RECEIVED
Jul 10 2026
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

The Honorable Steven C. Kirven, Master in Equity

Appellate Case No. 2025-002504

Solid Rock Construction Services, LLC, ... Plaintiff,

v.

Mike Wheeler, Cindy Wheeler, Oconee Federal Savings and Loan Association, ... Defendants,

AND

Mike Wheeler and Cindy Wheeler, ... Appellants,

v.

MJ Custom Builders, LLC, ... Respondent.

APPELLANTS MIKE WHEELER AND CINDY WHEELER'S INITIAL BRIEF

Respectfully submitted,

/s/ Townes B. Johnson III
Townes B. Johnson III (SC Bar# 75412)
TOWNES B. JOHNSON III, LLC
PO Box 9246
Greenville, SC 29604
(864) 757-4899
tjohnson@sc.legal
Attorney for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF THE ISSUES ON APPEAL

1. Whether the Master in Equity erred in concluding that the Wheelers committed the first material breach of the parties' cost-plus contract, where MJ Custom admitted under oath that it knowingly overbilled the Wheelers on each of its twelve draw requests, commencing with the first draw on November 30, 2020; knowingly retained builder discounts the contract obligated it to pass through; and assessed its fifteen percent fee upon costs it never incurred.

2. Whether the Master erred in denying the Wheelers' causes of action for fraud, breach of contract accompanied by a fraudulent act, negligent misrepresentation, and constructive fraud upon the stated ground that the Wheelers presented no evidence of specific fraudulent acts, where MJ Custom admitted that it knowingly invoiced costs it did not incur, knowingly misrepresented vendor invoice amounts in its draw requests, and failed to communicate truthfully with the Wheelers.

3. Whether the Master erred in denying the Wheelers' cause of action under the South Carolina Unfair Trade Practices Act, where MJ Custom admitted that it engaged in the identical overbilling practices with respect to fourteen other client families and that such conduct constituted its pattern and practice.

4. Whether the Master erred as a matter of law in denying the Wheelers' landscaping damages under the Notice and Opportunity to Cure Construction Dwelling Defects Act, where the sole remedy the Act provides is a stay upon motion of a party and MJ Custom made no such motion.

5. Whether the Master erred in permitting MJ Custom to recover charges the Master himself found to be undocumented, in contravention of the contractual obligation, found by the Master, that MJ Custom document its actual costs.

6. Whether the Master abused his discretion in awarding the Wheelers only $1,000 in attorney's fees pursuant to S.C. Code Ann. § 29-5-10 after the Wheelers prevailed upon MJ Custom's mechanic's-lien foreclosure claim.

INTRODUCTION

This appeal arises from a cost-plus contract for the construction of the Wheelers' residence. The parties' bargain was straightforward: the Wheelers agreed to pay MJ Custom's actual costs, together with a fee of fifteen percent of those costs. (Pl.'s Ex. 25 § 2.2.) At trial, James Nichols, one of MJ Custom's two members, conceded under oath that MJ Custom did not honor that bargain. MJ Custom overbilled the Wheelers on each of its twelve draw requests, commencing with the first draw on November 30, 2020. (Tr., Pg. 210, Ln. 1–Pg. 211, Ln. 20; Tr., Pg. 243, Ln. 24–Pg. 244, Ln. 4.) It invoiced costs it never incurred. (Tr., Pg. 245, Lns. 6–12.) It knowingly retained builder discounts the contract required it to pass through to the Wheelers. (Tr., Pg. 299, Lns. 15–25.) It assessed its fifteen percent fee upon the overcharges themselves. (Tr., Pg. 298, Lns. 1–22.) And it admitted that it engaged in the identical conduct with respect to fourteen other client families as its pattern and practice. (Tr., Pg. 211, Ln. 21–Pg. 214, Ln. 9.)

The Master in Equity nevertheless concluded that the Wheelers—who paid every draw as presented (Order ¶ 5)—committed the first breach of the contract when they disputed MJ Custom's final invoice. (Order ¶ 7.) The Final Order characterizes MJ Custom's admitted and knowing overcharges as minor billing issues and technical breaches, awards MJ Custom $56,687.33 upon its counterclaim, and denies each of the Wheelers' causes of action. (Order ¶¶ 7, 9–11, 14.)

That disposition inverts South Carolina's first-breach rule, and the Final Order's remaining rulings compound the error. The Order denies the Wheelers' fraud-based claims for an asserted want of evidence that the record supplies in the form of MJ Custom's own admissions. (Order, Conclusions of Law; Tr., Pg. 243, Lns. 11–23.) It denies the Wheelers' claim under the Unfair Trade Practices Act notwithstanding an admitted pattern of identical conduct directed at fifteen families. (Tr., Pg. 214, Lns. 7–9.) It denies the Wheelers' landscaping damages under a statute whose sole remedy is a stay that no party ever requested. (Order ¶ 13; S.C. Code Ann. § 40-59-830.) It permits MJ Custom to recover thousands of dollars in charges the Master himself found undocumented. (Order ¶ 9.c–d.) And it awards the Wheelers an attorney's fee of $1,000, untethered to any evidence, after they prevailed upon the mechanic's-lien claim. (Order ¶ 14.) This Court should reverse.

STATEMENT OF THE CASE

Solid Rock Construction Services, LLC, a subcontractor, commenced this action on January 28, 2022, seeking to foreclose a mechanic's lien against the Wheelers and Oconee Federal Savings and Loan Association. On March 8, 2022, the Wheelers answered and filed a Third-Party Complaint against MJ Custom Builders, LLC ("MJ Custom"), the general contractor for the construction of their residence, asserting causes of action for breach of contract, breach of express and implied warranties, negligence, negligent misrepresentation, fraud, constructive fraud, breach of fiduciary duty, violation of the South Carolina Unfair Trade Practices Act, and equitable indemnification. On April 14, 2022, MJ Custom answered and asserted counterclaims for breach of contract and foreclosure of its own mechanic's lien. MJ Custom at no time filed a notice of pendency of action in support of its lien claim. (Order ¶ 12); see S.C. Code Ann. § 29-5-120.

By consent order, the matter was referred to the Master in Equity for Oconee County. Prior to trial, the Wheelers reached a settlement with Solid Rock, and Solid Rock and Oconee Federal were dismissed, leaving for trial only the claims between the Wheelers and MJ Custom. (Order at 1–2.) The Master tried those claims without a jury on March 26 and 27, 2025, and both parties thereafter submitted post-trial briefs. (Order at 1–2.)

By Final Order filed September 5, 2025, the Master denied each of the Wheelers' causes of action, dismissed MJ Custom's mechanic's-lien claim for failure to file a notice of pendency of action, awarded MJ Custom $57,687.33 upon its breach-of-contract counterclaim, and awarded the Wheelers $1,000 in attorney's fees as the prevailing party upon the lien claim, yielding a net judgment of $56,687.33 against the Wheelers. (Order ¶¶ 9–14.) The Wheelers timely moved to alter or amend the judgment pursuant to Rule 59(e), SCRCP, on September 12, 2025. The Master heard the motion on November 13, 2025, and denied it by order filed November 20, 2025. The Wheelers served their Notice of Appeal on December 7, 2025.

STATEMENT OF FACTS

In October 2020, the Wheelers and MJ Custom entered into a contract for the construction of a residence at 852 Necker Pointe Lane, Seneca, South Carolina. (Pl.'s Ex. 25; Tr., Pg. 87, Lns. 1–2; Tr., Pg. 138, Ln. 15.) The contract was a cost-plus agreement: the Wheelers undertook to pay "a sum equal to [MJ Custom's] total cost plus a fee of 15% of total cost to build." (Pl.'s Ex. 25 § 2.2; Tr., Pg. 274, Ln. 18.) Mr. Nichols acknowledged that the contract obligated MJ Custom to bill the Wheelers its actual costs. (Tr., Pg. 217, Lns. 2–4.) MJ Custom submitted twelve draw requests over the course of construction—the only twelve draws on the project—and the Wheelers, or their construction lender, paid each draw as presented. (Tr., Pg. 211, Lns. 14–19; Tr., Pg. 239, Lns. 19–21; Order ¶ 5.)

MJ Custom did not bill its actual costs. Mr. Nichols testified that it was MJ Custom's position, taken in its own discovery responses, that it overcharged the Wheelers on draw one, draw two, draw three, and each succeeding draw through draw twelve—that is, on every draw it ever submitted to the Wheelers. (Tr., Pg. 210, Ln. 1–Pg. 211, Ln. 20; Pl.'s Ex. 30.) Following a reconciliation undertaken only after this litigation commenced, MJ Custom computed the total of the identified overcharges at $1,581.53. (Tr., Pg. 266, Lns. 13–23; Tr., Pg. 267, Lns. 1–14; Pl.'s Ex. 30.) Mr. Nichols further conceded that MJ Custom assessed its fifteen percent builder's fee upon those overcharges, that it did not earn that fee, and that it has not credited the fee back to the Wheelers. (Tr., Pg. 298, Lns. 1–22.)

The overcharges were knowing. The first draw invoice represented a $100 monthly charge for a portable toilet as an actual cost when the vendor's invoice was $91.62; Mr. Nichols admitted that the represented amount "was not" the actual cost, that the same overcharge persisted throughout the project, and that he knew at the time of invoicing that the amount invoiced was not the amount of the vendor's bill. (Tr., Pg. 216, Lns. 4–22; Tr., Pg. 217, Lns. 8–10; Tr., Pg. 222, Lns. 11–15.) He acknowledged that the practice was "a lazy way" of billing and "an unthinking, careless way to do it." (Tr., Pg. 221, Lns. 23–25; Tr., Pg. 222, Lns. 7–9.) He admitted that the portable-toilet invoicing on draws one through eleven constituted "a misrepresentation of the actual cost." (Tr., Pg. 242, Lns. 22–25.) As to vendors extending builder discounts—GBS Building Supply and Clayton Tile—Mr. Nichols admitted that MJ Custom billed the Wheelers anticipated rather than actual amounts and knowingly retained the discounts rather than crediting them to the Wheelers. (Tr., Pg. 219, Ln. 4–Pg. 220, Ln. 21; Tr., Pg. 242, Lns. 4–21; Tr., Pg. 299, Lns. 15–25.)

MJ Custom's draw documentation likewise misstated its vendor payments. The notation upon draw three that $60,575.27 "were for Wheeler invoices" overstated the $60,003.80 MJ Custom actually paid GBS, and Mr. Nichols conceded that the corresponding notations upon draws three and four were "a misrepresentation" of what MJ Custom paid. (Tr., Pg. 219, Lns. 4–16; Tr., Pg. 224, Lns. 13–25; Tr., Pg. 226, Lns. 4–7; Pl.'s Exs. 32–33.) He made the same concession as to the draw-five notation that $28,785.34 "was for Wheeler invoices." (Tr., Pg. 227, Lns. 1–4; Pl.'s Ex. 34.)

MJ Custom's sworn discovery responses fared no better. Mr. Nichols conceded at trial that MJ Custom's denial of the request to admit that it "invoiced Mike Wheeler and Cindy Wheeler for costs that [it] did not incur" was improper, because MJ Custom did in fact invoice the Wheelers for costs it did not incur. (Tr., Pg. 244, Ln. 14–Pg. 245, Ln. 12; Pl.'s Ex. 30.) He conceded that MJ Custom knowingly retained builder discounts without qualification. (Tr., Pg. 245, Lns. 13–25; Tr., Pg. 299, Lns. 15–25.) And he conceded that MJ Custom's denial of the request to admit that it "knowingly overcharged" the Wheelers was not a proper answer, because "[w]e did" knowingly overcharge them. (Tr., Pg. 246, Lns. 2–11.) Mr. Nichols further admitted that, through its draw requests, MJ Custom did not communicate truthfully with the Wheelers despite its obligation to do so, did not deal with the Wheelers in good faith, and breached the contract by billing other than actual costs, commencing with draw one. (Tr., Pg. 243, Ln. 11–Pg. 244, Ln. 4.)

The practice extended beyond the Wheelers. Mr. Nichols testified that it was MJ Custom's position that it overcharged fourteen other client families—the Browders, the Rampys, the Burnses, the Ropers, the Saemisches, the Ferrells, the Rampeys, the Hollises, the Hice-Smiths, the Hennessees, the McClellans, the Wagners, the Rileys, and Ms. Gwinn—and he agreed that MJ Custom "had a pattern and practice of overcharging its clients." (Tr., Pg. 211, Ln. 21–Pg. 214, Ln. 9; Pl.'s Ex. 30.) Grant Hollis, one of those clients, testified that MJ Custom resisted producing financial documentation on his project and ultimately acknowledged in writing that he had been overcharged $706.95 on the GBS discount alone. (Tr., Pg. 24, Lns. 14–24; Tr., Pg. 27, Lns. 4–11.)

MJ Custom also billed the Wheelers substantial charges for which it possessed no supporting documentation. Mr. Nichols admitted that MJ Custom had no check or other documentation supporting the $2,500 "General liability/Workers Comp" charge on draw one (Tr., Pg. 215, Ln. 9–Pg. 216, Ln. 3; Pl.'s Ex. 31); that the $10,000 framing-labor charge on draw five was supported only by a $7,500 invoice and corresponding check, with no documentation for the remaining $2,500 (Tr., Pg. 237, Lns. 11–25; Tr., Pg. 239, Lns. 8–10; Pl.'s Ex. 41); that MJ Custom had no checks supporting the $1,000 fascia charge, the $3,300 window and exterior-door installation charge on draw six (Tr., Pg. 228, Ln. 5–Pg. 230, Ln. 9; Pl.'s Ex. 35), or the $400 main-entry-door installation charge on draw eight (Tr., Pg. 230, Ln. 19–Pg. 231, Ln. 11; Pl.'s Ex. 36); and that no checks supported the dumpster-rental charge on draw twelve, which rested instead upon an invoice MJ Custom generated on its own letterhead for the use of its member's personal dump trailer. (Tr., Pg. 232, Ln. 12–Pg. 234, Ln. 1; Pl.'s Ex. 37.) In the aggregate, the trial record established $11,989.65 in charges MJ Custom could not support, together with the fifteen percent fee of $1,798.45 assessed upon them. (Pl.'s Exs. 31, 33–37, 41.)

MJ Custom did not furnish backup documentation with its draw requests, and the Wheelers, in Mr. Wheeler's words, were "basically taking them at their word." (Tr., Pg. 142, Lns. 4–10.) On December 21, 2021—before this action was commenced—the Wheelers transmitted to MJ Custom a written list of approximately sixteen items requiring attention. (Tr., Pg. 142, Ln. 11–Pg. 143, Ln. 19; Pl.'s Ex. 28.) The relationship deteriorated over the final balance, and each side thereafter refused further performance: the Wheelers declined to pay the final invoice in full, and MJ Custom declined to perform further work, including punch-list items, until paid. (Order ¶¶ 5–6.)

The landscaping failure arose immediately upon installation. The sod was delivered the day before forecasted torrential rain, and MJ Custom's landscapers laid it in the early-morning hours in the pouring rain. (Tr., Pg. 98, Lns. 2–7.) Two days after the sod was installed, the Wheelers advised MJ Custom in writing that the work was unacceptable and requested that the landscaper not be paid until the deficiencies were addressed; MJ Custom had already paid the landscaper in full. (Tr., Pg. 98, Lns. 17–25.) A drain installed in response to standing water proved to be connected to nothing. (Tr., Pg. 97, Lns. 14–21; Tr., Pg. 100, Lns. 10–11.) Water seeped through the block in the garage and into the crawlspace. (Tr., Pg. 100, Lns. 14–17.) Mr. Nichols agreed that the water penetration into the basement and crawlspace required immediate attention. (Tr., Pg. 309, Lns. 13–18.) The Wheelers afforded MJ Custom seven to eight weeks to correct the work; the remediation never came, and MJ Custom's member Marty Whitfield ultimately proposed waiting “a couple seasons” to see whether the yard would level. (Tr., Pg. 99, Lns. 6–18.) The Wheelers then engaged a second landscaping contractor, which regraded the yard, replaced the failed drainage, and resodded; the cost of remediating the landscaping deficiencies was approximately $23,000. (Tr., Pg. 99, Lns. 19–25; Tr., Pg. 100, Lns. 1–13; Tr., Pg. 205, Lns. 5–8; Pl.'s Ex. 29.) Following that remediation, the drainage problems ceased. (Tr., Pg. 100, Lns. 18–22.)

On March 8, 2022, after MJ Custom served its mechanic's lien, the Wheelers served MJ Custom with a formal Notice of Opportunity to Cure identifying the outstanding defects. (Tr., Pg. 150, Ln. 17–Pg. 151, Ln. 14; Pl.'s Ex. 39.) MJ Custom and Mr. Whitfield responded to the punch list in writing, agreeing to address or investigate the majority of the items. (Tr., Pg. 290, Ln. 3–Pg. 291, Ln. 5; Tr., Pg. 309, Lns. 8–12; Pl.'s Ex. 27.) Charlie Pulcine of CAP Construction, Inc. inspected the residence and prepared an itemized estimate of $96,600 to complete and repair the outstanding items, and testified that, in his professional opinion, the work was necessary. (Tr., Pg. 53, Lns. 8–10; Tr., Pg. 53, Ln. 25–Pg. 54, Ln. 5; Pl.'s Ex. 38.) Net of the landscaping allowance and of items for which the Wheelers either were not charged or supplied their own fixtures, the outstanding remediation cost is $79,233.70. (Pl.'s Ex. 38.) MJ Custom offered no competing estimate.

Mr. Nichols additionally conceded that the verified statement of account upon which MJ Custom's mechanic's lien rested was not truthful and accurate, and that he knew of the portable-toilet overcharges at the time the statement of account was prepared. (Tr., Pg. 246, Lns. 12–17;

Tr., Pg. 247, Lns. 2–8.) MJ Custom filed no notice of pendency of action in support of its lien. (Tr., Pg. 247, Lns. 13–15; Order ¶ 12.)

Following trial and post-trial briefing, the Master concluded that the Wheelers committed the first material breach; determined that MJ Custom's admitted overcharges were "not substantial enough to constitute truly material breach"; denied each of the Wheelers' causes of action; reduced MJ Custom's claimed balance by $10,511.26 on account of billing errors, retained discounts, and undocumented charges; and entered the net judgment of $56,687.33 described above. (Order ¶¶ 7–14.)

STANDARD OF REVIEW

The contract and damages issues (Issues 1, 2, and 5) were tried without a jury and constitute actions at law. In a nonjury action at law, this Court reviews questions of law de novo, and the trial court's findings of fact will not be disturbed where evidence reasonably supports them. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976), abrogated on other grounds by *In re Estate of Kay*, 423 S.C. 476, 816 S.E.2d 542 (2018); *Silver v. Aabstract Pools & Spas, Inc.*, 376 S.C. 585, 590, 658 S.E.2d 539, 541–42 (Ct. App. 2008). A finding the record does not reasonably support cannot stand even under that deferential standard. *Silver*, 376 S.C. at 590, 658 S.E.2d at 541–42.

The construction and application of a statute—including the Notice and Opportunity to Cure Construction Dwelling Defects Act (Issue 4) and the South Carolina Unfair Trade Practices Act (Issue 3)—present questions of law that this Court decides de novo. *Grazia v. S.C. State Plastering, LLC*, 390 S.C. 562, 568–69, 703 S.E.2d 197, 200 (2010).

An award of attorney's fees pursuant to S.C. Code Ann. § 29-5-10 (Issue 6) is reviewed for abuse of discretion. An abuse of discretion occurs when the ruling is based upon an error of law or, when based upon factual conclusions, is without evidentiary support. *Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987).

ARGUMENT

I. MJ Custom, Not the Wheelers, Committed the First Material Breach of the Cost-Plus Contract.

To recover for breach of contract, a party must establish a binding contract, a breach thereof, and damages proximately resulting from the breach. *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 124 S.E.2d 602 (1962). "Where a contract is not performed, the party who is guilty of the first breach is generally the one upon whom all liability for the nonperformance rests." *Silver v. Aabstract Pools & Spas, Inc.*, 376 S.C. 585, 594, 658 S.E.2d 539, 543 (Ct. App. 2008) (quoting *Willms Trucking Co. v. JW Constr. Co.*, 314 S.C. 170, 178, 442 S.E.2d 197, 201 (Ct. App. 1994)).

A. MJ Custom's Admitted Overbilling Commenced with the First Draw and Defeated the Essential Purpose of the Cost-Plus Bargain.

The identity of the first breaching party is not in genuine dispute, because MJ Custom admitted it. Mr. Nichols testified that MJ Custom breached the contract in its very first draw request to the Wheelers (Tr., Pg. 217, Lns. 5–7); that the breach commenced with draw one and continued through every draw thereafter (Tr., Pg. 243, Ln. 24–Pg. 244, Ln. 4; Tr., Pg. 210, Ln. 1–Pg. 211, Ln. 20); that MJ Custom knew the portable-toilet charges were inaccurate when invoiced (Tr., Pg. 222, Lns. 11–15; Tr., Pg. 242, Lns. 1–3); that it billed anticipated rather than actual vendor costs (Tr., Pg. 242, Lns. 4–21); that it knowingly retained builder discounts rather than crediting them to the Wheelers (Tr., Pg. 299, Lns. 15–25); and that it assessed its fifteen percent fee upon charges it never incurred (Tr., Pg. 298, Lns. 1–22). The first draw was submitted on November 30,

2020. (Tr., Pg. 87, Lns. 22–24.) The conduct the Master identified as the Wheelers' breach—declining to pay the final balance in full—did not occur until late 2021, nearly one year later. (Order ¶¶ 5–7.)

The Master held that MJ Custom's breaches were "merely technical in nature and not material." (Order, Conclusions of Law; Order ¶ 7.) In a cost-plus contract, however, the obligation to bill actual cost is not a peripheral term; it is the term that defines the parties' exchange. The owner under such a contract surrenders price certainty and undertakes to pay whatever the construction actually costs, together with a defined fee, in exchange for the contractor's reciprocal obligation to charge only what it actually expends and to account for those expenditures. (Pl.'s Ex. 25 § 2.2.) A contractor that knowingly bills in excess of actual cost, retains vendor discounts belonging to its owner, and assesses its fee upon charges never incurred has not deviated trivially from the agreement; it has repudiated the provision upon which the entire compensation structure depends, and it has done so dishonestly. Mr. Nichols himself characterized MJ Custom's conduct as a breach of the contract, an absence of good faith, and a failure of its obligation to communicate truthfully. (Tr., Pg. 243, Lns. 11–23.) Knowing and repeated dishonesty in the operation of the contract's core pricing mechanism is not a technical breach as a matter of law, and under *Silver* and *Willms* it is MJ Custom—the first and persistent breaching party—upon whom liability for the nonperformance must rest.

B. The Findings Underlying the First-Breach Ruling Are Without Evidentiary Support.

The subsidiary findings upon which the Master's contrary conclusion rests lack support in the record. The Master found that "the billing disputes raised by the Wheelers were not raised until long after the litigation was initiated." (Order ¶ 7.) The evidence is to the contrary. The Wheelers transmitted their written list of deficiencies to MJ Custom on December 21, 2021—before Solid Rock commenced this action on January 28, 2022, and before MJ Custom counterclaimed. (Tr., Pg. 142, Ln. 11–Pg. 143, Ln. 19; Pl.'s Ex. 28.) MJ Custom furnished no backup documentation with its draw requests, leaving the Wheelers "taking them at their word" (Tr., Pg. 142, Lns. 4–10), and the Final Order itself elsewhere finds that the Wheelers "began disputing the balance due on the contract" upon moving into the residence in 2021. (Order ¶ 5.) A finding of fact contradicted by the only evidence of record cannot stand even under the any-evidence standard. *Silver*, 376 S.C. at 590, 658 S.E.2d at 541–42.

The Final Order likewise characterizes the overcharges as matters MJ Custom "was more than willing to correct" once raised. (Order ¶ 8.) A willingness to issue credits after the breaching conduct is exposed in litigation does not erase the breach; it confirms it. The undisputed evidence established that the overbilling was knowing at the time it occurred (Tr., Pg. 222, Lns. 11–15; Tr., Pg. 246, Lns. 2–11); that it was repeated across all twelve draws (Tr., Pg. 210, Ln. 1–Pg. 211, Ln. 20); that it was obscured by draw notations misrepresenting MJ Custom's vendor payments (Tr., Pg. 226, Lns. 4–7; Tr., Pg. 227, Lns. 1–4); and that MJ Custom undertook a full reconciliation only after this litigation was underway (Tr., Pg. 266, Lns. 13–19). Upon this record, the first material breach was MJ Custom's. The judgment upon MJ Custom's counterclaim should accordingly be reversed, and the Wheelers are entitled to their contract damages: $15,606.86 in overcharges and unsupported billings (Pl.'s Exs. 30–37, 41), $23,000 in completed landscaping remediation (Tr., Pg. 205, Lns. 5–8; Pl.'s Ex. 29), and $79,233.70 in outstanding remediation costs (Tr., Pg. 53, Lns. 8–10; Pl.'s Ex. 38).

II. The Master Erred in Denying the Wheelers' Fraud-Based Claims Notwithstanding MJ Custom's Admissions.

The Final Order denies the Wheelers' fraud-based causes of action upon the stated ground that the Wheelers "did not provide any evidence of specific fraudulent acts." (Order, Conclusions of Law.) The record contains precisely such evidence, the greater part of it in the form of admissions by MJ Custom's own member.

Fraud requires a representation; its falsity; its materiality; knowledge of its falsity or reckless disregard thereof; intent that the representation be acted upon; the hearer's ignorance of its falsity; reliance upon its truth; the right to rely; and consequent and proximate injury. *M.B. Kahn Constr. Co. v. S.C. Nat'l Bank of Charleston*, 275 S.C. 381, 384, 271 S.E.2d 414, 415 (1980). Breach of contract accompanied by a fraudulent act requires a breach, fraudulent intent relating to the breach, and a fraudulent act accompanying it; "[e]vidence of a dishonest design or devious scheme satisfies the fraudulent intent element." *Parker v. Nat'l Honorary Beta Club*, 423 S.C. 590, 594, 815 S.E.2d 769, 771 (Ct. App. 2018); *Harper v. Ethridge*, 290 S.C. 112, 348 S.E.2d 374 (Ct. App. 1986). Negligent misrepresentation requires a false representation, a pecuniary interest in the transaction, a duty of care to communicate truthful information, breach of that duty, justifiable reliance, and pecuniary loss. *Hurst v. Sandy*, 329 S.C. 471, 494 S.E.2d 847 (Ct. App. 1997).

Each element is established by admission. The draw requests and budget trackers constituted representations of actual cost. (Tr., Pg. 141, Lns. 23–25; Tr., Pg. 216, Lns. 7–9.) MJ Custom admitted those representations were false and that it knew of their falsity when made, including the specific draw notations overstating its GBS payments on draws three, four, and five. (Tr., Pg. 222, Lns. 11–15; Tr., Pg. 226, Lns. 4–7; Tr., Pg. 227, Lns. 1–4; Pl.'s Exs. 32–34.) The representations were material, for the entire cost-plus compensation structure depended upon their accuracy. (Pl.'s Ex. 25 § 2.2.) MJ Custom intended that the Wheelers act upon its invoices—such is the function of a draw request—and the Wheelers, ignorant of the falsity and without backup documentation against which to verify the charges, paid every draw. (Tr., Pg. 142, Lns. 4–10; Order ¶ 5.) Their injury is the $15,606.86 in overcharges and unsupported billings. (Pl.'s Exs. 30–37, 41.) Mr. Nichols' admissions that MJ Custom did not communicate truthfully, did not act in good faith, and engaged in the identical practice with fourteen other families (Tr., Pg. 243, Lns. 11–23; Tr., Pg. 211, Ln. 21–Pg. 214, Ln. 9) constitute evidence of precisely the "dishonest design or devious scheme" that satisfies the fraudulent-intent element under *Parker*. The denial of these claims for an asserted absence of evidence was error, and because the conduct was admittedly knowing and repeated, the Wheelers' entitlement to punitive damages should be addressed upon remand. See S.C. Code Ann. § 15-32-520(C)–(D).

III. The Master Erred in Denying the Wheelers' Claim Under the South Carolina Unfair Trade Practices Act Where MJ Custom Admitted a Pattern of Overcharging Fifteen Client Families.

The Unfair Trade Practices Act proscribes unfair or deceptive acts in the conduct of trade or commerce. A mere breach of contract does not violate the Act, *Columbia E. Assocs. v. Bi-Lo, Inc.*, 299 S.C. 515, 386 S.E.2d 259 (Ct. App. 1989); the knowing invoicing of costs never incurred and the misrepresentation of vendor payments, however, constitute deception rather than mere breach. The Act's public-interest element is satisfied where the challenged acts possess a potential for repetition, *Noack Enters., Inc. v. Country Corner Interiors of Hilton Head Island, Inc.*, 290 S.C. 475, 351 S.E.2d 347 (Ct. App. 1986), and such potential may be demonstrated by showing that the same kind of acts occurred in the past. *Wright v. Craft*, 372 S.C. 1, 640 S.E.2d 486 (Ct. App. 2006).

In the present case, repetition is not merely potential; it is admitted and proven. Mr. Nichols testified that MJ Custom overcharged fourteen identified client families in the same manner, that it charged a builder's fee upon clients' overcharges, and that MJ Custom "had a pattern and practice of overcharging its clients." (Tr., Pg. 211, Ln. 21–Pg. 214, Ln. 9; Tr., Pg. 298, Lns. 1–22; Pl.'s Ex. 30.) Mr. Hollis, one of those clients, corroborated the practice from the witness stand. (Tr., Pg. 24, Lns. 14–24; Tr., Pg. 27, Lns. 4–11.) The Final Order's conclusion that "the evidence simply does not reflect wrongful conduct sufficient to constitute unfair trade practices" neither engages this evidence nor can be reconciled with it. Where, as here, the violation is willful, the statute is not permissive: "the court shall award three times the actual damages sustained," together with reasonable attorney's fees. S.C. Code Ann. § 39-5-140(a); *Payne v. Holiday Towers, Inc.*, 283 S.C. 210, 321 S.E.2d 179 (Ct. App. 1984). The denial of the Wheelers' claim under the Act should be reversed.

IV. The Master Erred as a Matter of Law in Denying the Wheelers' Landscaping Damages Under the Right-to-Cure Act.

The Final Order denies the Wheelers' landscaping-remediation damages upon the ground that the Wheelers did not afford MJ Custom a meaningful opportunity to cure, observing that the Wheelers did not serve their statutory Notice and Right to Cure until after they had engaged another contractor. (Order ¶ 13; Order, Conclusions of Law (citing S.C. Code Ann. § 40-59-830).) That ruling misconstrues the statute and misapprehends the record.

A. The Act's Sole Remedy Is a Stay upon Motion of a Party, and MJ Custom Made No Such Motion.

The Notice and Opportunity to Cure Construction Dwelling Defects Act, S.C. Code Ann. §§ 40-59-810 to -850, prescribes a pre-suit notice procedure and provides a single remedy for noncompliance: "If the claimant files an action in court before first complying with the requirements of this article, on motion of a party to the action, the court shall stay the action until the claimant has complied with the requirements of this article." S.C. Code Ann. § 40-59-830. The

Supreme Court has directed that the Act's notice provisions be applied according to their plain terms. *Grazia v. S.C. State Plastering, LLC*, 390 S.C. 562, 703 S.E.2d 197 (2010). Nothing in the Act renders pre-suit notice an element of a defect claim, and nothing in the Act authorizes a court to deny damages for remedial work performed before notice was given. The remedy is a stay; its office is to suspend the litigation while the cure process runs its course; and it is available only "on motion of a party." MJ Custom made no such motion. Having forgone the only remedy the General Assembly provided, MJ Custom may not obtain through judgment that which it never sought by motion, and a court may not convert a procedural stay provision into a substantive forfeiture of damages. No South Carolina appellate decision has applied section 40-59-830 as a bar to damages, and this Court should decline to be the first.

B. The Record Establishes Immediate Notice and an Emergency Condition Requiring Prompt Remediation.

The alternative factual rationale—that the Wheelers denied MJ Custom a meaningful opportunity to address the landscaping—fares no better. The Wheelers notified MJ Custom in writing that the work was unacceptable two days after the sod was installed. (Tr., Pg. 98, Lns. 17–22.) Water was penetrating the block of the garage and entering the crawlspace through drainage that, as was later discovered, had never been connected. (Tr., Pg. 100, Lns. 10–17; Tr., Pg. 97, Lns. 14–21.) Mr. Nichols conceded that the water penetration required immediate attention. (Tr., Pg. 309, Lns. 13–18.) The Wheelers nevertheless waited seven to eight weeks, during which MJ Custom's remediation efforts addressed neither the drainage nor the failed sod, and Mr. Whitfield ultimately proposed waiting "a couple seasons." (Tr., Pg. 99, Lns. 6–18.) Only then did the Wheelers engage a second contractor to arrest the ongoing water intrusion into their foundation—a measure any prudent owner mitigating damage would undertake, and one that in fact resolved the problem. (Tr., Pg. 99, Lns. 19–25; Tr., Pg. 100, Lns. 18–22; Pl.'s Ex. 29.) Upon these facts, the denial of all landscaping damages because the formal statutory notice followed the emergency remediation was error: the Wheelers furnished actual and immediate notice, MJ Custom failed to act within any reasonable time notwithstanding an admitted emergency, and the Act in any event supplies no forfeiture.

V. The Award to MJ Custom Includes Charges the Master Found Undocumented; the Judgment Is Overstated by No Less than $5,105.60.

The Master found that "MJ Custom had an obligation to properly document costs pursuant to their contract." (Order ¶ 9.c.) Applying that finding, the Final Order disallowed certain undocumented charges in their entirety—$2,500 in insurance, $2,500 in framing, and $200 in re-do work—yet allowed one half of other charges standing upon the identical footing: $500 of $1,000 in siding charges, $1,250 of the $2,500 window-installation charge, and $600 of $1,200 in door-installation charges; and it allowed in full a $465.60 dumpster charge for which MJ Custom produced no supporting checks whatsoever, only an invoice generated upon its own letterhead for the use of its member's personal dump trailer. (Order ¶ 9.c–d; Tr., Pg. 232, Ln. 12–Pg. 234, Ln. 1; Pl.'s Exs. 35–37.)

No evidence supports the partial allowances. Mr. Nichols admitted at trial that MJ Custom possessed no checks or other documentation for those charges at all. (Tr., Pg. 228, Ln. 5–Pg. 231, Ln. 11; Tr., Pg. 237, Lns. 11–25; Tr., Pg. 239, Lns. 8–10.) The division of an admittedly undocumented charge by half is not a finding drawn from evidence; it is an arbitrary compromise, and under the any-evidence standard it cannot stand. *Silver*, 376 S.C. at 590, 658 S.E.2d at 541–42. Upon the Master's own legal premise—that the contract obligated MJ Custom to document its costs—the full $11,989.65 in unsupported charges, together with the $1,798.45 fee assessed upon them, a total of $13,788.10, must be disallowed. The Final Order reduced MJ Custom's claim by only $8,682.50 upon this account. (Order ¶ 9.d.) The judgment is therefore overstated by no less than $5,105.60 and must be reduced accordingly.

VI. The $1,000 Attorney's-Fee Award Under Section 29-5-10 Constituted an Abuse of Discretion.

MJ Custom's mechanic's-lien foreclosure claim was dismissed because MJ Custom never filed the notice of pendency of action the statute requires. (Order ¶ 12; Tr., Pg. 247, Lns. 13–15); S.C. Code Ann. § 29-5-120. The Master correctly determined that the Wheelers were the prevailing party upon the lien claim and were entitled to an award of fees: "[t]he costs which may arise in enforcing or defending against the lien under this chapter, including a reasonable attorney's fee, may be recovered by the prevailing party." S.C. Code Ann. § 29-5-10(a); (Order ¶ 14).

The $1,000 figure, however, was not the product of evidence. The Final Order reasons that "very little time and expense was spent by Wheeler's attorney regarding the mechanics lien claim by itself" because nearly all of the work "would have been incurred in defense of the breach of contract claim." (Order ¶ 14.) That reasoning inverts the statute. The lien MJ Custom filed asserted the same disputed contract balance it pursued through its counterclaim (Tr., Pg. 267, Lns. 15–19), and its own member conceded that the verified statement of account underlying the lien was neither truthful nor accurate. (Tr., Pg. 246, Lns. 12–17.) The labor of defeating and limiting that balance was, in substance, the defense "against the lien." The statute does not confine the prevailing owner to fees attributable solely to the lis-pendens defect, and the Final Order identifies no fee affidavit, time records, or other evidence supporting $1,000 as the reasonable value of the lien defense. A fee award resting upon an error of law and without evidentiary support constitutes an abuse of discretion. *Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987). The award should be vacated and the matter remanded for a fee determination founded upon evidence.

CONCLUSION

For the foregoing reasons, the Wheelers respectfully request that this Court reverse the Final Order filed September 5, 2025, and the order filed November 20, 2025 denying their motion to alter or amend; hold that MJ Custom committed the first material breach of the parties' contract and vacate the $56,687.33 judgment entered against the Wheelers; and remand for entry of judgment in the Wheelers' favor in the amount of $117,840.56, for determination of treble damages pursuant to S.C. Code Ann. § 39-5-140(a) or punitive damages pursuant to S.C. Code Ann. § 15-32-520, and for an award of attorney's fees founded upon evidence pursuant to S.C. Code Ann. § 29-5-10. In the alternative, the Wheelers respectfully request that this Court reduce the judgment against them by no less than $5,105.60, reverse the denial of their landscaping damages, and remand for a proper determination of their attorney's fees as the prevailing party upon the mechanic's-lien claim.

Respectfully submitted,

/s/ Townes B. Johnson III
Townes B. Johnson III (SC Bar# 75412)
TOWNES B. JOHNSON III, LLC
PO Box 9246
Greenville, SC 29604
(864) 757-4899
tjohnson@sc.legal
Attorney for Appellants

Greenville, South Carolina