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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM FLORENCE COUNTY

Court of Common Pleas

The Honorable H. Steven DeBerry, IV, Circuit Court Judge

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Appellate Case No. 2023-001713

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Barbara L. Sarb…… Respondent/Appellant,

v.

Julie W. Phillips and Joseph M. Phillips……Appellants/Respondents.

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# FINAL BRIEF OF RESPONDENT/APPELLANT *AS APPELLANT*

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**ATTORNEYS FOR RESPONDENT-APPELLANT**

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## STATEMENT OF ISSUES ON APPEAL

**I.** **Did the trial court err in denying Sarb's Motion for Judgment Notwithstanding the Verdict on the Phillips' counterclaim for "failure to adequately inspect" the Subject Property where Sarb owed no duty to the Phillips to "adequately inspect" under any contractual, statutory, or common law; the Phillips offered no evidence of Sarb's purported failure to adequately inspect; and the Phillips failed to submit any evidence of recoverable damages?**

**II.** **Did the trial court err as a matter of law or abuse its discretion by awarding the Phillips the entirety of their requested attorneys' fees and costs pursuant to the Purchase Agreement where the jury never found that Sarb breached the Purchase Agreement; an award of attorneys' fees and costs was not mandatory under the Purchase Agreement; and the amount of the award was unreasonable pursuant to the *Baron Data Sys., Inc. vs. Loter*, 297 S.C. 382, (1989) six factor analysis?**

**III.** **Did the trial court err as a matter of law or abuse its discretion by failing to award Sarb's full attorney's fees and costs where the trial court's order was grounded in error rather than any sound logic or reason and Sarb prevailed at trial on her cause of action for violation of a statute intended to reimburse prevailing parties?**

## STATEMENT OF THE CASE

Respondent/Appellant Barbara Sarb (hereinafter the "Sarb") filed this civil action on August 6, 2020 in the Court of Common Pleas for Florence County in the Twelfth Judicial Circuit. (R. pp. 0016-0031). In her Complaint, Sarb alleged causes of action against Appellants/Respondents Joseph and Julie Phillips (hereinafter collectively referred to as the "Phillips") for violating the South Carolina Residential Property Condition Disclosure Act, S.C. Code Ann. § 27-50-10 *et seq*. (the "Disclosure Act"), fraud, constructive fraud, negligent misrepresentation, negligence, breach of contract, and breach of contract accompanied by a fraudulent act. *Id*. Sarb filed an amended complaint on September 9, 2021 upon leave of the trial court, in which she reasserted the aforementioned causes of action, added a third-party breach of contract claim based on the Exclusive Right to Sell Agreement Listing Agreement, and included additional allegations regarding the Phillips' failure to timely provide the disclosure statement. (R. pp. 0074-0089). Phillips filed their answer and counterclaims to Sarb's amended complaint on October 8, 2023 in which they generally denied the allegations contained in the amended complaint and asserted the following counterclaims: (1) South Carolina Frivolous Civil Proceedings Sanctions Act; (2) Breach of Contract – Indemnification and hold harmless; (3) Breach of Contract – Failure to Inspect; and (4) Breach of Contract – Implied Covenant of Good Faith and Fair Dealing. (R. pp. 0090-0106).

The jury trial of this matter took place in Florence County from September 11, 2023 through September 14, 2023 before Florence County Judge H. Steven DeBerry, IV. The Phillips were represented by Edward A. Love of Florence. Sarb was represented by Valerie Garcia Giovanoli and Ely O. Grote of Columbia. At the close of the Phillips' case, Sarb moved for a directed verdict as to the Phillips' counterclaims. Counsel for the Phillips stipulated to the

dismissal of the counterclaim for breach of contract, specifically the indemnity/hold harmless provisions of the contract, but the trial court denied Sarb's motion for directed verdict as to the Phillips' counterclaim for breach of contract for failure to adequately inspect. (R. pp. 0853, 0936).

The jury found the Phillips liable to Sarb on her claim for violation of the Disclosure Act, and awarded damages to Sarb in the amount of $70,000.00. (R. pp. 0001-0002). However, the jury also found Sarb liable to the Phillips for "Failing to Adequately Inspect the Property", and originally awarded damages to the Phillips in the amount of $0.00, but ultimately awarded damages in the amount of $1,000.00 upon receiving further instruction from the trial court. (*Id*.); (R. p. 1046).

On September 25, 2023, Sarb timely filed a motion for judgment notwithstanding the verdict arguing that the trial court erred in denying her motion for directed verdict as to Phillips' counterclaim for "failure to adequately inspect" the Subject Property. (R. pp. 0127-0130). Also on September 25, 2023, the Phillips filed their motion for judgment notwithstanding the verdict or in the alternative for new trial. (R. pp. 0131-0134). The trial court denied both motions. (R. pp. 0012-0013).

On October 12, 2023, the parties filed their respective motions for attorney's fees and costs. (R. pp. 0135-0313); (R. pp. 0314-0365). In her motion, Sarb requested attorney's fees in the amount of $183,347.40 and costs in the amount to $7,795.84.[1] (R. pp. 0135-0313). Conversely, the Phillips requested attorney's fees in the amount of $55,393.00 and costs in the amount of $2,310.11. (R. pp. 0314-0376).

[1] Sarb originally requested $6,395.84 in costs in her original filing on October 12 2023. But, on October 20, 2023, Sarb requested $7,795.84 in costs in a supplemental filing.

The trial court awarded Sarb fees in the amount of only $55,393.00 and costs in the amount of only $6,395.84, and further awarded the Phillips all fees and costs requested by them, in the amount of $55,393.00 and $2,310.11, respectively, as memorialized in Judge DeBerry's November 21, 2023 Order. (R. pp. 0007-0011). The net award to Sarb for attorney's fees was $0 to Sarb and $4,085.73 for costs, for the trial in which she prevailed. (*Id.*).

Thereafter, the Phillips filed a notice of appeal on November 1, 2023 as to the trial court's denial of their motion for JNOV or new trial. (Phillips' Not. of Appeal). On November 3, 2023, Sarb filed a notice of cross-appeal as to the denial of her motion for JNOV. (Sarb Not. of Cross-Appeal). On December 15, 2023, Sarb filed a notice of appeal as to the November 21, 2023 trial court order granting fees and costs. (Sarb Not. of Appeal). On December, 19, 2023, the Phillips filed a notice of cross-appeal of the order granting fees and costs. (Phillips Not. of Cross-Appeal). On March 5, 2023, the South Carolina Court of Appeals granted Sarb's motion to consolidate the appellate matters, which was filed with the Phillips' consent on December 29, 2023. (Order Granting Mot. Consolidate).

## STATEMENT OF FACTS

This appeal stems from the sale of a residential property located at 550 Wisteria Drive in Florence, Florence County, South Carolina (the "Subject Property") by the Phillips to Sarb, and the subsequent litigation concerning the condition of the Subject Property at the time of the sale.

The Phillips listed the Subject Property for sale on or about June 12, 2019. (R. p. 1052). On June 13, 2019, the Phillips signed the disclosures required under the Disclosure Act. (R. pp. 1061-1066). The next day, on June 14, 2019, Sarb made an offer to purchase the Subject Property. After competing offers, Sarb made an offer higher than the Phillips' list price, which the Phillips accepted. (R. p. 1052); (R. p. 0733, lines 2-10); (R. p. 0813, lines 9-25); (R. p. 0814,

lines 1-2). On or about June 15, 2019, the parties entered into the "Agreement/Contract: To Buy and Sell Real Estate (Residential) for the purchase of the Subject Property," ("Purchase Agreement"). (*See* R. pp. 1053-1060).

**A. The Purchase Agreement**

Paragraph 9 of the Purchase Agreement granted Sarb, as the buyer, a right to visually inspect the Subject Property and to provide reasonable notice to the Phillips of any issues observed during those visual inspections. (R. p. 1056 at ¶ 9).

Additionally, Paragraph 23 of the Purchase Agreement contains the following provision:

> 23. DEFAULT/BREACH
>
> (A) If Seller defaults in the performance of any of the Seller's obligations under this Contract ("Default"), Buyer may:
> (i) Deliver Notice of Default to Seller and terminate Contract; and
> (ii) Pursue any remedies available to Buyer at law or equity; and
> (iii) Recover attorneys' fees and all other direct costs of litigation if Buyer prevails in any action against Seller.
>
> **(B) If Buyer defaults in the performance of any of the Buyer's obligations under this Contract ("Default"), Seller *may*:**
> **(i) Deliver Notice of Default to Buyer and terminate Contract; and**
> **(ii) Pursue any remedies available to Seller at law or equity; and**
> **(iii) Recover attorneys' fees and all other direct costs of litigation *if* Seller prevails in any action against Buyer.**
>
> (C) If either/both Parties default, Parties agree to sign an escrow deposit disbursement agreement or release agreement.
> (D) Parties may agree in writing to allow a Cure Period for a default. If within the Cure Period, either Party cures the Default and Delivers Notice, Parties shall proceed under the Contract.

(R. p. 1058 at ¶ 23) (emphasis added).

**B. The Disclosure Statement and Defects**

The Disclosure Statement that the Phillips provided to Sarb prior to purchase contained a number of false statements and omissions regarding the condition of the Subject Property.

*i. Groundwater Intrusion in Basement*

Item 7 of the Disclosure Statement required the Phillips to disclose whether they had actual knowledge of any problems, including any defects, damages, conditions or characteristics, concerning the:

> Foundation, slab, chimneys, wood stoves, floors, basement, windows, driveway, storm windows/screens, doors, ceilings, interior walls, exterior walls, sheds, attached garage, carport, patio, deck, walkways, fencing, or other structural components including modifications[.]

(R. p. 1062). The Phillips represented on the Disclosure Statement that they had no knowledge of any issue with the structural components of the Subject Property, including the basement. (*Id.*). At trial, the Phillips admitted that the basement flooded twice during their ownership; once in 2015 during the "1000-year flood" and again during either Hurricane Matthew or Hurricane Florence. (R. p. 0816, lines 3-11). Although the Phillips claimed that these flooding events were solely due to the sub-pump failing, they affirmatively represented that they had no knowledge of any issue with or damages to the basement walls or floors on the Disclosure Statement. (R. p. 1062). Moreover, Sarb testified that she specifically asked her realtor, John Etheridge, to confirm with the Phillips that there was never any flooding or water intrusion in the Subject Property. (R. p. 0688, line 25); (R. p. 0689, lines 1-8). In response, the Phillips, through their real estate agent, confirmed that there were never any water intrusion or flooding events in the Subject Property, not even during a hurricane. (*Id.*). Mr. Etheridge confirmed this interaction in his trial testimony. (R. p. 0741, lines 17-25); (R. p. 0742, lines 1-10).

Robin Hatchell, who lived next door to the Subject Property from 1960 through 2019. (R. p. 0780, lines 19-20); (R. p. 0781, line 3). Ms. Hatchell testified that she grew up playing with the kids that lived in the Subject Property and that they would venture into the basement of the Subject Property. (R. p. 0782, lines 6-25). She testified that during those visits, the entire basement was damp. (R. p. 0783, lines 1-6). Ms. Hatchell also testified she visited the Subject Property on numerous occasions during the Phillips' ownership, sometime in 2016 or 2017 during either Hurricane Matthew or Hurricane Florence, to watch the Phillips' cat while they were vacationing. (R. p. 0783, lines 7-18). Ms. Hatchell testified that Mr. Phillips took her to the basement, before leaving for vacation, to show her how to turn the sump pump on if it turned off during the storm. (R. p. 0783, line 19); (R. p. 0784, line 15). At that time, she observed the sump pump running while there was standing water and flowing water through the basement, about three (3") inches deep. (*Id*). Ms. Hatchell also testified that she checked on the Phillips' cat a couple of times while the Phillips were away on vacation and the cat had to jump from one piece of furniture to another to keep his paws out of the water. (R. p. 0783, line 23); (R. p. 0784, line 2). Ms. Hatchell testified that the McLeans owned the house and had children with whom she grew up and played. (R. p. 0782, lines 6-11); (R. p. 0784, lines 16-20).

Additionally, Joe McLean, Esq., testified he lived in the Subject Property for approximately 18 years, beginning in the early 1960s, until he went off to college. (R. p. 0789, lines 14-24). After college, Mr. McLean would visit the Subject Property for the next ten years. (*Id*). He testified at trial that when he was living at the Subject Property, the basement flooded with an inch (1") to inch and a half (1.5") of water during periods of heavy rain. (R. p. 0790, lines 9-16). He recalled he and his brothers would have to sweep water out of the basement. (R. p. 0790, lines 17-21).

Moreover, in connection with the Phillips' purchase of the Subject Property in 2010, the Phillips had an appraisal of the Subject Property. The Phillips were provided a Uniform Residential Appraisal Report dated October 9, 2010 and completed by Mark Chandler of Florence Appraisal, Inc. (R. pp. 1168-1191). Mr. Chandler's report identified the following:

> Basement floor has a few sections that are damp (see photo). If lender requires evidence of any potential damages, an inspection by a licensed home inspector or contractor is recommended to determine if there are any structural damages due to the moisture/dampness in the basement. A home inspector, contractor, or surveyor may be able to provide info in regards [sic] to if this level of dampness is typical/common for the market area.

(R. p. 1168); (R. p. 1170). During her testimony, Mrs. Phillips confirmed that she received this report prior to their purchase of the Subject Property. (R. p. 0824, line 25); (R. p. 0825, lines 1-8). Mrs. Phillips also testified to the following during direct examination:

> Q: […] you did not disclose that there had been water in the basement at [the Subject Property] before Sarb purchased the property…[i]sn't that correct?
>
> A: I did not.
>
> Q: And you are sitting here today admitting that you had at least two water incidents in the basement of [the Subject Property]?
>
> A: We did have two water instances, yes.

(R. p. 0798, lines 9-15).

Sarb and her realtor John Etheridge testified that they did not observe any standing water in the basement or any indication of water intrusion during their multiple pre-closing walkthroughs likely due to the dry summer. (R. p. 0740, lines 24-25); (R. p. 0742, lines 1-7). As shown on the precipitation data reports prepared by the South Carolina Department of Natural Resources ("SCDNR"), there were at least ten (10) incidences where rainfall in Florence County exceeded one (1") inch from 2010 to 2018, when the Phillips owned the Subject Property. (R.

pp. 1116-1125). By contrast, the precipitation data for April through July 2019 indicates that the Spring and Summer 2019 was a dry period, especially when compared to the precipitation data for the same period in prior years. (*See generally* R. pp. 1116-1126).

Sarb testified at trial that she personally visited the Subject Property on numerous occasions prior to closing. (R. p. 0454, lines 14-17). Prior to closing, Sarb also had a home inspection performed by a licensed home inspector, Kevin Watford of HouseMaster (R. pp. 1071-1103), as well as a CL-100/South Carolina Wood Infestation inspection performed by Dodson Brothers Exterminating Company (R. pp. 1067-1069).

On June 27, 2019, Sarb submitted a Repair Addendum to the Phillips requesting that the Phillips make all recommended repairs pursuant to the HouseMaster and CL-100 Reports. (R. pp. 1104-1105). However, neither the CL-100 or the HouseMaster reported identified any groundwater infiltration or prior flooding events to the basement, or anything indicating such problems. (R. p. 0729 lines 11-15); (*See generally* R. pp. 1106-1108); (R. pp. 1109-1112). Closing on the property took place on July 26, 2019 (R. pp. 1113-1115). At that time, Sarb signed an ATLA Settlement Statement indicating that the Phillips were crediting her with $5,669.00 for repairs to be made in accordance with the June 27, 2019 Repair Addendum. (R. pp. 1109-1115). Sarb testified that any issues identified in the HouseMaster and CL-100 reports were corrected by her after closing, but neither report indicated any groundwater infiltration issues and therefore those were not requested repairs. (R. p. 0729, lines 11-15); (R. p. 0730, lines 11-24); (R. p. 0837, lines 19-23); (R. p. 0838, lines 5-21); (R. p. 0575, lines 4-25); (R. p. 0576, lines 1-2). Sarb was unaware of the groundwater infiltration issue due to the Phillips various misrepresentations on the Disclosure Statement and the affirmative misrepresentation made by

the Phillips prior to closing, and therefore did not know that any additional repairs would be required or that she should request the same. (*Id*.).

Almost immediately after closing and moving into the Subject Property, she began to experience water problems in the basement. The first instance of flooding in the basement was on or about August 18, 2019 followed by another on or about September 6, 2019. (R. 0458, lines 10-17); (R. p. 0461, lines 22-25); (R. p. 0462, lines 1-10); (R. p. 0465, lines 8-13). These events coincide with the precipitation data from SCDNR (R. p. 1126). In December of 2019, the basement flooded again. On December 17, 2019, Sarb recorded a video showing groundwater steadily pouring through the crevices in the wall like a fountain. (R. p. vi, Plaintiff's Trial Exhibit 33 (omitted-video)). Further, photographs dated December 19, 2023 show groundwater penetrating the masonry wall and flowing onto the floor. (R. p. 1134); (R. p. 1135). The existing sump pump in the basement, which was working at the time, could not handle draining the water from the basement during this flooding. (R. p. 0564, line 18); (R. p. 0565, line 5). Sarb contracted Daniel Williams, a licensed plumber, to upgrade the sump pump in an effort to remedy the flooding. (R. p. 0502, lines 15-25).

Sarb testified that she continued to experience frequent, recurrent problems with water pouring from in-between the walls, the floor, and all three sides of the basement despite the upgraded sump pump (R. p. 0466, lines 6-10), which resulted in flooding and standing water. The basement flooded multiple times from December 2019 through February 2020, as evidence by photographs. (*See* R. pp. 1130-1133); (R. p 1135); (R. pp. 1137-1145); (R. pp. 1147-1154). The flooding contributed to an increase in moisture, humidity and mold growth in the home. (R. p. 0515, lines 9-12; lines 16-19); (R. p. 1143); (R. p. 1144). As a result of the high moisture

levels, the walls in the upstairs area began weeping, and Sarb's furniture became wet from the humidity. (R. p. 0571, line 14).

Photographs of the moisture monitor taken from October 2019 through January 2020 reflect that the moisture levels in the basement were at 90-100% humidity. (R. p. 1129); (R. p. 1146). Sarb also testified that the humidity levels in the upstairs kitchen right above the basement were reading at 80-90% humidity during that same period. (R. p. 0571, lines 9-14). She recalled experiencing headaches, coughing, difficulty breathing, shortness of breath, and joint pain as a result of the humidity levels in the Subject Property (R. p. 0571, lines 14-16); (R. p. 0599, lines 16-17) for which she sought medical treatment. (R. p. 0599, lines 20-21); (R. p. 0601 lines, 12-25); (R. p. 0602, lines 1-25); (R. p. 0603, lines 1-2, 19-25); (R. p. 0604, line 1); (R. pp. 1157-1161). These symptoms also affected her job performance as a physician at Florence Neurosurgery and Spine (R. p. 0604, lines 13-25); (R. p. 0605, lines 1-25), and her overall mental health. (R. p. 0605, lines 9-10).

Sarb testified that, as a result of her ongoing medical symptoms from the flooding and barometric pressure levels, she moved out of the Subject Property in December 2019 and returned to her residence in Myrtle Beach. (R. p. 0510, lines 4-22); (R. p. 0572, lines 9-21). Nevertheless, despite not residing at the Subject Property or in Florence during that period, Sarb would diligently visit every morning before work, during her lunch breaks, and whenever she had time off to empty the dehumidifiers, squeegee any standing water in the basement, and attend to any other essential household tasks needed for the Subject Property. (R. p. 0510, lines 15-19); (R. p. 0572, lines 1-8). Sarb's medical symptoms did not improve until approximately four (4) months after moving out of the Subject Property. (R. p. 0604, lines 8-9).

On March 1, 2020, Sarb entered into a month-to-month lease agreement for an apartment located in Florence so that she could be closer to her workplace and the Subject Property, and to avoid the daily 155 round trip commute from her residence in Myrtle Beach to the Subject Property. (R. p. 0573, lines 12-25); (R. p. 0574, lines 1-17). She testified that she lived in the Florence apartment until December 2020, approximately nine (9) months after signing the lease and one (1) year after initially moving out. (R. p. 0575, lines 4-25); (R. p. 0576, lines 1-2). She moved back into the Subject Property after having extensive repairs performed to stop water from infiltrating the home. (R. p. 0576, lines 7-10).

In February of 2020, Sarb's engineering expert, Glenn Stewart, M.E., P.E. of Engineering Design & Testing Corp. ("EDT"), performed an inspection of the Subject Property. (*See* R. p. 0710, line 25); (R. p. 0710, lines 1-2). At trial, Mr. Stewart was qualified as an expert in the fields of civil engineering including building evaluation and groundwater evaluation without objection. (R. p. 0710, lines 4-13). Mr. Stewart testified that during this inspection, he found standing water in the basement while the sump pump was running (R. pp. 0711-0712) and water penetrating along the front wall of the *basement* and at the seam between the basement wall and the slab (floor) of the basement. (*Id*.). He also went into the crawlspace of the Subject Property, and noted that there was soil that was extending outside that would be at a higher elevation than the soil in the crawlspace itself. (R. p. 0717, lines 6-10). He further testified that the backside of the masonry on the basement wall was wet and had water stains. (R. p. 0717, lines 10-12); (*see also* R. pp. 1155-1156). His conclusion, based on a reasonable degree of engineering certainty, was that groundwater from the home was entering the building foundation walls and slab, resulting in standing water and elevated moisture conditions in the basement. (R. p. 0717, lines 12-15).

The HouseMaster Report noted that the foundation walls, piers/columns, main beams, floor framing and crawlspace ventilation as "satisfactory" and Mr. Waterford did not recommend any repairs. (R. p. 1091). Indeed, the only issue Mr. Waterford identified with the basement components was the existence of some water intrusion to the front section of the crawlspace and he recommended installing vent wells to reduce water penetration. (R. p. 1092).

Mr. Stewart concluded that the issue of the moisture staining on the foundation wall and the recommendation to install a vent well as noted in the HouseMaster report was to address a surface water issue. He testified that the surface water issue in the *crawlspace* area was a separate and distinct issue from the groundwater penetrating the *basement* foundation wall, in a different area of the house. (R. p. 0718, lines 9-25); (R. p. 0719, lines 1-13). He explained that the purpose of the vent well is to prevent surface water on grade running into the crawlspace vent, but that the vent wells would not alleviate the groundwater penetration into the basement foundation due to the water table the Subject Property sits upon. (R. p. 0719, lines 20-25); (R. p. 0720, lines 1-10). Additionally, Mr. Stewart was questioned as to whether there were any indications of water damage to the basement on the CL-100 Report. (R. p. 0719, line 114). Mr. Stewart's conclusion, based on a reasonable degree of engineering certainty, was that although the CL-100 indicated some evidence of non-active fungal-based decay in other areas under the house, it did not identify any sort of concerns about standing water in the basement or groundwater infiltration. He also opined that the non-active fungal decay was unrelated to the groundwater infiltration issues and those areas. (*See* R. p. 0719, lines 11-14).

*ii.* *Sewage Disposal Systems and Plumbing*

The Phillips likewise represented on the Disclosure Statement that they had no actual knowledge of any problems, including any defects, damages, conditions or characteristics of the

sanitary sewage disposal system for any waste water or the plumbing systems (pipes, fixtures, water heater, disposal, softener, plumbing components. (R. p. 1062 at ¶ III.).

Sarb testified that almost immediately after moving into the Subject Property, she began to experience recurrent problems with sewer line stoppages/backups, including clogged sinks, toilets not flushing properly and debris backing up into the shower. (*See* R. p. 0609, lines 1-23).

Sarb retained Daniel Williams to assist her in identifying the cause of her sewer stoppages and backups and repairing it. Mr. Williams discovered a defective and rusted plumbing line that had been reduced from four (4") inches to three (3") inches as the pipe left the house toward the street. (R. p. 0843, lines 23-25); (R. p. 0844, lines 1-14). Mr. Williams, who was properly qualified as an expert in the area of plumbing, further testified that in addition to the reduction to the line, the line ran backwards, up the slope towards the street. (R. p. 0845, lines 2-25); (R. p. 0846, lines 1-11). He confirmed that this reverse slope would be guaranteed to cause sewage backups (R. p. 0846, lines 18-19), and that this in combination with the reduction of the line is a "double whammy" guaranteed to cause backups. (R. p. 0846, lines 24-25). It was Mr. Williams' expert opinion that the line had been situated in that manner there for quite a long time, likely when it was first put down. (R. p. 0847, lines 2-9). Additionally, Mr. Williams observed a number of holes that had been cut into the line, which indicated some prior attempt to unclog the line. (R. p. 0847, lines 10-25); (R. p. 0848, line 1).

At trial, Mrs. Phillips stated that there were maybe three to four sewage backups during the nine years she, her husband, and two children lived at the Subject Property. (R. p. 0807, lines 4-6). She further confirmed that she filed a claim on her home warranty for those sewage backups, but that the warranty company denied the claim because there was no sewer cleanout. (R. p. 0807, lines 10-16).

*iii. Cockroach and Pest Infestation(s)*

The Phillips asserted on the Disclosure Statement that they had no actual knowledge of any known present pest infestation. (R. p. 1063 at ¶ IV.). Sarb testified after moving into the Subject Property, she began to immediately notice a large number of roaches (approximately twenty or more a day). (R. p. 0616, lines 9-15). Sarb testified that live and dead cockroaches, cockroach feces and cocoons were three feet high, up to the light sockets, behind the wall coverings throughout areas of the house. (R. p. 0613, lines 7-25); (R. p. 0614, lines 1-9). John Sims, a licensed contractor who was performing some work to the Subject Property, also testified that, when some of the baseboard was removed in the sunroom in August 2019, he discovered a severe cockroach infestation that required immediate treatment. (*See* R. p. 0835, lines :7-12, 23-25); (R. p. 0834, lines 1-4). Similar to the other defects with the Subject Property, the Phillips responded "[n]one" to any known past or present pest infestations on the Disclosure Statement. (R. p. 1063 at ¶ IV.).

## STANDARD OF REVIEW

### A. Directed Verdict/Judgment Notwithstanding the Verdict

"On review from a trial court's denial of a motion for directed verdict or judgment notwithstanding the verdict (JNOV), this Court applies the same standard as the trial court and views the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *See Allegro, Inc. v. Scully*, 418 S.C. 24, 32, 791 S.E.2d 140, 144 (2016) (citing *Elam v. South Carolina Dep't of Transp*., 361 S.C. 9, 28, 602 S.E.2d 772, 782 (2004)).

"A directed verdict motion is properly granted if the evidence as a whole is susceptible of only one reasonable inference." *Chakrabarti v. City of Orangeburg*, 403 S.C. 308, 313, 743 S.E.2d 109, 112 (Ct. App. 2013) (citation omitted). "In deciding motions for a directed verdict or

judgment notwithstanding the verdict, the trial judge must consider the evidence in the light most favorable to the nonmoving party." *Brady Dev. Co. v. Town of Hilton Head Island*, 312 S.C. 73, 78, 439 S.E.2d 266, 269 (1993). "If only one reasonable inference can be drawn from the evidence, the motion must be granted." *Id*.

**B. Award of Attorney's Fees**

"When an award of attorney's fees is based upon a contract between the parties, the determination of the fees is left to the discretion of the trial court and will not be disturbed absent an abuse of discretion." *S.C. Elec. & Gas Co. v. Hartough*, 375 S.C. 541, 550, 654 S.E.2d 87, 91 (Ct. App. 2007); *Baron Data Sys., Inc. v. Loter*, 297 S.C. 382, 384, 377 S.E.2d 296, 297 (1989). "The review of attorney fees awarded pursuant to a contract is governed by an abuse of discretion standard." *Laser Supply & Servs., Inc. v. Orchard Park Assocs*., 382 S.C. 326, 340, 676 S.E.2d 139, 147 (Ct. App. 2009). "An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions." *See Sloan v. Friends of Hunley, Inc.*, 393 S.C. 152, 156, 711 S.E.2d 895, 897 (2011).

## ARGUMENT

### I. THE TRIAL COURT ERRED IN DENYING SARB'S MOTIONS FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT AS TO THE PHILLIPS' COUNTERCLAIM FOR "FAILURE TO ADEQUATELY INSPECT" THE SUBJECT PROPERTY.

**A. The Phillips' counterclaim was premised upon a duty Sarb did not owe.**

The Phillips' counterclaim for "failure to adequately inspect," is not grounded upon any duty owed by Sarb to the Phillips under any statute, contract, common law or otherwise, and was not supported by any evidence offered by the Phillips. Nonetheless, the Phillips assert that

Paragraph 9 of the Purchase Agreement created a duty of "adequate inspection" on Sarb; however, the plain language of Paragraph 9 states that Sarb, as the buyer, as well as her licensed inspectors, have the ***right*** to perform reasonable, visual, non-destructive, inspections and re-inspections of the Subject Property, and to provide reasonable notice to the Phillips through closing of any off-site conditions and any issues related to the Subject Property at her own expense. (R. p. 1056 at ¶ 9) (emphasis added). There is no provision contained anywhere in the Purchase Agreement that Sarb has a duty to "adequately inspect" the Subject Property, nor is there any guidance as to what constitutes an "adequate inspection." (*See id.*). In fact, under the terms of the Purchase Agreement, Sarb could have chosen to forgo inspections altogether and she still would not have liability for any alleged "failure to adequately inspect." Even viewing all the evidence in a light most favorable to the Phillips, there was no evidence from which one could even infer Sarb owed the Phillips a duty to inspect property she was purchasing from them.

Therefore, the trial court erred, as a matter of law, in denying Sarb's motions for directed verdict and Judgment Notwithstanding the Verdict.

### B. The Phillips did not present any evidence of Sarb's "failure to adequately inspect."

Even if Sarb owed a duty to Phillips to "adequately inspect" the Subject Property, which Sarb denies, there was simply no evidence at trial that Sarb breached said duty or otherwise "failed to adequately inspect." Rather, there was undisputed testimony and evidence at trial that prior to closing Sarb: (1) personally visited and inspected the property on multiple occasions; (2) had a wood infestation inspection ("CL-100") performed by Dodson Brothers Exterminating Company; (3) had a home inspection performed by HouseMaster; and (4) had a contractor, John Sims, involved in looking at the Subject Property. Further, Sarb's real estate agent, John Etheridge, testified that he didn't recommend any further inspections and that the inspections

performed by or on behalf of Sarb were what were normal and customary for this type of real estate transaction. (*See* R. p. 0739, lines 1-9). Even when viewing the evidence in the light most favorable to the Phillips, only one reasonable inference could have been drawn from the evidence, which is that Sarb performed reasonable due diligence and inspections prior to closing.

Therefore, the trial court erred in denying Sarb's motions for directed verdict and JNOV.

**C. The Phillips did not present any evidence of recoverable damages.**

The trial court erred when it denied Sarb's motions for directed verdict and JNOV on the Phillips' counterclaim for the additional reason that the Phillips presented no evidence at trial that they had sustained any recoverable damages as a result of Sarb's alleged "failure to adequately inspect" the Subject Property. To be clear, the Phillips' only legitimate cause of action pled in its answer was for a *breach of contract* for failing to adequately inspect the Subject Property, rather than merely "failing to adequately inspect" as presented on the verdict form. Notwithstanding the fact the jury did not find Sarb liable for breaching the Purchase Agreement, "[w]hen there is an action for the breach of a contract, a [party] must not only prove the contract and its breach, but damages caused by the breach." *Baughman v. S. Ry. Co.*, 127 S.C. 493, 121 S.E. 356, 356 (1924). "In a breach of contract action, damages serve to place the non-breaching party in the position he would have enjoyed had the contract been performed... In the normal case, the damage will consist of two distinct elements: (1) out-of-pocket costs actually incurred as a result of the contract; and (2) the gain above costs that would have been realized had the contract been performed." *S.C. Fed. Sav. Bank v. Thornton-Crosby Dev. Co., Inc.,* 303 S.C. 74, 77, 399 S.E.2d 8, 10-11 (Ct. App. 1990). "In order for damages to be recoverable, the evidence should be sufficient to 'enable the court or jury to determine the amount thereof with reasonable certainty or accuracy.'" *Winters v. Fiddie,* 394 S.C. 629, 647, 716 S.E.2d 316, 325 (Ct. App.

2011) (quoting *Whisenant v. James Island Corp.,* 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981)). "[T]he existence or amount of damages cannot be left to conjecture, guess, or speculation." *Proctor v. Dep't of Health & Env't Control*, 368 S.C. 279, 317, 628 S.E.2d 496, 516 (Ct. App. 2006).

Here, the Phillips failed to offer any evidence as to any recoverable damages incurred as a result of Sarb's purported failure to adequately inspect the Subject Property throughout the four (4) day trial. At no point did the Phillips proffer any estimates, bills or witness testimony showing evidence of damages. The only instance where the Phillips' "damages" were brought up was during closing arguments, when the Phillips' counsel essentially requested that the jury speculate as to this crucial element:

> [when discussing the Verdict Form]…Now, one other question, and then you got the damages blank, where you get to assign any damages you want to or none at all. That's up to you. I can't tell you what to do there.

(R. p. 1001, lines 23-25).

Moreover, the lack of any evidence of any damages is further highlighted by the fact that the jury initially found damages to be $0.00 before being given the following instruction by the trial court:

> There's one issue that's arisen, and it may be an oversight, it may not be. But the verdict, as it relates to Number 8, and Number 8 says As to Defendants' claim for failing to adequately inspect the property against the plaintiff, the jury -- or the verdict form is checked as liable. And if it is liable, then there must be some amount of damages placed in the damages line. I'm not indicating any amount whatsoever. That's completely in the purview of the jury. But there must be some damage if that is checked as liable. All right? So, I'm gonna [sic] ask you to take the verdict form, go back to your jury room and try to fix that issue, and we'll see you when you get ready.

(R. p. 1046, lines 8-19).

As stated above, given the Phillips' total failure to show any measure of non-speculative, recoverable damages, the jury's arbitrary award of $1,000.00, can only be based on speculation or guess. Therefore, the trial court erred denying Sarb's motions for directed verdict and JNOV as to the Phillips' counterclaim.

## II. THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN AWARDING ATTORNEY'S FEES AND COSTS TO THE PHILLIPS PURSUANT TO THE PURCHASE AGREEMENT AND THE AMOUNT OF THE AWARD WAS UNREASONABLE AND CONTRADICTORY TO SOUTH CAROLINA PUBLIC POLICY.

### A. The Jury did not find Sarb to be in default/breach of the Purchase Agreement.

The trial court erred in awarding the Phillips' attorney's fees and costs under the Purchase Agreement because the jury never found that Sarb was in default or breach of the Purchase Agreement.

In South Carolina, the general rule is that attorney's fees are not recoverable unless authorized by contract or statute. *Baron Data Sys., Inc. v. Loter*, 297 S.C. 382, 383, 377 S.E.2d 296, 297 (1989). Paragraph 23(B)(iii) of the Purchase Agreement states that the "Seller ***may*** recover attorney's fees and all other direct costs of litigation ***if*** Buyer found in default/breach of [the Purchase Agreement.]". (R. p. 1058 at ¶ 23(B)(iii)) (emphasis added). In order for the Phillips to even be *eligible* to recover attorney's fees and costs under the Purchase Agreement, Sarb must have been found to be in default/breach of the Purchase Agreement. (*See generally* R. pp. 1053-1060). While the Phillips asserted counterclaims for breach of contract in their answer to Sarb's amended complaint filed on October 8, 2021, the issue of a breach of contract by Sarb was not properly submitted to nor decided by the jury. Moreover, the jury was never charged as to a counterclaim for breach of contract by Sarb. Instead, the trial court instructed the jury that

the Phillips had alleged that Sarb failed to adequately inspect the property, and as a result, they were entitled to damages – a misstatement of the law. (R. p. 1024, lines 12-15).

Likewise, the verdict form never informed the jury of any counterclaim for breach of contract, nor did the verdict form ask the jury to decide whether Sarb had breached the Purchase Agreement. (R. pp. 0001-0002). Rather, the verdict form simply prompted the jury to determine whether Sarb was liable "as to [the Phillips] claim for Failing to Adequately Inspect the Property."[2] (*Id*.). Notably, the verdict form specifically listed all of Sarb's causes of action by name, including her causes of action for breach of contract and breach of contract accompanied by a fraudulent act. (*Id.*). Specifically, item six (6) on the verdict form asked the jury to determine whether the Phillips were liable "[a]s to Breach of Contract" and item seven (7) on the verdict form asked the jury to determine whether the Phillips were liable "[a]s to Breach of Contract Accompanied by a Fraudulent Act." (*Id*. at ¶¶ 6, 7). However, again, item eight (8) of the verdict form only asked the jury to determine whether Sarb was liable "[a]s to [the Defendants'] claim for Failing to Adequately Inspect the Property", and did not mention breach of contract. (*Id.* at ¶ 8). If the Phillips intended the jury to decide the issue of breach of contract by Sarb, the jury should have been charged as such and the verdict form should have instead specifically mentioned a claim by the Phillips for breach of contract. The Phillips cannot now argue they are entitled to attorney's fees or costs because Sarb was found liable for breaching a contract that contained an attorney's fee provision.

In order to find that Sarb breached the Purchase Agreement, the jury would have had to determine at least two things: (1) that Sarb failed to adequately inspect the property in question;

[2] It is worth noting, South Carolina has never recognized a stand-alone cause of action for a buyer simply failing to adequately inspect property the buyer intends to buy. Nevertheless, that is how the Phillips submitted their causes of action to the jury.

and (2) that such failure to adequately inspect constituted a breach of the Purchase Agreement. In this case, the jury did not determine the second element. While the jury may have found that Sarb failed to adequately inspect the property, there was never any finding by the jury that such failure is a breach of the Purchase Agreement.[3] Again, the jury was not charged as to a counterclaim for breach of contract, nor did the verdict form ask the jury to decide whether Sarb had breached the Purchase Agreement. As such, Sarb was never found to have defaulted or breached the Purchase Agreement, and the trial court erred as a matter of law and abused its discretion in awarding attorney's fees and costs to the Phillips under the Purchase Agreement.

### B. An award of attorney's fees and costs is not mandatory under the Purchase Agreement.

In the trial court's "Order Attorney's Fees and Court Costs," Judge DeBerry found that "fees and costs submitted are reasonable, although some are ***mandated by contract*** and some are at the discretion of the court." (R. p. 0007) (emphasis added). This finding constitutes an error of law. Paragraph 23 of the Purchase Agreement clearly provides that if the Buyer (Sarb) defaults in the performance of her obligations under the contract, the Phillips "***may***" recover attorney's fees and costs "***if***" Sarb is found in default/breach of the contract. The use of the word "may" signifies that an award of attorney's fees and costs is discretionary rather than mandatory. Had an award of attorney's fees and costs been intended to be mandatory, the Purchase Agreement would have indicated that intent by using different language such as "shall" or "must", rather than "may". Thus, the trial court abused its discretion and erred as a matter of law in determining that attorney's fees or costs to the Phillips are mandated by contract, and by awarding any attorney's fees or costs to the Phillips.

[3] It is worth noting the jury never indicated what part of the Subject Property she failed to adequately inspect as they still found the Phillips liable to Sarb for violating the Disclosure Act for at least some of her requested damages.

### C. The amount of the award of attorney's fees and costs to the Phillips is not reasonable.

Even if it is determined that the award of attorney's fees and costs to the Phillips was warranted under the Purchase Agreement, the amount of the award was not reasonable. There are six factors to be considered in determining a reasonable attorney's fee: (1) the nature, extent and difficulty of the legal services rendered; (2) the time and labor necessarily devoted to the case; (3) the professional standing of counsel; (4) the contingency of compensation; (5) the fee customarily charged in the locality for similar legal services; and (6) the beneficial results obtained. *Baron Data Sys., Inc.* at 384-85.

First, with respect to factors (1) and (2), it is patently evident from the trial of this matter as well as time records submitted by the Phillips' in support of their motion for attorney's fees and costs that the vast majority of time devoted to this case by Phillips' counsel was related to *defending Sarb's claims*, rather than pursuing the counterclaims for breach of contract. Some examples of time spent on matters that are unrelated to the Phillips' breach of contract counterclaim(s) include, but are not limited to:

(1) the Phillips' post-trial motions were unrelated to Phillips' counterclaim(s). (*See generally* R. pp. 0131-0134).

(2) Fees and costs for time spent on seeking summary judgment as to Sarb's claims was unrelated to the Phillips' counterclaim(s).

(3) Fees and costs for time spent on contesting Sarb's Motion to Amend her Complaint is unrelated to the Phillips' counterclaim(s).

(4) Most, if not all, of the subpoenas issued on behalf of the Phillips were unrelated to the counterclaim(s), such as subpoenas to Sarb's employer and Sarb's medical providers, and thus much of the document review also appears to be unrelated to the counterclaim(s).

(5) Very little pre-trial discovery was devoted to the counterclaim(s).

(6) Scant attention was given to the Phillips' counterclaim(s) during the course of the trial, and the Phillips failed to present any evidence of damages arising from said counterclaim(s).

Further, with respect to factor six (6) of the *Baron Data Sys., Inc* analysis (beneficial results), it is evident that any results obtained on behalf of the Phillips on the counterclaim(s) were only very minimally beneficial, if beneficial at all. As noted on the verdict form, the jury initially found Sarb liable for $0.00 on the Phillips' claim for failing to adequately inspect the property, and then the jury came back with an amount of $1,000.00 after the Court instructed the jury to award some amount of damages. (R. pp. 0001-0003); (R. p. 1046, lines 8-19). The verdict obtained on behalf of the Phillips is less than two percent (2%) of the $55,393.00 in attorney's fees Sarb has been order to pay the Phillips. Further, the number of causes of action that Sarb prevailed under is irrelevant to whether beneficial results were obtained with respect to the counterclaim(s). Likewise, how the verdict in favor of Sarb compares to any settlement offers as to Sarb's claims is also irrelevant to whether beneficial results were obtained with respect to the counterclaim(s). Thus, the foregoing things are not things that can be considered in evaluating the reasonableness of Sarb's request for attorney's fees under the Purchase Agreement with respect to the Phillips' counterclaim(s).

Lastly, the costs awarded to the Phillips' included $569.87 for legal research fees though LexisNexis. It is respectfully asserted that any such expenses should be considered firm overhead rather than a recoverable cost. (R. pp. 0361-0365). Further, $474.89 of the research fees appears to be for research performed on September 18, 2023, and when correlated to the time entry of the corresponding date, it appears evident that such research was related to the Phillips' post-trial motions. (*Id*.). As mentioned above, the Phillips' post-trial motions were unrelated to their counterclaim(s), and thus this research fee appears to be an expense unrelated to the Phillips'

counterclaim(s). Consequently, it was an abuse of discretion by the trial court to award the Phillips these costs under the Purchase Agreement.

In this case, the jury found the Phillips liable for violating the Disclosure Act, and awarded $70,000.00 in damages to Sarb as a result of such violation(s). The Disclosure Act is intended to be a consumer protection statute to protect a buyer against the risks associated with undisclosed defects in property, and to provide a remedy to buyers for undisclosed defects. *See Gladden v. Boykin,* 402 S.C. 140, 144, 739 S.E.2d 882, 884 (2013). Here, the trial court's decision to grant attorney's fees and costs to the Phillips essentially means that the victim of the Phillips' misrepresentations is compelled to cover the expenses incurred by the Phillips' to defend those misrepresentations. This directly contradicts the intent of the Disclosure Act and constitutes a violation of public policy. Such inequitable results are surely not how justice in South Carolina should work, even in Florence County.

The trial court's award of the Phillips' full attorney's fees amounting to $55,393.00 and $2,310.11 of costs, in light of the jury verdict and award of damages for only $1,000.00, suggests a grave disregard of both the purpose of the Disclosure Act, the six-factor reasonableness analysis, and constitutes an error of law.

## III. THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN AWARDING SARB INSUFFICIENT AND UNREASONABLE ATTORNEY'S FEES AND COSTS.

### A. The trial court's award to Sarb for attorney's fees and costs was not grounded in any logic or reason, but rather an arbitrary decision rooted in an erroneous award of attorney's fees and costs to the Phillips.

The trial court's arbitrary allocation of attorney's fees and costs to Sarb, juxtaposed with the erroneous allocation to the Phillips, has effectively reduced Sarb's award to a mere $4,085.73. Despite clearly being the prevailing party under the Disclosure Act as evidenced by

the jury's verdict finding the Phillips liable to Sarb for violating the Disclosure Act, the trial court's award to Sarb did not even cover her costs in this matter. (*See* R. pp. 0007-0011); *see also* S.C. Code Ann. § 27-50-65. All of Sarb's causes of action derived from misrepresentations made by the Phillips. (*See generally* R. pp. 0073-0089). While the specific causes of action all required proof of different elements, the jury ultimately agreed that the Phillips violated the Disclosure Act when they misrepresented the Subject Property and awarded Sarb $70,000.00 of the approximately $114,000.00 she was seeking for her actual damages. (R. pp. 0001-0002).

Granting what essentially translates to $4,085.73 for fees and costs after accounting for the allocation to the Phillips, particularly in consideration of the facts of the case and Sarb's requested sum of $191,143.24 (fees & costs together), qualifies as an abuse of discretion. It was an error of law and abuse of discretion for the trial court to award ***all*** of the Phillips' requested attorney's fees and costs when there was no basis for the award, in contract or statute, and the Phillips were not the prevailing party. This Court must also find the trial court committed an error of law and abuse of discretion in its arbitrary award of $55,393.00 of Sarb's requested $183,347.40 attorney's fees, the **exact** same amount of attorney's fees requested and awarded to the Phillips, who had no basis to seek or recover attorney's fees. (R. pp. 0314-0365); (R. pp. 0009-0011). The only apparent basis for the amount of attorney's fees the trial court awarded to Sarb was that it was equivalent to the Phillips' award. The attorney fee award to Sarb amounted to thirty (30%) percent of the requested attorney fees while the jury awarded her sixty-one (61%) percent of the actual damages she sought. Sarb's award, when offset by the Phillips' award, shocks the conscience as it amounts to only 2% of the requested award to which she was entitled under the Disclosure Act and the factor six (6) of the *Baron Data Sys., Inc* analysis. Again, the trial court's decision was not grounded in any logic or reason, but rather an arbitrary matching of

a full award of fees and costs to the Phillips, which was premised on an error of law. Therefore, the insufficient attorney fee and cost award to Sarb was both an error of law and abuse of discretion.

### B. Public policy favors preventing, and the Disclosure Act is intended to prevent, outcomes in which a prevailing party is worse off economically after prevailing at trial due to trial court's ruling on attorney's fees and costs.

As already addressed above in Section II(C), the legislature intended the Disclosure Act to serve as a consumer protection statute to protect a buyer against the risks associated with undisclosed defects in property, and to provide a remedy to buyers for known and undisclosed defects. *See id.* at 144. The ability to recover attorney's fees is ***essential*** to make such claims economically viable for aggrieved home owners and to further public policy that defects in property should be properly disclosed and to ensure that those who fail to properly disclose defects be held accountable. If attorney's fees were not awarded to prevailing buyers in such cases, a seller could, like the instant case, simply vigorously contest a claim to the point where it ceased to be economically viable to pursue the claim, thus frustrating the legislature's intent and public policy behind the Disclosure Act.

Here, the trial court erred as a matter of law in not only awarding the full amount of requested fees and costs to the Phillips, but in also awarding Sarb only $61,788.84 ($55,393.00 for attorney's fees and $6,395.84 for costs) of the $191,143.24 total amount she incurred ($183,347.40 of attorney's fees and $7,795.84 of costs). This result is the kind the legislature intended to avoid through the passage of the Disclosure Act by allowing the recovery of attorney's fees to Sarb as the prevailing party and, therefore, is a clear violation of public policy. Additionally, the trial court's order failed to award, acknowledge or take into account the

additional *costs* requested by Sarb via supplemental affidavit of counsel filed eight (8) days after Sarb's motion for attorney's fees and costs. (*See* R. pp. 0153-0313); (R. pp. 0374-0376).[4] As such, Sarb requests that the award be modified by this Court or remanded to the trial court for further reconsideration of the insufficient award.

For these reasons, Sarb respectfully requests that this Court modify or remand to the trial court to increase her award of attorney's fees and costs.

## CONCLUSION

For all the foregoing reasons, Respondent/Appellant Barbara Sarb respectfully requests this court reverse the trial court's erroneous denial of her motions for directed verdict and judgment notwithstanding the verdict as to the Phillips' counterclaim; reverse, modify or remand for further consideration the trial court's award of attorney's fees and costs to Appellants/Respondents Joseph and Julie Phillips; and modify or remand for further consideration the trial court's award of attorney's fees and costs to Respondent/Appellant Barbara Sarb.

Columbia, SC
August 23, 2024

Respectfully submitted,

*s/ Valerie Garcia Giovanoli*
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[4] Plaintiff's motion for attorney's fees and costs filed October 12, 2023 omitted certain recoverable costs, as detailed in the supplemental affidavit of Ely O. Grote, filed October 20, 2023.