IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Clifton Newman, The Honorable Walton J. McLeod, IV
Lexington County

Trial Court Case No.: 2017CP3202204

ARM Quality Builders LLC d/b/a, ARM Quality Builders......................... Appellant.

v.

Joseph A. Golson and Lycia B. Golson and Branch Banking and Trust Company.. Respondents.

Joseph A. Golson and Lycia B. Golson..................................... Third-Party Respondents.

v.

Ahmad Mazloom... Third-Party Appellant.

Appellate Case No. 2020-001406

FINAL BRIEF OF APPELLANT AND THIRD-PARTY APPELLANT

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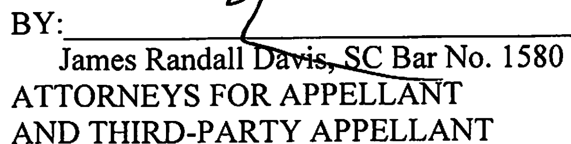

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Lexington, South Carolina
July 13, 2021

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STATEMENT OF ISSUES ON APPEAL

1. DID COURT ERR IN FINDING THAT THE APPELLANTS FAILED TO PROPERLY SERVE THE MECHANIC'S LIEN ON THE RESPONDENTS PURSUANT TO SC CODE ANN. §29-5-90?

2. DID THE COURT ERR IN GRANTING THE MOTION TO DISMISS MECHANIC'S LIEN AS TO THE TIMELY FILING OF THE 90-DAY STATUTORY FILING PERIOD?

3. DID THE COURT ERR IN AWARDING THE RESPONDENT ATTORNEY'S FEES BASED ON DISMISSAL OF MECHANIC'S LIEN?

4. DID THE COURT ERR IN FINDING THAT THERE IS NO EXTRA CONTRACTUAL WORK DONE BY APPELLANT TO CONFIRM RESPONDENTS OWED APPELLANT $55,084.33?

5. DID THE COURT ERR IN ITS FINDING THAT THE PROVEN PROJECT COSTS OF THE APPELLANT WAS ONLY $284,525.70 IN ITS FINDING OF FACT NUMBER 193?

6. DID THE COURT ERR IN ITS FINDING ON THAT PUNITIVE DAMAGES SHOULD BE AWARDED AGAINST THE APPELLANT AND THIRD-PARTY APPELLANT?

7. DID THE COURT ERR IN ALLOWING THE ATTORNEYS FEES AWARDED UNDER THE MECHANIC'S LIEN CASE BEING SPECIAL DAMAGES IN THE SLANDER OF TITLE ACTION?

8. DID THE COURT ERR IN ALLOWING DOUBLE RECOVERY FOR DAMAGES AGAINST THE APPELLANT AND THIRD-PARTY APPELLANT?

STANDARD OF REVIEW

On appeal from a case tried by a judge in an action at law, "the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." *Townes Assocs.*, 266 S.C. 81, 221 S.E.2d 733; *Alexander's Land Co., L.L.C. v. M & M & K Corp.*, 390 S.C. 582, 703 S.E.2d 207 (2010); *Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 663 S.E. 2d 484 (2008).

In an action in equity tried by a judge, the appellate court has the authority to find facts in accordance with its own view of the preponderance of the evidence. *Townes Assocs.*, 266 S.C. 81, 221 S.E.2d 73; see *Goldman*, 369 S.C. 462, 632 S.E.1d 850; *Doe v. Clark*, 318 S.C. 274, 457 S.E.2d 336 (1995); *Lowcountry Open Land Trust v. Charleston S. Univ.*, 376 S.C. 399, 656 S.E.2d 775 (Ct. App. 2008).

STATEMENT OF THE CASE

On June 15, 2017, the Appellant filed a Summons, Complaint and Lis Pendens against the Respondents which alleged Breach of Contract, Foreclosure of Mechanic's Lien, Violation of SC Code Ann. §29-6-10, et seq., quasi-contract, quantum meruit, and unjust enrichment. (R. Vol. I, pp. 136-152) The Respondents filed a timely Answer and Counterclaim. (R. Vol. I, pp. 153-163) On May 16, 2018, the Respondents filed a Motion to Amend their Answer to assert certain counterclaims and Third-Party Complaint. On July 5, 2018 the Court granted the Respondents' Motion to Amend and Third-Party Complaint. (R. Vol I, p. 7) On July 9, 2018, the Respondents filed a Third-Party Summons, Amended Answer and Third-Party Complaint of Respondents Joseph A. Golson and Lycia B. Golson wherein they named Ahmad Mazloom as a Third-Party Defendant. (R. Vol. I, pp. 234-253) Subsequently thereto, the Appellant and Third-Party Appellant Ahmad Mazloom filed a timely Answer. (R. Vol I, pp. 254-253) The

Appellant/Third-Party Appellant filed a Motion to Dismiss/Dissolve the Mechanics Lien filed by the Appellant by Motion dated August 15, 2018. (R. Vol. I, pp. 257-264) On September 10, 2018, the Appellant/Third-Party Appellant filed an Affidavit of Attorney's Fees with supporting Affidavits of Joseph A. Golson and Lycia B. Golson which were filed on September 13, 2018. (R. Vol. I, pp. 264-267) On November 27, 2018, The Honorable Clifton B. Newman issued his Order on the said Motions granting the motion to dissolve the mechanic's lien and dismissal of the mechanic's lien foreclosure cause of action. (R. Vol. I, pp. 63-75) On December 7, 2018, the Appellant and Third-Party Appellant filed a Motion to Reconsider pursuant to SCRCP Rule 52(b) and 59(h). On May 20, 2019, the Court issued its Order denying Appellant and Third-Party Appellant's Motion to Reconsider. (R. Vol. I, pp.76-78) In The Honorable Clifton B. Newman's Order of November 27, 2018, he determined "Defendants are entitled to an award of attorney's fees as the prevailing party." (R. Vol. I, p. 73, lines 6-7) On May 30, 2019, the Appellant and Third-Party Appellant filed a Motion to Reconsider the attorney's fees awarded in the amount of $25,000 to the Respondents in this action. On August 16, 2019, the Court denied said Motion to Reconsider but stated no grounds for said denial. (R. Vol. I, p. 81) On December 18-20, 2019 a non-jury bench trial was held in this matter and on August 7, 2020, The Honorable Walton J. McLeod issued his Order awarding judgment against the Appellant and Third-Party Appellant. (R. Vol. II and III, p. 456-1100; R. Vol. I, pp. 130-132) Thereafter, on August 17, 2020 the Appellant and Third-Party Appellant filed a motion to reconsider the Order of The Honorable Walton J. McLeod (R. Vol. I, pp. 130-132) and Judge McLeod filed his Order denying the same on September 18, 2020. R. Vol. I, pp. 133-135) Thereafter, the Appellant and Third-Party Appellant filed its Notice of Appeal to appeal this matter to the South Carolina Court of Appeals.

ARGUMENT I

THE COURT ERRED IN FINDING THAT THE APPELLANTS FAILED TO PROPERLY SERVE THE MECHANIC'S LIEN ON THE RESPONDENTS PURSUANT TO SC CODE ANN. §29-5-90.

STATEMENT OF FACTS

The Honorable Clifton Newman ruled in his Order that:

1. A lien claimant is required to serve a copy of the lien on the property owner or the lien is automatically dissolved. *S. C. Code Ann.* § 29-5-90. (R. Vol I, p. 73)

2. In Judge Newman's footnote 3 on page 9 of his Order, he indicates that S.C. Code Ann. §29-5-90 does not specify a manner of service. (R. Vol. I, p. 71)

3. The purpose of requiring service of notice of the mechanic's lien is to advise a property owner of the existence of the lien and to afford him or her an opportunity to investigate the claim and determine its validity. (R. Vol. I, p. 69)

4. Because lien statutes are in derogation of common law, they should be construed against lien claimants. (R. Vol. I, p. 67)

5. Respondents retained E. Wade Mullins for the purpose of facilitating a pre-litigation resolution between the parties. (R. Vol. I, p. 64)

The Honorable Clifton Newman's Order should be reversed for the following reasons.

1. Judge Newman does not cite any South Carolina case which indicates that not providing the affidavit of the sheriff or his deputy is a fatal defect in service.

2. Judge Newman acknowledges that the statute does not specify the manner of service on the property owner. (R. Vol. I, p. 71, footnote 3)

3. *Clo-Car Trucking Co., Inc. v. Clifflue Estates of South Carolina, Inc.,* 282 S.C. 573, 575-76, 320 S.E.2d 51, 53 (Ct. App. 1984), states "we believe the rule in this State is that mechanic's lien statutes, being remedial, are to be given a liberal construction" and "[E]ven

though [we] follow[] the view that the mechanic's lien law is to be construed in a most liberal and comprehensive manner in favor of lien claimants, a claim may not be sustained when that can be done only by a forced and unnatural interpretation of the language of the statute...." The Courts have also ruled "Minor imperfections and mistakes in the complaint or petition to foreclose a lien do not affect its validity." *Wood v. Hardy*, 235 S.C 131, 110 S.E.2d 157 (1959). (R. Vol. I, p. 3)

The applicable service statute reads as follows:

> Such a lien shall be dissolved unless the person desiring to avail himself thereof, within ninety days after he ceases to labor on or furnish labor or materials for such building or structure, serves upon the owner or, in the event the owner cannot be found, upon the person in possession and files in the office of the register of deeds or clerk of court of the county in which the building or structure is situated a statement of a just and true account of the amount due him, with all just credits given, together with a description of the property intended to be covered by the lien sufficiently accurate for identification, with the name of the owner of the property, if known, which certificate shall be subscribed and sworn to by the person claiming the lien or by someone in his behalf and shall be recorded in a book kept for the purpose by the register or clerk who shall be entitled to the same fees therefor as for recording mortgages of equal length. Provided, that in the event neither the owner nor the person in possession can be located after diligent search, and this fact is verified by affidavit of the sheriff or his deputy, the lien may be preserved by filing the statement together with the affidavit. The delivery on the register or clerk for filing, as provided in this section, shall be and constitute the delivery contemplated with regard to such liens in Title 30 of this Code. (R. Vol. I, p. 4)

Firstly, Respondents have complied with the statute completely, with the exception of the affidavit from the sheriff's department, as discussed below. The process server for the Appellant went to Respondents' residence on two occasions, not one as the Court indicates, and the process server by sworn statement, indicated he taped notice of the Mechanic's Lien on the front door of the Respondents' residence.

The above underlined portion of the statute in question is the "underlined" portion. Appellants argue that the reading of the underlined portion of the statute indicates that if you cannot locate the property owner, after a diligent search, you can utilize the affidavit from the sheriff or a deputy. There was no issue as to the location of the Respondents at the time of the service based on the deposition of the Respondent Joseph Golson indicating that they had moved into the residence in 2017 and the 2017 Lexington County Tax Bill showed that the Respondents were the owners of this property. (R. Vol. IV, p. 1756)

Respondents, at the time of the service, retained an attorney who was acting on their behalf and full disclosure of the lien was given to him a few days after the attempted service on the Respondents. The retaining of counsel for the Respondents was done prior to the attempted service date of May 9, 2017. Although mechanic's liens are purely statutory, and the requirements of the statue must be strictly followed, our courts have recognized that the laws of agency apply to the statutes controlling the creation and perfection of mechanic's lien. *Hodge v. First Federal Sav. And Loan Ass'n*, 267 S.C. 270, 274-75, 227 S.E.2d 310, 312 (1976). Attorneys are recognized in this State as agents for their clients. *DeBerry v. McCain*, 275 S.C. 569, 274 S.E.2d 293 (1981).

ARGUMENT II

THE COURT ERRED IN GRANTING THE MOTION TO DISMISS MECHANIC'S LIEN AS TO THE TIMELY FILING OF THE 90-DAY STATUTORY FILING PERIOD.

The Respondents' Motion to Dismiss did not raise an issue as to whether the mechanic's lien was filed after the expiration of the ninety (90) day statutory filing period. Reviewing the second page of the Respondents' Motion indicates that it is based on the Affidavit of Non-Service filed with the Notice of Mechanic's Lien by the Appellant and Third-Party Appellant,

no money was owed to the Appellant and Third-Party Appellant and that Appellant and Third-Party Appellant did not satisfy the requirements of SC Code Ann. §29-5-10 which deals with those type materials and labor that you can file for a Mechanic's Lien.

Appellants, prior to the Motion to Dismiss being heard, indicated that they were relying on Appellant and Third-Party Appellant's Notice of Mechanic's Lien and documents attached thereto as well as the Affidavit of Non-Service and SC Code Ann. §29-5-10. Appellant and Third-Party Appellant provided their Brief and accompanying material to the Court prior to the Motion being heard. Respondents' Motion to Dismissed that if they were going to provide any supporting affidavits, etc., it would be served pursuant to Rule 56, prior to the hearing, which no additional materials were provided prior to the hearing.

Appellant filed a Brief, with accompanying documents, in response to Respondents' supporting material. Documents submitted by the Appellant included the following: (1) Notice of Mechanic's Lien which has been referenced above along with Verification signed by the owner of the Appellant company, Amhad Mazloom, indicating that the document attached to the Verification showed a balance of money owed to the Appellant in the amount $55,085.52, dated February 11, 2017 (R. Vol. I, pp. 136-152,); (2) Notice of Mechanic's Lien was the legal description for the Respondents' property which has a property address of 207 Libby Ariail Lane, Chapin, SC; (3) an Affidavit of Non-Service dated May 11, 2017 signed by a Brian Setree, a process server, indicating that an attempted service of the Notice of Certificate of Mechanic's Lien, Exhibits A and B, on the Respondents, on May 11, 2017, but was unsuccessful due to the residence being unoccupied (R. Vol I, p. 1767); (4) an Affidavit from the same process server indicating that he had attempted serve on the Respondents at their home place on two different occasions and on the last occasion, May 9, 2017, he had posted the

Notice of Mechanic's Lien and ancillary documents on the front door of the house by taping the items to the door; (5) pages of the deposition of the Respondent, Joseph A. Golson were provided which indicates that Mr. Golson had testified in his deposition that he and his wife had moved into the residence in January 2017 and that address was their residence and that they had claimed this property as their legal residence for tax purposes with the County of Lexington and a Certificate of Occupancy had been issued for them to move into the house in January 2017 (R. Vol. IV, pp. 1747-1755); (6) the legal residence document from Lexington County for the Respondents' house for the year 2017 (R. Vol. IV, p. 1756); and (7) documentation that on May 15, 2017, copies of the Notice of Mechanic's Lien document and accompanying documentation was sent to counsel for the Respondents which counsel had been retained by the Respondents on this specific issue (R. Vol. IV, pp. 1761-1766).

No additional information was requested by the Court on this matter and if any additional information was sent, it was not on a motion basis or with the Court's consent.

An application to the court for an order shall be by motion which, unless made during a hearing or trial in open court with a court reporter present, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion. SCRCP Rule 7(b)(1).

Appellant and Third-Party Appellant contends that the Motion to Dismiss should be limited to those matters which are actually presented in the Motion to Dismiss and not matters that were beyond documentation filed with the Court.

ARGUMENT III

THE COURT ERRED IN AWARDING THE RESPONDENT ATTORNEY'S FEES BASED ON DISMISSAL OF MECHANIC'S LIEN

On May 20, 2019, The Honorable Clifton Newman issued his Order granting the Respondents attorney's fees in the amount of $25,000.00. (R. Vol. I, pp. 76-78) The Order states "The Court, having considered the Amended Affidavit of Attorney's Fees and Costs of Defendant Joseph A. Golson and Lycia B. Golson, the Fee Transaction Report, and the nature and extent of the professional services rendered, awards counsel for the Defendant attorney's fees in the amount of $25,000." (R. Vol I, p. 77)

In *Keeney's Metal Roofing, Inc. v. Palmieri,* 345 S.C. 550, 548 S.E.2d 900 (2001), the Court held "a party may recover attorney's fees and costs under § 29-5-20(A) as a `prevailing party' even though the party obtained a dismissal via a procedural rule, provided the dismissal was not due to [a] mere technicality." See also, *EFCO v. Renaissance of Charleston Harbor, LLC*, 370 S.C. 612, 635 S.E.2d 922.

Also, it was noted in *Keeney* that "although Appellants were dismissed pursuant to a procedural rule, the dismissal was not on a mere technicality. Instead, Appellants prevailed because, ***as a matter of law,*** they could not be held liable for the damages Keeney sought under any circumstance.

For legal and factual reasons hereinafter stated, Appellant believes that this case falls within the "technicality" provision of the prevailing party rule. See Argument I above.

"As a general rule, attorney's fees are not recoverable unless authorized by contract or statute." Id. At 553-54, 548 S.E.2d at 902. Accordingly, attorney's fees are available for only those fees incurred by Respondents in defending against the lien. See *Utilities Const. Co., Inc. v. Wilson,* 468 S.E.2d 1 (Ct. App. 1996) (finding the circuit court abuse its discretion by

awarding attorney's fees for defending against breach of contract and unjust enrichment causes of action included in the mechanic's lien foreclosure action).

Our Court has found an abuse of discretion as to the amount of the attorney fee award and remand to the trial court for the entry of an award based upon the time Wilson's counsel spent in defending the mechanic's lien cause of action only. *Utilities Const. Co., Inc. v. Wilson*, 468 S.E.2d 1 (Ct. App. 1996).

The circuit court abused its discretion by awarding attorney's fees for work done outside the scope of defending against the mechanic's lien. See *Keeney's Metal Roofing, Inc. v. Palmieri*, 345 S.C. 550, 553, 548 S.E.2d 900, 901 (Ct. App. 2001).

Cedar Creek Props., 320 S.C. at 487, 465 S.E.2d at 776 (stating the amount of attorney fees should be limited to those actions specifically involving the mechanic's lien.

When an award of attorney's fees is requested and authorized by contract or statute, the court should make specific findings of fact on the record for each factor set forth in *Collins v. Collins*, 239 S.C. 170, 122 S.E.2d 1 (1961)]." *Blumberg v.. Nealco, Inc.*, 310 S.C. 492, 494, 427 S.E.2d 659, 661 (1993). There are six factors to consider in determining an award of attorney's fees; 1) nature, extent, and difficulty of the legal services rendered, 2) time and labor devoted to the case, 3) professional standing of counsel, 4) contingency of compensation, 5) fee customarily charged in the locality for similar services, and 6) beneficial results obtained. On appeal an award of attorney's fees will be affirmed so long as sufficient evidence in the record supports each factor. *Seabrook Island Prop. Owners' Ass'n v. Berger*, 365 S.C. 234, 616 S.E.2d 431 (Ct. App. 2005).

This case was filed on June 15, 2017. Appellant had the following causes of action: Breach of Contract; Foreclosure of Mechanic's Lien; Violation of South Carolina Code §29-6-10,

et seq.; Quasi-Contract; Quantum Meruit; and Unjust Enrichment. The amount in controversy was $55,000.00, plus attorney's fees and interest. There were interrogatories and request to produce in this case by both parties, including Appellant's discovery response which included the material and labor invoices on this matter which contained 219 pages. A total of 19-20 subpoenas were issued by the Respondent on the subcontractors in this matter requesting they produce the items. This is a summary of the activity in this case. None of that activity related to the issues that were presented by the Respondents' Motion to Dismiss which dealt with proper service on the Respondents.

The only time there was any discussion in regards to the alleged untimely nature of Notice of Mechanic's Lien being filed and the service of the Respondents was in the Appellant's deposition but only covered 3 or 4 pages of that deposition, at the most out of a 210 page deposition. Any attorney's fee awarded should be limited to any time that was spent only on the issue of the proper service on the Respondents and the timeliness of filing of the mechanic's lien which Appellant's position is that matter was not presented to the Court for consideration by the Respondents. The discovery in this case and the subpoenas and deposition only related to legitimacy of the material and labor invoices and alleged workmanship issues on the built home and not as to the service on Respondents or the filing of the mechanic's lien.

The Order referenced above, failed to specify specific findings as to the factors considered in granting the Respondent attorney's fees in the amount of $25,000.00. An Order for award of attorney fees must contain specific findings regarding the factors considered in granting the award. *Voelker v. Hillcock*, 288 S.C. 622, 344 S.E.2d 177 (Ct. App. 1986).

ARGUMENT IV

THE COURT ERRED IN FINDING THAT THERE IS NO EXTRA CONTRACTUAL WORK DONE BY APPELLANT TO CONFIRM RESPONDENTS OWED APPELLANT $55,084.33.

GENERAL BACKGROUND

ARM is owned by Ahmad Mazloom who is a license contractor in South Carolina and has been such since 1988. Mr. Mazloom builds residential homes in the Lexington County area. Mr. Mazloom and Respondents Golson had prior knowledge of each other prior to Appellant ARM agreeing to build a residential home for Respondents Golson in Chapin, Lexington, South Carolina. Mr. Mazloom and Respondents Golson had been neighbors for some time. In February 2016, Mr. Mazloom agreed to build a residential home for Respondents Golson. There are three contractual documents: (1) a Contract to Build; (2) Contract for Services; and (3) printed List of Specifications. (R. Vol. III, pp. 1276-1281; Trial Exhibits 31-33) These contractual documents are dated February 29, 2016. Actual work commenced on this project by Appellant ARM in July 2016. The Contract to Build document set a dollar figure of $395,000.00 which was based on house plans and specifications. The List of Specifications included printed language indicating that any extras or changes beyond the items in the List of Specifications would be paid by the Respondents Golson. Respondents Golson contend that their contract with Appellant ARM was for a total of $395,000.00 as a guaranteed maximum price. Appellant ARM contends that the contract did not have a guaranteed price figure but the contract price listed in the Contract to Build would be adjusted by an extras or changes that were built into the home. Under the Contract for Services, the Appellant ARM had a commission of 15%. Appellant ARM contends that based on his total costs in the form of labor and materials has the Respondents Golson owing him $55,085.22. Respondents Golson contend that besides the guaranteed maximum argument there was a scheme by the Appellant

ARM to engage in the increase of costs of the transaction based on fraudulent labor claims, inflated invoices and receipts.

CONTRACT INTERPRETATION

The contractual documents in this matter are a Contract to Build dated February 26, 2016 signed by the Appellant ARM and Respondents Golson and indicates the home is to be built for $359,000.00 in paragraph 2 and is tc be built according to plans and specifications on the property. The second document is the Contract for Services dated the same day as the Contract to Build (February 26, 2016) signed by the Appellant ARM and Respondents Golson indicating that the Appellant ARM was to provide to the Respondents Golson the services which included building the residential home according to the plans and specifications in a timely manner, the builder would construct the home at costs, and his builder's fee would be 15% of the costs to build said home. The third document is a List of Specifications entitling builder to provide which has printed listed items as to what the specifications were. The second page indicates, in bigger print, any extras or changes will be at the owner's expense and builder to provide specification list was initialed by the Respondents Golson personally. The parties acknowledged that the Contract to Build and Contract for Services were signed by the parties at the same time and are dated February 26, 2016.

The generally essential elements of a contract are a contractual intent followed by an actual meeting of the minds of the parties accompanied by valid consideration. When a contract is clear and unambiguous, the language alone determines the contract's force and effect. *Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 568 S.E.2d 361 (2002). A court's duty to enforce a contract made by the parties, regardless of whether a party fails to guard their rights carefully. *Steffenson v. Olsen*, 360 S.C. 318, 600 S.E.2d 129. The primary test as to the character of a

contract is the intention of the parties. Such intention to be gathered from the whole scope and effect of the language used. *Barnacle Broad., Inc. v. Baker Broad., Inc.*, 343 S.C. 140, 538 S.E.2d 672.

APPELLANT'S PROOF AS TO CONTRACT, BREACH AND DAMAGES

This being an action for a breach of the contract, the burden is upon the Appellant to prove the contract, its breach and the damages caused by such breach. F*uller v. Eastern Fire & Casualty Ins. Co.*, 240 S.C. 75, 124 S.E.2d 602. The general rule is that for a breach of contract, the Respondent is liable for whatever damages follow as a natural consequence and approximate result of such breach. The purpose of the award of damages for breach of contract is to put the Appellant in as good of a position as he would have been in if the contract had been performed. *Minter v. GOCT, Inc.*, 322 S.C. 525, 473 S.E.2d 67. The measure of compensation is the loss actually suffered by the Appellant as the result of the breach. *Id.* Contract damages must be proven by a reasonable certainty and cannot be based on speculation or conjecture. *Whisenant v. James Island Corp.*, 277 S.C. 10, 281 S.E.2d 794, 1981 S.C. LEXIS 488.

CONSTRUCTION COSTS

Appellant's Trial Exhibit 34 (R. Vol. II, p. 1282) is a summary of what the Appellant ARM contends as to his construction costs in this matter as well as calculation of his 15% builder's commission and the amount that is owed by Respondents Golson. Construction cost in this matter was $388,998.66. The Respondents Golson contributed $18,247.05 in the form of materials that they purchased. The total construction cost would have been $395,000.00 that the Appellant ARM received from the bank loan the Respondents Golson had plus the $18,247.05 contributed by the Respondents Golson for a total construction cost figure of $413,247.05. The builder charged a commission of 15% on the total construction cost figure of

$413,247.05 for a total construction cost of $468,332.57. The difference between the $413,247.05 and the $468,332.57 is the amount the Appellant ARM is claimed is owed which is the total of $55,085.52. Appellant's Trial Exhibits 1-29 (R. Vol. III, pp. 1101-1275) encompass the total construction costs on the project and are broken down by materialman or labor subcontractor. Those constructions costs are shown as follows:

EXHIBIT	AMOUNT	CONTRACTOR/SUBCONTRACTOR
1	$46,246.83	BMC East, LLC
2	$454.20	Barnhills Services Inc.
3	$6,950.00	GTG
4	$315.80	Lowe's
5	$3,475.44	Stier Supply Co.
6	$1,541.00	Allwaste Services, Inc.
7	$1,040.00	SCE&G
8	$4.329.4	Winsupply
9	$12,586.00	Harvey Wise
10	$5,150.00	Jim Pasko
11	$5,670.00	Bilt-Rite
12	$22,483.56	Johnny Huerta
13	$1,040.00	Adam Goings
14	$9,154.00	Crystaline Products, Inc.
15	$6,700.00	Donald Daniels
16	$2,400.00	Billy Kelly
17	$3,500.00	Complete Septic Tank
18	$25,000.00	White Knoll Heating & Colling, Inc.
19	$16,900.00	Jason Kyzer (Kyzer Masonry)
20	$23,000.00	B&R Electric, LLC
21	$2,800.00	Vacuum Center, Inc.
22	$608.00	County of Lexington
23	$10,000.00	Mark Proctor (Proctor Foundation & Concrete, LLC)
24	$400.00	Lucius Cobb (Surveying)
25	$256.41	Cayce Exterminating
26	$875.00	Columbia Shelving & Mirror
27	$148,000.00	Nery Rodas
28	$13,999.00	Joshua Hall
29	$13,000.00	A&D Fabrications

Appellant's Trial Exhibit 30 (R. Vol. III, p. 548) is a printout of Mastercard charges where the Appellant ARM used his Mastercard to pay the material costs and attached to that exhibit is the monthly statement from credit card company showing material payments by the Appellant

ARM. Appellant ARM also contends that it is entitled to commission on the materials paid for by the Respondents Golson in that these materials were incorporated into the house construction which he had to supervise the installation of as part of his Builder's Fee Contract. Respondent's Trial Exhibit 4 (R. Vol. III, p. 1305) is a list of checks prepared by ARM which was to confirm cash payments made to the subcontractors on this project and those cash payments are attached to Appellant's Trial Exhibits 18, 20, 27, 28 and 29 (R. Vol III. pp. 1223, 1235, 1253,1269, 1272).

The third document of the contract documents was a List of Specifications which on the second page indicated, in bigger print, any extras or changes will be at the owner's expense and this was initialed by Respondents Golson personally. Also, the extras which are handwritten on the List of Specifications were actually constructed and installed in said home and this is confirmed by the testimony of the Respondents Golson. (R. Vol. III, pp. 954-958). Appellant should be allowed to charge a fee on the materials paid for by the Respondents because Appellant had to supervise the installation of said materials.

ARGUMENT V

THE COURT ERRED IN ITS FINDING THAT THE PROVEN PROJECT COSTS OF THE APPELLANT WAS ONLY $284,525.70 IN ITS FINDING OF FACT NUMBER 193.

A large majority of the claims by the Appellant and Third-Party Appellant that were denied by Judge McLeod relates to cash payments that were made to subcontractors. The Court found that these checks were fraudulent. Appellant and Third-Party Appellant argue that there is not clear and convincing evidence of fraud with these checks.

Respondent's Trial Exhibit 4 (R. Vol. III, p. 1305) is a list of checks prepared by ARM which was to confirm cash payments made to the subcontractors on this project and those cash

payments are attached to Appellant's Trial Exhibits 18, 20, 27, 28 and 29 (R. Vol III. pp. 1223, 1235, 1253,1269, 1272). Mr. Mazloom testified that each time he made a cash payment to a materialman or subcontractor he would make a notation in his records and would execute a signed check for his tax records to have written confirmation of what cash payments were being made to the materialmen, labor men or subcontractors. (R. Vol II, pp 110-111). Appellant also secured cash receipts from materialmen and subcontractors which are denoted under Respondent's Trial Exhibit 5 (R. Vol. III, p. 1306)and these receipts are further evidenced of the legitimacy of the checks under Respondent's Trial Exhibit 4 (R. Vol III, p 1305). Respondent also entered into evidence Appellant and Third-Party Appellant's Exhibits 1-29 (R. Vol. III, pp. 1101-1272) which were a listing of all of Appellant and Third-Party Appellant's invoices for the sub-contractors and materialmen. Appellant and Third-Party Appellant listed at least three sources of documented evidence to prove its losses included the Appellant and Third-Party Appellant's invoices, sub-contractor invoices, cash receipts and checks prepared by the Appellant and Third-Party Appellant's for verification of the cash payments.

The Court put unduly weight on the testimony of four sub-contractors to prove fraud. Appellant and Third-Party Appellant here does a summary of statement of these sub-contractors. Appellant and Third-Party Appellant contend that their testimony shows as follows:

a. Mr. Crolley, who owns A&D Fabrications, indicated in his testimony he could not remember when he worked on the house. (R. Vol. II, p.720). He was not sure what the payment amount was. (R., Vol. II, p. 721). He had no record, no memory of the amount of invoice on the project (R. Vol. II, p. 724). There was an invoice which Crolley wrote on it "ARM", the address of the Defendants Golson's in Chapin where the house was being built and wrote "deck for the porch" but denied he wrote in the figure of $13,000. Defendant's Trial Exhibit 6A, Invoice No. 048852. This payment is marked as "paid". On the cash receipt he indicates it is his handwriting and he did write that which is for $3600 which is the cash payment to him paid on

January 29, 2017. (R. Vol II., p. 729 and Defendant's Trial Exhibit 6D, R. Vol. III, p. 1318). He did not know what he has been paid. (R. Vol. II, p. 740). Although, earlier he said $13,000. When you add the checks together that were written to him, they total $13,000 which entered on the invoice. (R. Vol. II, pp. 737-745 and Plaintiff's Trial Exhibit 29 showing checks, R. Vol. III, p. 1272).

b. B&R Electric. The owner testified he submitted a written bill for $23,098.51 which has 21 separate entries (Defendant's Trial Exhibit 15A, R. Vol. III, p. 1337). This bill matches up with the three checks that are written to him by the Plaintiff ARM which are entered under Plaintiff's Exhibit 20, R. Vol. III, p. 1235). He stated he did not receive cash but his invoice matches up with the checks which are in the amount of $18,000, $900 and $4,100 (Plaintiff's Trial Exhibit 20, R. Vol. III, p. 1235). He indicated he produced the invoice given to the Plaintiff ARM for $23,090.51 given to the Plaintiff ARM for the $23,098.51. The date of the invoice is December 30, 2016. He said he produced the $4,100 invoice and gave it to Plaintiff ARM (Defendant's Trial Exhibit C, R. Vol. III, p. 772). He testified 39 additional recess lights had to be placed in the house, as requested by the Defendants Golson. (R. Vol. II, pp. 772-785).

c. Joshua Hall did the interior finish carpentry on the house and he had been working for the Plaintiff ARM for 20 years and had no reason to not trust him and he was a good builder. His testimony discussed conflicting invoices but he indicated he could not calculate what the discrepancy was in these invoices. He was not the best bookkeeper. However, he did indicate the proper invoices in this case was 1052 and 1079 and when you add up the checks that are written to him which are checks 800, 807, 824 and 848, they match-up which what he says is the dollar figure on the invoices 1052 and 1079, within $900 (Plaintiff's Trial Exhibit 28, R. Vol. III, p. 1269). Also, he testified he had traveled to obtain wood product to match-up with the cabinetry that was being moved from the Defendants Golson's house in Columbia to be placed in their new house because it had been built by Mrs. Golson's parents. This was a day trip to the upper part of the state and would have to be cut to have completed cabinetry in the kitchen (R. Vol. II, pp. 814-826).

d. White Knoll Heating & Air's representative, Josh Joyner, submitted an invoice of $25,000. He said he was actually paid $19,500 but he could not produce the invoice on that. The checks that are written to him which are number 768, 799, 811 and 847 total what his invoice was in the amount of $25,000. He denied he received cash payments. (R., Vol. II, pp. 832-840).

Furthermore, Appellant and Third-Party Appellant would ask the Court to consider, in regards to the question of fraud, the following:

1. The actions of the Appellant and Third-Party Appellant in this matter are the following:

    a. The parties were neighbors and had been for years.

    b. Appellant and Third-Party Appellant assisted the Respondents in securing a bank loan by referring them to the bank he used.

    c. Appellant and Third-Party Appellant sent the Respondents to a house designer who minimized his charges because of concern of costs by the Respondents.

    d. Appellant and Third-Party Appellant delayed the finishing of the construction of the house so the Respondents would not have to be charged for the real estate taxes on the house improvement until the year 2017.

    e. Appellant and Third-Party Appellant had never been sued before in all of his years practicing as a licensed contractor. Even the sub-contractors recognized the Appellant and Third-Party Appellant paid their bills to them and one sub-contractor even indicated he had no reason to question the integrity of the Appellant and Third-Party Appellant. These are not indications of anyone attempting to scheme the homeowner.

ARGUMENT VI

THE COURT ERRED IN ITS FINDING ON THAT PUNITIVE DAMAGES SHOULD BE AWARDED AGAINST THE APPELLANT AND THIRD-PARTY APPELLANT

In Judge McLeod's Order, he stated:

"Furthermore, the Court finds that Mazloom's conduct is so reprehensible as to warrant the imposition of further sanctions achieve punishment or deterrence. *Magnolia North Property Owners Ass'n., Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012). The comprehensive, concerted and complex scheme of fraudulent activity engaged in by Mazloom was willful, wanton and reckless, which merits an award of punitive damages. *Sample v. Gulf Ref. Co.*, 183 S.C. 399, 410, 191 S.E. 209,

241 (1973). The Court awards the Golsons punitive damages against Mazloom for $42,678.86, which equates to the fee earned as a result of the actual proven cost of the work." (R. Vol. I, p. 127)

In South Carolina, punitive damages are allowed in the interest of society in the nature of punishment and as a warning and example to deter the wrongdoer and others from committing like offenses in the future. Moreover, they serve as a vindication of private rights when it is proved that such have been wantonly, willfully or maliciously violated. Lastly, punitive damages may be awarded only upon a finding of actual damages. *Scott v. Porter*, 340 S.C. 158, 530 S.E.2d 389 (Ct. App. 2000).

In order to receive an award of punitive damages, the Appellant has the burden of proving by clear and convincing evidence the Respondent's misconduct was willful, wanton, or in reckless disregard of the Appellant's rights. *Scott v. Porter*, 340 S.C. 158, 530 S.E.2d 389 (Ct. App. 2000).

The Gamble factors for awarding punitive damages are: (1) Respondent's degree of culpability; (2) duration of the conduct; (3) Respondent's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the Respondent or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) Respondent's ability to pay; and finally, (8) other factors deemed appropriate. The trial judge is not required to make findings of fact for each factor to uphold a punitive damages award. *Scott v. Porter*, 340 S.C. 158, 530 S.E.2d 389 (Ct. App. 2000).

In *Scott v. Porter*, 340 S.C. 158, 530 S.E.2d 389 (Ct. App. 2000), the Court determined "In examining the record, we find the trial judge properly reviewed the punitive damage awards using the *Gamble* factors. The trial judge stated:

> Specifically, the Court finds that the Respondent has the ability to pay, that the Respondent's degree of culpability was very high, if not 100 percent, that the

Respondent was aware of her actions. There is no evidence of any past conduct, however the Court feels that this award of punitive damages is likely to deter others from this type of conduct in the future. The Court further finds that the award of punitive damages is reasonably related to the injuries suffered in this particular case."

Judge McLeod's Order granting the punitive damages does not indicate that he reviewed the *Gamble* factors in the decision he gave for punitive damages and do not factor in a substantial number of those factors.

ARGUMENT VII

THE COURT ERRED IN ALLOWING THE ATTORNEYS FEES AWARDED UNDER THE MECHANIC'S LIEN CASE BEING SPECIAL DAMAGES IN THE SLANDER OF TITLE ACTION

Appellant/Third-Party Appellant would cite the reasons set forth in Arguments I, II and III above. Also, the Court does not cite any South Carolina authority allowing a slander of title action to be based on the filing of an alleged defective notice of mechanic's lien.

ARGUMENT VIII

THE COURT ERRED IN ALLOWING DOUBLE RECOVERY FOR DAMAGES AGAINST THE APPELLANT AND THIRD-PARTY APPELLANT

In Judge McLeod's Order he states:

"Having found that ARM is liable to the Golsons for breach of contract in the amount of $86,042.50 and recognizing that the damages of $80,360.59 for fraud is subsumed in the contract damages and in order to avoid a double recovery, the Court declines to issue an award for damages against ARM for fraud. However, the Court has found that Mazloom, in his individual capacity, engaged in fraud; and thus, finds Mazloom liable for the fraud damages in the amount of $81,160.59. Furthermore, the Court finds that Mazloom's conduct is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." (R. Vol. I, p. 125)

The doctrine of election of remedies involves a choice between two or more different and coexisting modes of procedure and relief afforded by law for the same injury. *Tzouvelekas v. Tzouvelekas,* 206 S.C. 90, 33 S.E.2d 73 (1945). Its purpose is to prevent double redress for a

single wrong. Use of the doctrine is limited to cases where a double recovery by the plaintiff is threatened. *Save Charleston Foundation v. Murray*, 286 S.C. 170, 333 S.E.2d 60 (Ct.App.1985). When one set of facts entitles the plaintiff to alternative remedies, he may plead and prove his entitlement to either or both; however, the plaintiff may not recover both. *Id.* The plaintiff should have a full opportunity to prove his claim to some form of relief, but he should not receive a double recovery. *Id.* The invocation of one remedy constitutes an election of remedies that will bar another remedy consistent therewith where the suit upon the remedy first invoked reached the stage of final adjudication. *Id.* *Brown v. Felkel*, 320 S.C. 292, 294, 465 S.E.2d 93, 95 (Ct. App. 1995) *cert. dismissed*, 326 S.C. 36, 482 S.E.2d 564 (1997). As we have stated, there can be no double recovery for a single wrong. This is the basic purpose of the election of remedies doctrine. Id. A defendant may raise the issue of election of remedies at any stage of the case. Indeed, to carry out the doctrine's purpose, the trial judge should on his own motion require election if he lets both causes of action go to the jury. *Nichols*, 279 S.C. at 341, 306 S.E.2d at 619 (holding trial judge acted properly in striking verdict on one cause of action to prevent double recovery). To hold otherwise would result in an impermissible double recovery. *Adamson v. Marianne Fabrics, Inc.* 301 S.C. 204, 391 S.E.2d at 251.

Judge McLeod has allowed double recovery because the specific findings of fact for the judgment against Appellant and Third-Party Appellant for breach of contract are the same facts used to impose a personal judgment against the Third-Party Appellant (i.e. a review of Finding 193, R. Vol. I. p. 117 and Finding 206, R. Vol. I, p. 121 are identical with the exception of $5,000.00. This is allowing double recovery).

CONCLUSION

Appellant and Third-Party Appellant contend that proper service was made on the Respondents even though the Affidavit from the sheriff's department was not obtained. The Affidavit did not need to be obtained because the evidence is the Respondents lived at that address and did not have to be located. Furthermore, notice was given to Respondents' attorney shortly after the attempted service so they have full disclosure before the notice of mechanic's lien was filed and afterwards as to the intent of the Appellant and Third-Party Appellant. Appellant and Third-Party Appellant further argues that the Motion to Dismiss by Respondents should be limited to the question of service and not timely filing as the matter of service was the only matter raised in Respondents' Motion to Dismiss. Rule 7 of the SC Rules of Civil Procedure indicate that the reasons for a motion have to be particularly stated.

Appellant and Third-Party Appellant argues that the decision on the attorney's fees and mechanic's lien should be reversed because at worst the service issue is a mere technicality and fees should not be awarded and the evidence in the file is that the time spent on the question of service was minimal in the case based on the deposition of the Respondent Joseph A. Golson and the discovery in the case.

Appellant and Third-Party Appellant argues that they prove that there were extra contractual work and that this work was listed on the List of Specifications and was confirmed by the testimony of Respondent Joseph A. Golson as to that work being done.

Appellant and Third-Party Appellant also contends that they approved their damages in the amount of $55,000.00 and the Court's determination that there was a fraud by the Appellant and Third-Party Appellant for reasons stated in the Order, do not meet the standard of clear and convincing evidence based on the fact the Appellant and Third-Party Appellant had written

documentation as to the invoices, cash receipts and checks to verify cash payments as compared to the testimony of four sub-contractor which was ambiguous at best.

Appellant and Third-Party Appellant contends that punitive damages should not be awarded based on the fact that there is no clear and convincing evidence that punitive damages should be allowed and there was not clear and convincing evidence of a fraud and the Court did not render a decision based on the *Gamble* factors.

Appellant and Third-Party Appellant also contend that there was a double recovery against the Third-Party Appellant when the same set of facts were used to determine the breach of contract with fraudulent intent action against the Appellant.

Finally, Appellant and Third-Party Appellant contend that attorney fees should not be special damages for the slander of title action in that there has been no case in this State rendering the Notice of Mechanic's Lien is not protected by pleadings privilege.

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Jul 26 2021
SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Clifton Newman, The Honorable Walton J. McLeod, IV
Lexington County

Trial Court Case No.: 2017CP3202204

ARM Quality Builders LLC d/b/a, ARM Quality Builders........................ Appellant.

v.

Joseph A. Golson and Lycia B. Golson and Branch Banking and Trust Company.. Respondents.

Joseph A. Golson and Lycia B. Golson....................................Third-Party Respondents.

v.

Ahmad Mazloom.. Third-Party Appellant.

Appellate Case No. 2020-001406

CERTIFICATE OF COUNSEL

I hereby certify that this Final Brief of Appellants complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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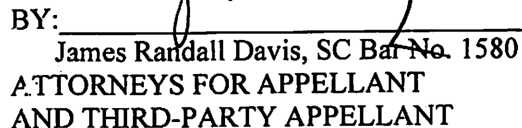

BY:______________________________
James Randall Davis, SC Bar No. 1580
ATTORNEYS FOR APPELLANT
AND THIRD-PARTY APPELLANT

Lexington, South Carolina
July 13, 2021

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Walton J. McLeod, Circuit Court Judge

Appellate Case No.: 2020-001406

ARM Quality Builders LLC d/b/a, ARM Quality Builders........................ Appellant.

v.

Joseph A. Golson and Lycia B. Golson and Branch Banking and Trust Company.. Respondents.

AND

Joseph A. Golson and Lycia B. Golson.....................................Third-Party Respondents.

v.

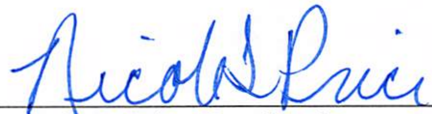
Ahmad Mazloom... Third-Party Appellant.

PROOF OF SERVICE

I, Nicole T. Price, a paralegal with the law firm of DAVIS | FRAWLEY, LLC, do hereby certify that I have served the following with the foregoing **FINAL BRIEF OF APPEALLANT AND THIRD-PARTY APPELLANT,** by electronic mail and depositing the same in the United States mail, with sufficient postage attached thereto, to them at the following address:

E. Wade Mullins, III, Esquire
Post Office Box 61110
Columbia, SC 29260-1110
Attorney for Respondent and Third-Party Respondents

on this 26th day of July, 2021 all in accordance with Rule 5 (b)(1) of the South Carolina Rules of Civil Procedure.



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◊ American Board of Trial Advocates
Δ Certified Circuit Court Mediator

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SC Court of Appeals

July 26, 2021

VIA ELECTRONIC MAIL
South Carolina Court of Appeals
Attn: The Honorable Jenny Abbott Kitchings
Clerk of Court
1220 Senate Street
Columbia, South Carolina 29201

RE: ARM Quality Builders LLC d/b/a ARM Quality Builders v. Joseph A. Golson and Lycia B. Golson, and Branch Banking and Trust Company, LLC and Joseph A. Golson and Lycia B. Golson v. Ahmad Mazloom
Appellate Case No.: 2020-001406
Our File No.: 30909

Dear Ms. Kitchings:

Enclosed, please find the Final Brief of Appellant and Third-Party Appellant and Certificate of Counsel regarding the above referenced matter. I am serving all other parties in this matter by copy of this letter and email. Please let me know if the Court requires anything further.

Sincerely,

Nicole T. Price
Paralegal

cc: E. Wade Mullins, III, Esquire
Post Office Box 61110
Columbia, South Carolina 29260-1110