seabrook Island Prop. v. Berger, 365 S.C. 234, 616 S.E.2d 431 (Ct. App. 2005). But, when evidence of attorneys' fees is established only by affidavit, it is necessary that the adverse party have the opportunity to prepare and provide a full and complete presentation against the award. Id.

In the instant case, Formliners' demand for attorneys' fees was predicated solely on the information offered through Mr. Crawford's affidavit. Mr. Crawford was not presented as a witness at the hearing on either of Formliners' Rule 59(e) motions. And,

without the opportunity for cross-examination, as well as access to the underlying facts and data on which Mr. Crawford based his opinion, there was no meaningful opportunity for CRG to rebut Mr. Crawford's assertions as to the propriety of attorneys' fees.

This fact was not lost on the trial judge. At the conclusion of the hearing on Formliners' second, successive Rule 59(e) motion, Formliners' counsel—for the first time—offered to provide the trial court with records of his law firm's bills. (Tr. Hr'g Feb. 22, 2023 at 10:17-21.) In light of the procedural posture before him, the trial judge appropriately declined to review any information on a motion for reconsideration that was not already before the court. See, e.g., Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 563, 762 S.E.2d 693 (2014) (“[A] party cannot use a Rule 59(e) motion to advance an issue the party could have raised to the circuit court prior to judgment, but did not.”); Spreeuw v. Barker, 385 S.C. 45, 682 S.E.2d 843 (Ct. App. 2009) (declining to consider evidence submitted only as an attachment to a Rule 59(e) motion, noting “it cannot be considered on appeal”).

In short, on the contractual attorneys' fees issue, Formliners is stuck with the record it built, threadbare as it may be. Accordingly, with the information before the court, and in light of South Carolina precedent, the trial judge properly declined to make an award of contractual attorneys' fees to Formliners, ostensibly because Formliners failed to carry its burden to show the court that the amount of fees claimed was supported by the evidence. That decision must be affirmed.

VI. THE TRIAL COURT'S DECISION TO REFRAIN FROM AWARDING STATUTORY COSTS MUST BE AFFIRMED.

The only aspect of Formliners' second, successive Rule 59(e) motion that was procedurally appropriate pertains to Formliners' request for statutory costs pursuant to Rule

54(d), SCRCPP. Rule 54(d) expressly contemplates the filing of a post-trial motion for the recovery of costs incurred in the course of litigation. Accordingly, when Formliners' filed its first set of post-trial motions, the issue of statutory costs was the only component that did not arise under Rule 59(e). Furthermore, when the trial court initially denied Formliners' motion for statutory costs, a Rule 59(e) motion to request reconsideration of that decision was the appropriate procedural vehicle. Consequently, CRG would respectfully contend that the only aspect of Formliners' appeal that was timely filed is the issue of the denial of the award of statutory costs.

That being said, the trial court's decision to deny Formliners' request for statutory costs must be affirmed.

Rule 54(d) provides that "[a] motion for costs, supported by an affidavit that the costs are correct and were necessarily incurred in the action, may be filed by the prevailing party within 10 days of the entry of final judgment." Rule 54(d), SCRCPP.

As discussed above, the only information that was filed to substantiate Formliners' request for statutory costs and attorneys' fees was supplied by John T. Crawford, Esq. Formliners' counsel did not submit any affidavit, let alone any verification that the amount of the costs for which reimbursement was claimed were "correct" or "necessarily incurred." Accordingly, because Formliners chose to submit only the affidavit of Mr. Crawford, it is necessary to examine his affidavit to determine whether the requirements of Rule 54(d) were met.

In that connection, to comply with Rule 54(d), the onus was on Mr. Crawford's affidavit to affirm that the amount of statutory costs claimed by Formliners was "correct," and that they were "necessarily incurred in the action." Mr. Crawford's affidavit makes

neither of these affirmations. Nor is there any suggestion that Mr. Crawford could make such affirmations. After all, according to the affidavit, all Mr. Crawford did was talk with Formliners' counsel and review their legal bills. There is no information to suggest that he would know whether the amounts reflected in the bills was "correct," since he did not receive the bills, nor did he pay them. Nor is there any information to suggest that Mr. Crawford would know whether any of the expenses claimed were "necessarily incurred." Cf. Arredondo v. SNH SE Ashley River Tenant, LLC, 433 S.C. 69, 856 S.E.2d 550 (2021) (observing that "[t]he plain, ordinary, and popular meaning of the word 'necessary' is 'absolutely needed' or 'required'") (citation omitted).

The furthest that Mr. Crawford's affidavit goes is to characterize the amounts incurred for filing fees, subpoenas, and depositions as "reasonable." (Aff. Crawford at ¶ 15.) "Reasonable" may be a standard associated with awards of attorneys' fees, but it is not the standard established in Rule 54(d). Nor is the word "reasonable" synonymous with "necessary" or "necessarily."

Consequently, on this point, Formliners again finds itself in the position of being stuck with the record it built. The only information that Formliners provided the trial court with in connection with its initial Rule 54(d) request for statutory costs is that such costs were "reasonable." That is not the proper measure. Accordingly, the trial court properly denied Formliners' request for statutory costs, ostensibly because Formliners failed to carry its initial burden of demonstrating its entitlement thereto. And, because Mr. Crawford's affidavit was the totality of the basis on which statutory costs were claimed, there was no valid legal basis presented in Formliners' Rule 59(e) motion for the trial court to disturb its prior decision.

That proposition carries forward to these appellate proceedings. And, for the same reasons as were presented to the court below, this Court is respectfully requested to affirm the decision of the trial judge as to the denial of an award of statutory costs to Formliners.

CONCLUDING STATEMENT

Consistent with the foregoing discussion, and for any other reason that may appear in the record presented, CRG respectfully requests a decision from this Court which affirms the trial court's decision to refrain from making an award of attorneys' fees, prejudgment interest, and statutory costs in Formliners' favor, and for such other and further relief as the Court deems just and proper.

Respectfully submitted,

s/ Steven Edward Buckingham

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