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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM YORK COUNTY
Court of Common Pleas

Honorable J. Mark Hayes, II, Circuit Court Judge

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Appellate Case Number 2026-001717

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Carolina Real Estate Holdings, LLC ..... Appellant,

v.

Brilin Electric, LLC and W & L Services, LLC ..... Defendants,

of which, Brilin Electric, LLC is ..... Respondent.

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# INITIAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUES ON APPEAL

I. DID THE LOWER COURT ABUSE ITS DISCRETION IN HOLDING THAT BRILIN, RATHER THAN CREH, WAS THE "PREVAILING PARTY" UNDER PARAGRAPH 28(g) OF THE LEASE, WHERE, AFTER ENTRY OF JNOV ON THE UTPA CLAIM, THE ONLY REMAINING VERDICTS ARE ON THE PARTIES' COMPETING CLAIMS FOR BREACH OF THE LEASE AND THOSE VERDICTS PRODUCE A NET JUDGMENT IN CREH'S FAVOR?

II. DID THE LOWER COURT ERR BY BASING ITS PREVAILING-PARTY DETERMINATION ON ITS OWN FINDINGS REGARDING CREDIBILITY, COURTROOM DEMEANOR, AND WHICH PARTY WAS "MORE TRUTHFUL," THEREBY USURPING THE PROVINCE OF THE JURY, AND ON SPECULATION ABOUT WHAT THE JURY INTENDED BY THE VACATED UTPA AWARD?

III. DID THE LOWER COURT ERR BY RELYING ON SETTLEMENT DISCUSSIONS AND ON PRE-SUIT CONDUCT NEVER SUBMITTED TO OR FOUND BY THE JURY?

IV. ALTERNATIVELY, DID THE LOWER COURT ERR IN DETERMINING THE AMOUNT OF ATTORNEY'S FEES AWARDED TO BRILIN?

V. DO THE LOWER COURT'S STATEMENTS AT THE REMAND HEARING AND ITS FINDINGS IN THE REMAND ORDER REQUIRE THAT FURTHER PROCEEDINGS BE CONDUCTED BEFORE A DIFFERENT CIRCUIT JUDGE?

## STATEMENT OF THE CASE

This is the second appeal in this commercial lease dispute.[1] Appellant Carolina Real Estate Holdings, LLC ("CREH"), the landlord, filed its Complaint on March 27, 2020, alleging that its tenant, Respondent Brilin Electric, LLC ("Brilin"), breached the parties' Lease. (Appeal I R. p. 00020). Brilin answered and asserted counterclaims for, among other things, breach of the Lease and violation of the South Carolina Unfair Trade Practices Act ("UTPA"), S.C. Code Ann. §§ 39-5-10 to -890. (Appeal I R. p. 00039). CREH filed an Amended Complaint on June 25, 2020 (Appeal I R. p. 00062), and Brilin filed an Answer to Amended Complaint and Counterclaims on July 27, 2020 (Appeal I R. p. 00085). Defendant W & L Services, LLC was dismissed by consent before trial and is not a party to this appeal.

A jury trial was held July 18–21, 2022, before the Honorable J. Mark Hayes, II. The jury returned a verdict (1) for CREH on its claim for breach of the Lease in the amount of $10,513.88; (2) for Brilin on its counterclaim for breach of the Lease in the amount of $4,424.75; and (3) for Brilin on its UTPA counterclaim in the amount of $6,089.13. (Appeal I R. p. 00018). By Order on Post-Trial Motions filed December 9, 2022, the trial court denied CREH's motion for JNOV on the UTPA claim, trebled the UTPA award to $18,267.99, held that Brilin was the prevailing party under both the UTPA and paragraph 28(g) of the Lease, and awarded Brilin $58,879.55 in attorney's fees and $3,553.05 in costs. (Appeal I R. p. 00008-12).

CREH appealed. In Opinion No. 6114, heard May 8, 2025 and filed July 2, 2025, this Court reversed the denial of CREH's motion for JNOV, holding that there was no evidence on

[1]The transcript of the February 18, 2026 hearing on remand is cited as "Hr'g Tr. [page]:[line]." The Order Entering JNOV as to UTPA Claim Only and Reconsidering Attorney's Fees and Costs, electronically filed July 10, 2026, is cited as "Remand Order." This Court's prior opinion, *Carolina Real Estate Holdings, LLC v. Brilin Electric, LLC*, Op. No. 6114 (Ct. App. filed July 2, 2025), is cited as "CTA Op." The Record in the first appeal of this case is cited as "Appeal I R." The Record in this second appeal is cited as "R." followed by page number(s).

either the actual-damages element or the public-interest element of the UTPA claim, and remanded "for entry of a JNOV on the UTPA claim and reconsideration of the award of attorney's fees." (R. p. __) (CTA Op. p. 8). The remittitur issued July 24, 2025. This Court thereafter awarded CREH $7,076.07 in costs pursuant to Rule 222, SCACR. (R. p. __).

On remand, both parties filed briefs on November 19, 2025. (R. pp. __ (CREH Brief on Remand), __ (Brilin Brief on Remand)). CREH moved for an award of its attorney's fees and costs as the prevailing party under the Lease in the amount of $99,024.02, comprising trial counsel's fees of $47,928.45 and appellate and remand counsel's fees of $51,095.57, and submitted an affidavit relating thereto. (R. p. __). A hearing was held February 18, 2026. By the Remand Order, electronically filed July 10, 2026, the trial court entered JNOV on the UTPA claim, but again held that Brilin was the prevailing party under the Lease, re-awarded Brilin the identical $62,432.60 in fees and costs,[2] and entered a net award to Brilin of $49,267.40. (R. p. __) [Remand Order pp. 14–15]. CREH timely served and filed its Notice of Appeal on August 3, 2026.

## STATEMENT OF FACTS

**The Lease and Its Prevailing-Party Provision.**

On or about April 17, 2017, CREH, as landlord, and Brilin, as tenant, entered into the Lease for commercial premises at 2180 Carolina Place, Suite 111, Fort Mill, South Carolina, for a three-year term ending April 30, 2020. (Appeal I R. p. 00071-84) [Pl. Trial Ex. 2]. Paragraph 28(g) of the Lease provides:

> If legal proceedings are instituted to enforce any provision of this Lease, the prevailing party in the proceeding shall be entitled to recover from the non-

[2]The Remand Order recites the fee component as "$58,879.65." (R. p. __) [Remand Order p. 2]. The fees awarded in the December 9, 2022 Order were $58,879.55, and the $62,432.60 total that the Remand Order re-awards reflects the $58,879.55 figure plus $3,553.05 in costs.

> prevailing party reasonable attorney's fees and costs incurred in connection with the proceeding.

(Id.) [Lease ¶ 28(g)]. The Lease does not define "prevailing party."

The parties' relationship deteriorated in 2019. As this Court recounted in its Opinion, after CREH repaved the parking lot, Brilin "unilaterally elected to pay approximately $1,200 less in rent the following month, August 2019," and "[a]s a result of the failure to pay the entirety of the rent, CREH determined the lease had been violated and sent Brilin an eviction notice." (R. p. __) (CTA Op. p. 2). CREH then identified damage to the premises that it attributed to Brilin, and the parties met on October 31, 2019 to address it. (*Id.* at p. 3) (Appeal I R. p. 00255). Disputes over the damage and the repairs continued, and CREH filed suit on March 27, 2020. (Appeal I R. p. 00020).

**The Trial and the Verdict.**

At trial, CREH sought damages for Brilin's breaches of the Lease, including damages to the leased premises. In closing, CREH asked the jury to award $28,802.76. (Appeal I R. p. 00745). Brilin asked the jury to award CREH nothing on its claim, to award Brilin $4,424.75 on its Lease counterclaim, and to award Brilin $1 on its UTPA counterclaim "to send a message." (Appeal I R. p. 00773).

The jury found for CREH on its Lease claim and awarded $10,513.88; found for Brilin on its Lease counterclaim and awarded $4,424.75; and found for Brilin on its UTPA counterclaim, awarding $6,089.13—the exact difference between the two contract awards. (Appeal I R. p. 00018-19). The verdict form did not call for itemized damages or for findings on individual alleged breaches of the Lease. (*Id.*). During trial, the jury sent the court a note that stated: "The jurors are easily distracted by the noise and movements by the plaintiff area. Thank you." (Appeal I R. p. 01031) [Court Ex. 1 at Trial]. The trial judge acknowledged at the remand

hearing that he "chose to remain silent" and never admonished CREH's representative or counsel regarding any conduct during the trial. (R. p. __) (Hr'g Tr. 31:9–13).

**The First Appeal.**

This Court reversed the denial of JNOV on the UTPA claim. It held that "a difference in quotes alone does not mean there were actual damages," that Brilin "never paid any of the higher quotes," and that "there was no evidence of actual damages related to the UTPA claim." (R. p. __) (CTA Op. p 7). It further held that Brilin "did not offer any evidence to support the public interest element." (*Id.*) Because the trial court "did not distinguish between its award of attorney's fees under the lease agreement and its award of attorney's fees under the UTPA," this Court remanded for reconsideration of fees, citing *Richland County v. Kaiser*, 351 S.C. 89, 97, 567 S.E.2d 260, 264 (Ct. App. 2002), which reversed a fee award because, after reversal on the merits, the respondents "were no longer the prevailing parties." (R. p. __) (CTA Op. p. 8).

**The Remand Hearing.**

On remand, CREH argued that, with the UTPA claim eliminated, the remaining verdicts on the competing Lease claims established that CREH was the prevailing party under *Heath v. County of Aiken*, 302 S.C. 178, 394 S.E.2d 709 (1990). (R. p. __) (Hr'g Tr. 5:23–7:16). Brilin asked the court to "reaffirm" its prior award. (R. p. __) (Hr'g Tr. 16:3–22). Brilin's counsel described the UTPA claim as addressing "conduct outside of the scope of the lease, which is why we brought it as a UTPA claim." (R. p. __) (Hr'g Tr. 18:4–6).

The lower court made clear its view of the case and its opinion of CREH's representative. It told CREH's counsel that it "cannot ignore -- I don't feel like I should ignore what I know happened during that trial and how that conduct may have affected the jury's perception of the parties," and that "mathematically what the jury did was say neither party wins in this case." (R.

p. __) (Hr'g Tr. 10:19–11:2). It stated that the CREH representative's "attitude in the court was reprehensible. He argued with witnesses. He made faces at witnesses." (R. p. __) (Hr'g Tr. 29:9–11). It told counsel that "it's difficult for this Court to come to a decision that your side [CREH] of the courtroom was the prevailing party . . . Just the – everything that took place during that trial, the issues I had to address, what the jury was asked to do." (R. p. __) (Hr'g Tr. 40:7–14). And it described CREH's position as "a very narrow path" that "might be what the case law says," but added: "I just don't think it would be the truthful path." (R. p. __) (Hr'g Tr. 41:5–11).

**The Remand Order.**

The Remand Order entered JNOV on the UTPA claim but held that Brilin remained the prevailing party. (R. p. __) [Remand Order pp. 3–12]. The lower court rejected reliance on a straightforward comparison of the breach-of-contract verdicts. Instead, it created a complicated mathematical percentages comparison between what amount was sought and the amount awarded. Its calculation resulted in its finding that CREH recovered "only 36.5 percent" of its demand and that, measured against both sides' combined demands, "Defendant was successful on 68.36% and Plaintiff only 31.64%." (R. p. __) (Remand Order at 6, 9). It also decided that CREH had not carried its burden on "five (5) of the six (6) alleged lease violations" pleaded in the Complaint. (*Id.* at 9–10). In a section captioned "Credibility of Each Sides Case," the lower court found that "the credibility for truthfulness weighs heavily in favor of the Defendant," that CREH's representative's courtroom conduct "demonstrated a lack of unprecedented respect for the court process" and "was shocking," and that the court "finds the Defendant's factual positions to be more reasonable, more truthful, and more consistent with acting in good faith with the Lease terms." (*Id.* at 10–12). The lower court further stated that it "continues to agree that the Plaintiff's conduct was unfair and deceptive, even if not in context of the UTPA." (*Id.* at

11). It re-awarded Brilin $62,432.60 in fees and costs without allocating or deducting any time to the UTPA claim. (*Id.* at 12–14 & n.30).

## STANDARD OF REVIEW

"The decision to award or deny attorney's fees and costs will not be disturbed on appeal absent an abuse of discretion." *Maybank v. BB&T Corp.*, 416 S.C. 541, 579–80, 787 S.E.2d 498, 518 (2016); *see Heath*, 302 S.C. at 182, 394 S.E.2d at 711. "An abuse of discretion occurs either when a court is controlled by some error of law, or where the order is based upon findings of fact lacking evidentiary support." *Patel v. Patel*, 359 S.C. 515, 599 S.E.2d 114 (2004) (citing *Townsend v. Townsend*, 356 S.C. 70, 587 S.E.2d 118 (Ct. App. 2003)). A trial court's discretion is not unlimited. *See State v. McClinton*, 369 S.C. 167, 170, 631 S.E.2d 895, 896 (2006) (a court abuses its discretion when its ruling rests, *inter alia*, on "application of the wrong legal principle," lacks evidentiary support, or "does not fall within the range of permissible decisions applicable in a particular case").

Although a fee award is ordinarily reviewed for abuse of discretion, where the issue "hinges on the Court's interpretation of" the term in the provision authorizing fees, it presents a question of law reviewed de novo. *Layman v. State*, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008).

## ARGUMENT

This Court's reversal of the UTPA award eliminated the only component of the verdict that brought any uncertainty as to which party was the "prevailing party" under the Lease. What remains is a claim and a counterclaim under the same Lease, a verdict of $10,513.88 for CREH and $4,424.75 for Brilin, and a net judgment in CREH's favor. Under the definition of "prevailing party" adopted in *Heath v. County of Aiken* and applied by this Court in *Seckinger v.*

*Vessel Excalibur*, 326 S.C. 382, 483 S.E.2d 775 (Ct. App. 1997), CREH is the prevailing party. The lower court reached the opposite result only by (1) discounting CREH's recovery because it was less than CREH requested—the very reasoning *Heath* rejects; (2) substituting its own assessment of credibility, "truthfulness," and courtroom demeanor for the jury's verdict; (3) speculating about what the jury "wanted," relying in part on a UTPA award this Court held was unsupported by any evidence; and (4) relying on settlement discussions and pre-suit conduct the jury never decided. The hearing transcript and the Remand Order further show that the court had formed a fixed view of CREH and its representative and acknowledged that the law might point the other way. The Remand Order should be reversed, CREH should be declared the prevailing party, and the case should be remanded to a different circuit judge to determine the amount of CREH's fees.

## I. THE LOWER COURT ABUSED ITS DISCRETION IN HOLDING THAT BRILIN, RATHER THAN CREH, WAS THE PREVAILING PARTY UNDER THE LEASE.

### A. The Lease incorporates the settled definition of "prevailing party" adopted in *Heath*.

Attorney's fees are not recoverable unless authorized by contract or statute. *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 427 S.E.2d 659 (1993); *Seckinger*, 326 S.C. at 386. The only authority here is paragraph 28(g) of the Lease, which provides: "[i]f legal proceedings are instituted to enforce any provision of this Lease, the prevailing party in the proceeding shall be entitled to recover" its reasonable fees and costs. (Appeal I R. p. 00084). The provision is mandatory, and it ties entitlement to the outcome of "the proceeding," not to either party's conduct before or during the litigation, and not to the court's impressions of the parties.

The Lease does not define "prevailing party," but when the parties executed it, the term had a settled meaning in South Carolina. Our Supreme Court has defined a prevailing party as

"[t]he one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention [and] is the one in whose favor the decision or verdict is rendered and judgment entered." *Heath*, 302 S.C. at 182–83, 394 S.E.2d at 711 (quoting *Buza v. Columbia Lumber Co.*, 395 P.2d 511, 514 (Alaska 1964)). In the same passage the Supreme Court held: "Contrary to appellant's assertion, a party need not to be successful as to all issues in order to be found to be a prevailing party." *Id.* at 182, 394 S.E.2d at 711. This Court has described *Heath*'s formulation as "the common law definition of prevailing party." *Seckinger*, 326 S.C. at 391. Both parties and the lower court agreed that *Heath* and *Seckinger* supply the governing definition. (R. p. __) [Remand Order p. 5]. The question on remand, therefore, should have been which party satisfies that definition.[3]

### B. With the UTPA claim eliminated, CREH is the party in whose favor the verdict was rendered and judgment entered on the main issue.

The main issue in this case was never in doubt. CREH sued to enforce the Lease; Brilin counterclaimed to enforce the Lease; and the jury decided which party breached the Lease and in what amount. Brilin's counsel told the lower court on remand: "This is a commercial lease case. It's exactly what this case is, it's what this case has always been . . . ." (R. p. __) (Hr'g Tr. 15:24–16:1).

On that main issue of competing breach of contract claims, the jury found that Brilin breached the Lease and awarded CREH $10,513.88. Brilin asked the jury to award CREH

[3]The Remand Order suggests that applying *Heath* according to its terms would "divest[] this Court of discretion" and transform the inquiry into "a mechanical exercise." (R. p. __) [Remand Order p. 6 n.16]. This is incorrect. A court retains discretion over the *amount* of a reasonable fee, but it has no discretion to apply an incorrect legal definition of "prevailing party" to a contract that says the prevailing party "shall be entitled" to fees. *See Utilities Constr. Co. v. Wilson*, 321 S.C. 244, 468 S.E.2d 1, 3 (Ct. App. 1996) (under mandatory fee provision, "while the amount of attorney fees to be awarded . . . is discretionary with the court, the question of entitlement is not"); *Patel v. Patel*, 359 S.C. 515, 599 S.E.2d 114 (2004) (an abuse of discretion occurs "when a court is controlled by some error of law").

nothing (Appeal I R. p. 00771). The jury awarded Brilin only $4,424.75 on its breach of Lease counterclaim. Thus, the jury awarded CREH more than twice what it awarded to Brilin on the competing breach of contract claims. Once this Court directed entry of JNOV on the UTPA claim, the only judgment that could be entered on the verdict was a net judgment in CREH's favor of $6,089.13. CREH is thus both the party that "successfully prosecute[d] the action . . . prevailing on the main issue" and "the one in whose favor the . . . verdict [was] rendered and judgment entered." *Heath*, 302 S.C. at 182–83, 394 S.E.2d at 711.

*Seckinger* compels that conclusion. In that case, a boat repairman sued the vessel owner for $2,131.01 for breach of contract and to foreclose a maritime lien, and later added claims for slander and intentional infliction of emotional distress; the owner counterclaimed. 326 S.C. at 385–86. The emotional-distress claim and the owner's counterclaim were dismissed at trial, the jury found for the owner on the slander claim, and the jury awarded the repairman only $782.50 on the contract and lien claims. *Id.* at 386. The owner argued that he was the prevailing party because the verdict was closer to zero than to the repairman's demand. *Id.* at 388. This Court disagreed. It held that under *Heath*, the owner "is not the prevailing party . . . because the jury returned a verdict for Seckinger on his lien foreclosure, albeit for less than he claimed." *Id.* The Court explained that, absent a formal statutory offer-of-settlement procedure that modifies the common-law rule, "the prevailing party was determined at trial," and the party with the verdict prevailed. *Id.* at 391.

The repairman in *Seckinger* recovered about 36.7% of his contract demand and lost his slander claim outright. Yet the repairman—not the owner—was the prevailing party. If the owner in *Seckinger* was not the prevailing party, Brilin cannot be the prevailing party.

### C. The lower court's "degree of success" percentages disregard *Heath*'s holding that a party need not prevail "to the extent of the original contention."

The Remand Order acknowledges that CREH obtained the only net verdict, but it decides that CREH recovered "only 36.5 percent" of the $28,802.76 it requested, and therefore Brilin "prevailed on $18,288.88 (63.5%)" of the claims against it. (R. p. __) [Remand Order p. 9]. That is the argument *Heath* rejected. A prevailing party is one who prevails on the main issue "even though not to the extent of the original contention." 302 S.C. at 182, 394 S.E.2d at 711. Treating the unrecovered portion of CREH's requested amount as a "win" for Brilin converts the gap between request amount and verdict into the dispositive factor, even though *Heath* says it does not matter.

The lower court's methodology is confusing, and it proves too much. Under it, any plaintiff who recovers less than half of its demand would forfeit prevailing-party status to the very defendant against whom it obtained a judgment, and any defendant held liable could claim fees by pointing to the difference between the prayer for relief and the verdict.[4] That is precisely the "closer to zero" argument this Court rejected in *Seckinger*, 326 S.C. at 388–91, and it is contrary to the holding in *Heath*.[5]

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[4] The trial court's percentage methodology produces absurd results in almost any case. Consider a commercial lease with a prevailing-party fee provision. The landlord wrongfully locks out its tenant, a family restaurant, and the restaurant goes out of business. At trial, the evidence supports lost-profit damages ranging from $30,000 to $100,000, and the tenant's counsel asks the jury for $100,000, the top of that range. The jury finds that the landlord breached the lease and awards the tenant $46,000. Each side has incurred $50,000 in attorney's fees. Under the trial court's methodology, the tenant achieved only 46% "success," so the landlord is the "prevailing party." The tenant, wrongfully locked out of its own restaurant, would then owe the landlord $50,000 in fees, more than its entire verdict, leaving the tenant paying the landlord $4,000 on top of its own $50,000 in fees. Had the tenant's counsel instead asked for any amount below $92,000, the same $46,000 verdict would exceed 50% of the request, the tenant would be the prevailing party, and the landlord would owe the tenant $96,000 (the verdict plus fees). The same breach, the same evidence, and the same verdict thus produce a $100,000 swing based solely on the number counsel chose to request in closing argument. The method penalizes zealous advocacy and rewards the lawyer who asks for less, a result that cannot be squared with *Heath*'s holding that a party prevails "even though not to the extent of the original contention." 302 S.C. at 182–83, 394 S.E.2d at 711.

[5] Also noteworthy, and further demonstrative of the folly of the lower court's analysis, is that $3,000 of Brilin's recovery on its counterclaim was for its security deposit (*see* CTA Op. p. 4 n. 4), which was stipulated to by the parties before closing arguments (Appeal I R. p. 00712-13). Because the security deposit was properly withheld under the Lease ¶ 5 due to Brilin's breach (Appeal I R. p. 00073), the $3,000 security deposit was merely an agreed-

Further, *Heath*'s statement that "[a] court determines the prevailing party by evaluating the degree of success obtained," 302 S.C. at 183, 394 S.E.2d at 711, does not support the lower court's approach. *Heath* used that inquiry to confirm which party prevailed on the main issue, not to strip the party that was awarded the verdict of its status as prevailing party because it recovered less than it sought. Under the lower court's interpretation, "degree of success" would swallow the phrase "even though not to the extent of the original contention" in the very same definition. The two parts of *Heath* must be read together, and together they mean that a party who wins the main issue and obtains the judgment prevails, even if its recovery is partial. Otherwise, *Seckinger* would have necessarily had the opposite outcome.

### D. The lower court's claims-based count rests on speculation about a general verdict, and is foreclosed by *Heath* in any event.

The lower court also reasoned that CREH "did not carry its burden of proof on five (5) of the six (6) alleged lease violations" pleaded in the Complaint, so that CREH "was successful on approximately 17% and Defendant was successful on 83%." (R. p. __) [Remand Order pp. 9–10]. The jury made no such findings. It returned a single dollar amount on CREH's Lease claim, and in no way identified which violations were encompassed in the amount. (Appeal I R. p. 00018). Nothing in the verdict identifies which alleged breaches the jury accepted or rejected, and the lower court's attribution of the award to one alleged breach, and rejection of the other five, is inference and speculation.

The jury's award of $10,513.88 does not even correspond to the amount CREH sought for any specific element of damage.[6] The lower court's premise that the jury accepted exactly

upon setoff. Further, Brilin did not get what it asked for either because it asked the jury to award CREH nothing (Appeal I R. p. 00771), and the jury rejected that request. The complexity and uncertainty that would result from an affirmance of the lower court's methodology would be severe.

[6] The lower court apparently speculated that the amount awarded by the jury was the total of the invoices for the demising wall, but that total was less than the actual jury award to CREH. (Appeal I R. pp. 00934-35; 00952-53).

one of six alleged breaches and rejected the other five in their entirety is therefore not a finding the verdict supports. It is irrelevant and it is speculation.

More fundamentally, counting pleaded sub-claims is the analysis *Heath* forbids. A party "need not . . . be successful as to all issues in order to be found to be a prevailing party." 302 S.C. at 182, 394 S.E.2d at 711. In *Seckinger*, the plaintiff repairman was the prevailing party even though his slander claim failed and his emotional-distress claim was dismissed. 326 S.C. at 386–88. The prevailing-party inquiry turns on who won the main issue and obtained the judgment, and not on a tally of pleaded subparts.

## II. THE LOWER COURT ERRED BY SUBSTITUTING ITS OWN VIEW OF CREDIBILITY, "TRUTHFULNESS," AND COURTROOM DEMEANOR FOR THE JURY'S VERDICT, AND BY SPECULATING ABOUT WHAT THE JURY INTENDED.

### A. Credibility was for the jury, which resolved the main issue in CREH's favor.

This was a jury trial. Our constitution provides that "[t]he right of trial by jury shall be preserved inviolate." S.C. Const. art. I, § 14. In ruling on motions by which a verdict may be challenged, "neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence." *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 332, 732 S.E.2d 166, 171 (2012). The only mechanism by which a trial judge may set aside a verdict because he weighs the evidence differently is a timely motion for a new trial under the thirteenth-juror doctrine. *See Norton v. Norfolk S. Ry. Co.*, 350 S.C. 473, 478, 567 S.E.2d 851, 854 (2002); *Folkens v. Hunt*, 300 S.C. 251, 254–55, 387 S.E.2d 265, 267 (1990). No such relief was sought or granted here, and the jury's verdict on the Lease claims stands.

The Remand Order nonetheless devotes an entire section, captioned "Credibility of Each Sides Case," to the court's own findings that "the credibility for truthfulness weighs heavily in

favor of the Defendant," that the testimony of CREH's representative and property manager "recalled the diminished view this Court had of the witnesses' credibility," and that the court "finds the Defendant's factual positions to be more reasonable, more truthful, and more consistent with acting in good faith with the Lease terms." (R. p. *) [Remand Order pp. 10–12]. The court even recast the "main issue" in the case as "which party acted 'reasonable' under the Lease terms" and as "'which side of the case do you believe more?'"* (R.p.__)(*Id.* at 5 n.13, 12).

That approach completely misconstrues the prevailing-party inquiry. *Heath* defines the prevailing party as the one that prevailed on the main issue and in whose favor the verdict was rendered and judgment entered. It does not invite a trial judge to decide, four years after the verdict, which party he found more believable. The jury answered the only credibility question that matters for the Lease claims when it found that Brilin breached the Lease and awarded CREH damages more than double Brilin's counterclaim award. A trial judge's disagreement with how the jury weighed the credibility is an improper consideration and cannot convert the party that lost the net verdict into the "prevailing party." *RFT Mgmt. Co.*, 399 S.C. at 332, 732 S.E.2d at 171.

The court's improper findings also go beyond the verdict and, in places, contradict the record. The Remand Order states that "[t]he jury believed the Defendant's factual assertions as it related to, among other things, doors, the ductwork, the bricks, the cleaning of the carpet, and to the asphalt." (R. p. __) [Remand Order p. 11]. The jury made no such findings. Instead, it returned a general verdict. The court's finding that CREH "threatened the Defendant with eviction for no justifiable reason" (*id.*) is contrary to this Court's recitation that the eviction notice followed Brilin's unilateral decision to withhold approximately $1,200 in rent. (CTA Op. at p. 2). Findings of this kind are not an exercise of discretion. Instead, they are an invasion of

the province of the jury, and are "findings of fact lacking evidentiary support," which constitute an abuse of discretion. *Patel*, 359 S.C. 515, 599 S.E.2d 114.

### B. Courtroom demeanor has nothing to do with which party prevailed.

The lower court's ruling was driven in substantial part by its recollection of the courtroom conduct of CREH's representative. At the remand hearing, the court told counsel it "cannot ignore -- I don't feel like I should ignore what I know happened during that trial and how that conduct may have affected the jury's perception of the parties." (Hr'g Tr. 10:19–24).[7]

Courtroom demeanor is not part of the prevailing-party definition.[8] *Heath* looks to the *outcome* of the litigation, that is, who prevailed on the main issue and obtained the verdict and judgment. A litigant's gestures in the courtroom may warrant an admonition or a curative instruction, but they do not change who won, or even enter into the analysis of prevailing party. The court had every tool available to address the alleged conduct when it occurred and, by its own account, it "chose to remain silent." (R. p. __) (Hr'g Tr. 31:11). It could not, years later, penalize that alleged conduct by reallocating contractual fees that the Lease awards to "the prevailing party in the proceeding."

Moreover, to the extent the court believed the representative's demeanor "affected the jury's perception of the parties" (Hr'g Tr. 10:21–22), the jury's verdict already reflects that perception, and the jury still found for CREH on its Lease claim and awarded CREH more than

[7] Other remarks by the judge about CREH's representative include that "his attitude in the court was reprehensible" and that "[h]e argued with witnesses" (Hr'g Tr. 29:9–11), although it is not clear when or how this could have occurred. The Remand Order also found that the representative's conduct "demonstrated a lack of unprecedented respect for the court process" and "was shocking given the Plaintiff's owners level of sophistication," and relied on it as a ground for the prevailing-party ruling. (R. p. __) [Remand Order p. 11; *see id.* at 10 n.22]. Despite all of these descriptions, there are no actual instances in the record of any such conduct.

[8] It is unclear how courtroom gestures and fidgeting would impact the percentages of degree of success set forth by the trial court in the previous section of the Remand Order.

twice what it awarded Brilin. Using the same alleged demeanor a second time to override the verdict is doubly improper.

### C. The lower court improperly speculated about the meaning of the jury's vacated UTPA award.

The Remand Order repeatedly relies on the court's surmise about what the jury wanted or believed. It states that the jury's UTPA award was "an amount substantially in excess of that requested," and is "consistent with . . . this Court's opinion that the Defendant's case at trial was more believable and truthful." (R. p. __) [Remand Order p. 2 n.6]. At the hearing, the court explained that based on the amount awarded by the jury on the UTPA claim "there was just so many -- I don't know -- flashing lights to tell me that this jury really didn't want anybody to win." (R. p. __) (Hr'g Tr. 11:8–11).

However, the vacated UTPA award should not have been a consideration. This Court held that there was no evidence to support an UTPA award. (R. p. __) (CTA Op. at pp. 7–8). Therefore, the lower court's speculation about the jury's supposed "true" sentiments about a component of a verdict that has been reversed and was unsupported by any evidence is certainly improper. Even worse is its use to "defeat" the portion of the verdict that was proper and still stands.

The jury's intentions are expressed in its verdict, not in a judge's reconstruction of the jury's motives. Speculation of this kind is not a finding supported by the record, and an order "based upon findings of fact lacking evidentiary support" is an abuse of discretion. *Patel*, 359 S.C. 515, 599 S.E.2d 114.

Despite the reversal of the UTPA award, the lower court stated that it "continues to agree that the Plaintiff's conduct was unfair and deceptive, even if not in context of the UTPA." (R. p. __) [Remand Order p. 8 n.18, p. 11]. At the hearing, the court went further, suggesting that the

jury had found CREH's conduct "met that element of we don't want this type of conduct going on in our communities in South Carolina" (R. p. __) (Hr'g Tr. 28:25–29:4). This is the public-interest element that this Court held was entirely unsupported, yet the lower court considered it in determining the prevailing party.

The purpose of this Court's remand was to reconsider fees in light of the elimination of the UTPA claim, citing *Richland County v. Kaiser* for the proposition that reversal on the merits can mean the former prevailing party "no longer" prevails. 351 S.C. at 97, 567 S.E.2d at 264. The Remand Order instead treats the UTPA theory as though it survived in substance. A trial court on remand may not revisit what the appellate court has decided. *See Heath*, 302 S.C. at 181 (declining to reexamine an argument that "was raised and disposed of adversely to [appellants] in their first appeal").

Moreover, by Brilin's own account, the UTPA claim concerned matters outside the Lease. Brilin's counsel told the court that the alleged conduct "was conduct outside of the scope of the lease, which is why we brought it as a UTPA claim." (R. p. __) (Hr'g Tr. 18:4–6; *see also* Hr'g Tr. 37:7–11). Paragraph 28(g) awards fees to the prevailing party in "legal proceedings . . . instituted to enforce any provision of this Lease." Conduct that Brilin itself characterizes as outside the Lease cannot determine who prevailed in a proceeding to enforce the Lease.

## III. THE LOWER COURT ERRED BY RELYING ON SETTLEMENT DISCUSSIONS AND UNADJUDICATED PRE-SUIT CONDUCT.

### A. Settlement discussions, including the court's own settlement efforts, are improper considerations.

The Remand Order defines the "4-day trial" it considered to include "pre-trial meetings with the attorneys in attempting to negotiate a reasonable settlement of the dispute." (R. p. __) [Remand Order p. 3 n.8]. It faults CREH's interpretation of *Heath* because it would declare a

party prevailing even though that party "refused reasonable pre-trial settlement offers." (R. p. __) (*Id.* at 6 n.16). At the hearing, the court recounted its own efforts: "I tried to get the parties to settle. I mean, I -- I took them in the back hallway, you know, pushed and shoved and we talked and tried to get everybody to work it out." (R. p. __) (Hr'g Tr. 40:18–21). It then tied those efforts directly to its conclusion: "I've done what I can to try to get the case resolved, and I just think as a result of that four day it's tough. I've [sic] challenged to say that your party was the prevailing party." (R. p. __) (Hr'g Tr. 40:23–41:2).

South Carolina protects settlement communications. Rule 408, SCRE, bars the use of offers of compromise, and of conduct or statements made in compromise negotiations, to prove the validity or amount of a disputed claim. And where the General Assembly has wanted settlement posture to affect prevailing-party status, it has said so expressly in statutes and conditioned that effect on formal written offers. *See Seckinger*, 326 S.C. at 389–91 (explaining that § 29-5-10(b)'s offer-of-settlement procedure "modifies the common law definition of 'prevailing party'" only when properly invoked, and that absent such an offer "the prevailing party was determined at trial"). Paragraph 28(g) contains no such mechanism.[9] Courts construing prevailing-party provisions have likewise held that a trial court "may not invoke equitable considerations unrelated to litigation success, such as the parties' behavior during settlement negotiations." *Hsu v. Abbara*, 9 Cal. 4th 863, 877, 891 P.2d 804 (1995); *accord Silver Creek, LLC v. BlackRock Realty Advisors, Inc.*, 173 Cal. App. 4th 1533, 1541 (2009) (improper "to consider the fault of the parties or their litigation motives in making a prevailing party determination"). The lower court's reliance on informal settlement discussions to decide who

[9]Even if a formal offer of judgment under Rule 68, SCRCP, or S.C. Code Ann. § 15-35-400 had been made, its effect would be governed by that rule or statute—not by the court's recollection of informal hallway negotiations.

prevailed was error. If permitted, it would chill candid settlement discussion in every case governed by a prevailing-party clause.

### B. The lower court's findings about pre-suit conduct are outside the prevailing-party inquiry.

The Remand Order is replete with inappropriate "findings" by the trial court on matters the jury was never asked to decide, including (i) that CREH filed suit "to gain an unjustifiable tactical advantage, or alternatively, is motivated by unjustifiable hostility or retribution"; (ii) that CREH "unreasonably called the police"; (iii) that CREH's property manager "was used to harass the Defendant"; and (iv) that CREH's failure to countersign the Lease "reflects disrespect for the legal significance of the document." (R. p. __) [Remand Order p. 4 n.11, p. 5 n.12, p. 8 n.19, p. 11]. None of these findings bears on who is "the one in whose favor the decision or verdict is rendered and judgment entered."[10] *Heath*, 302 S.C. at 183, 394 S.E.2d at 711. Some of the "findings" are inconsistent with the record as this Court recited it. *See* CTA Op. at p. 2 (eviction notice followed Brilin's withholding of rent). And the unsigned-Lease finding is further irrelevant because the Remand Order acknowledges that Brilin "accepted the Lease terms as binding." (R. p. __) (Remand Order p. 5 n.12). The Lease makes entitlement to attorneys' fees turn on who prevailed "in the proceeding," not on the court's appraisal of the parties' character or pre-suit behavior.

## IV. ALTERNATIVELY, THE LOWER COURT ERRED IN DETERMINING THE AMOUNT OF FEES AWARDED TO BRILIN.

Even if Brilin could be deemed the prevailing party, the amount of the award cannot stand, for three reasons.

[10] Further, to the extent the lower court's "findings" have a factual basis, the jury's verdict encompassed any such facts or allegations.

First, the award includes fees for the UTPA claim. This Court remanded in part because the lower court "did not distinguish between its award of attorney's fees under the lease agreement and its award of attorney's fees under the UTPA." (R. p. __) (CTA Op. at p. 8). On remand, the court re-awarded the identical fee without separating a single hour. (R. p. __) [Remand Order pp. 12–14 & n.30].[11] The burden of establishing fees recoverable under the Lease was Brilin's, and an UTPA claim that Brilin's counsel described as addressing "conduct outside of the scope of the lease" (R. p. __) (Hr'g Tr. 18:4–6) is not part of "legal proceedings . . . instituted to enforce any provision of this Lease." Where a party prevails on some claims but not others, the fee must be limited to time spent on the claim for which fees are recoverable, and an award of the party's total fee is an abuse of discretion. *Utilities Constr. Co.*, 468 S.E.2d at 4 (reversing award of counsel's "total fee" and remanding "for the entry of an award based upon the time [counsel] spent in defending the mechanic's lien cause of action only").

Second, the lower court awarded Brilin the same amount despite a fundamental change in the result. The Remand Order states that the court's "previously reduced award of attorney's fees remains proper and reasonable." (R. p. __) [Remand Order p. 14]. But the 2022 award was made in a judgment under which Brilin received trebled UTPA damages and a substantial net recovery. After this Court's reversal, the "beneficial results obtained" are a net verdict *against* Brilin on the Lease claims. The lower court nevertheless found that "[c]ounsel obtained a very beneficial result for the Defendant," and "the counterclaims were all successfully pursued." (*Id.* at 13–14). The only result that could support that finding is the UTPA verdict this Court reversed.

[11]The Remand Order says the court reviewed "*the Plaintiff's* billing record" in concluding that no UTPA reduction was warranted. (R. p. __) [Remand Order p. 14 n.30]. Whether that reference is to CREH's records or is a misstatement that intended to reference Brilin's records, the result is the same -- the court did not identify any allocation of Brilin's counsel's time between the Lease claims and the UTPA claim.

"Beneficial results obtained" is a mandatory factor, *Horton v. Jasper Cnty. Sch. Dist.*, 423 S.C. 325, 815 S.E.2d 442, 444 (2018), and it was misapplied.

Third, the court did not make the specific findings the law requires. A trial court "should consider all six factors" and "should make specific findings of fact on the record for each of these factors." *Horton*, 423 S.C. 325, 815 S.E.2d at 444–45. The Remand Order does not identify the hours, rates, or time entries it credited; it adopts the prior order by reference and states in conclusory terms that the time "appears both reasonable and necessary." (R. p. __) [Remand Order p. 13]. Because the award rests on a reversed result and includes unallocated UTPA time, it must be vacated. *Utilities Constr. Co*., 468 S.E.2d at 4.

## V. THE LOWER COURT'S STATEMENTS AND FINDINGS REQUIRE THAT FURTHER PROCEEDINGS BE CONDUCTED BEFORE A DIFFERENT CIRCUIT JUDGE.

"[T]he expectation of a fair and impartial tribunal is a basic tenet of all cherished notions of due process." *Mallett v. Mallett*, 323 S.C. 141, 147, 473 S.E.2d 804, 808 (Ct. App. 1996) (citing *In re Murchison*, 349 U.S. 133 (1955)). Under Canon 3(E)(1) of the Code of Judicial Conduct, Rule 501, SCACR, "a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to, instances where he has a personal bias or prejudice against a party." *Patel*, 359 S.C. 515, 599 S.E.2d 114. This Court has held that "a judge's impartiality might reasonably be questioned when his factual findings are not supported by the record." *Mallett*, 323 S.C. at 146, 473 S.E.2d at 807 (quoting *Ellis v. Procter & Gamble Distrib. Co.*, 315 S.C. 283, 285, 433 S.E.2d 856, 857 (1993)). This Court has also considered whether the judge "expressed an opinion on the merits of the case prior to his decision." *Id.* at 147, 473 S.E.2d at 808.

CREH recognizes that adverse rulings alone do not establish bias, and that disqualifying bias ordinarily must be personal and stem from an extrajudicial source. *Mallett*, 323 S.C. at 145–47, 473 S.E.2d at 807–08; *Christensen v. Mikell*, 324 S.C. 70, 476 S.E.2d 692 (1996). But the record here shows more than adverse rulings.[12]

1. The court acknowledged that the law might require a different result.

During the hearing, the trial judge described CREH's position that the jury's verdicts should determine the prevailing party as "a very narrow path." Tellingly, he said: "It might be what the case law says . . . but again, I don't think that's the right way to do this," because "I just don't think it would be the truthful path." (R. p. __) (Hr'g Tr. 41:5–11). Also tellingly, the trial judge stated: "[I]t's difficult for this Court to come to a decision that your side [speaking to counsel for CREH] of the courtroom was the prevailing party." (Hr'g Tr. 40:7–12). A judge who states that the case law may point one way but that he will not take that "path" has announced that his decision rests on something other than the law. Unfortunately, the trial judge followed through and issued the Remand Order despite "what the case law says."

2. The court expressed personal antagonism toward CREH's representative.

The trial judge described the CREH representative's "attitude in the court" as "reprehensible" (R. p. __) (Hr'g Tr. 29:9–11), praised the jury as "brave" and "courageous" for submitting the note (R. p. __) (Hr'g Tr. 31:13–14), found his conduct "shocking" (R. p. __) (Remand Order p. 11), and faulted him for "disrespect" in failing to countersign a Lease that the court acknowledged both parties treated as binding (*id.* at 5 n.12). All of this antagonism is completely unjustified in light of the facts that trial judge never admonished him at trial, and the

[12]In *Mallett*, this Court concluded that "prudence and judiciousness would have dictated the trial judge disqualify himself" even though the record there did not show that the judge "ever expressed an opinion on the merits of the case prior to his decision." 323 S.C. at 147, 473 S.E.2d at 808. The record here contains an expression of opinion by the trial judge prior to his decision.

note from the jury simply reads: "The jurors are easily distracted by the noise and movements by the plaintiff area. Thank you." (Appeal I R. 01031). There is nothing nefarious or even unusual about a client whispering and conversing with counsel during a trial. The record also reveals that after the note was submitted, no further distractions occurred. (Appeal I R. *passim*).

3. The court relied on settlement discussions and matters outside the adjudicative record.

As set forth in Section III above, the trial judge stated that he relied on his own "back hallway" settlement conferences and other matters before trial (Hr'g Tr. 40:18–41:2; Remand Order p. 3 n.8) in reaching his ruling. It appears that he cannot "un-hear" such discussions, and therefore should not decide another remand.

4. The court's unauthorized "findings" are not supported by the record.

As shown in Sections I through III above, the trial judge made findings from a general verdict that the verdict does not contain, found facts the jury never decided thereby invading the province of the jury, and made findings inconsistent with this Court's opinion. Under *Ellis*, *Mallett*, and *Patel*, findings unsupported by the record are themselves evidence that a judge's impartiality might reasonably be questioned.

Even where a judge's views are formed in the course of proceedings, the United States Supreme Court has recognized that they warrant disqualification when they "display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994). This Court has looked to federal authority in applying Canon 3. *Mallett*, 323 S.C. at 146–47, 473 S.E.2d at 808. The comments by the trial judge here, set forth herein, meet that standard.

5. This Court should order the remand to a different trial judge.

This Court "may affirm, reverse, or modify the decision below or remand all or any issues for further proceedings." Rule 220(a), SCACR. In deciding whether further proceedings should be heard by a different judge, courts consider "(1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness." *United States v. DeMott*, 513 F.3d 55, 59 (2d Cir. 2008) (quoting *United States v. Robin*, 553 F.2d 8, 10 (2d Cir. 1977) (per curiam)). Each factor favors reassignment. The lower court has now twice ruled for Brilin, has announced that the result of CREH's position (i.e., the law of South Carolina) is not "the truthful path," and has expressed that it would be "difficult" for him to rule in favor of CREH. Reassignment is necessary to preserve the appearance of justice where the court has characterized a party's principal as "reprehensible" and relied on its own settlement efforts to determine the prevailing party.[13] And reassignment would entail no waste because the remaining task of determining the reasonable amount of CREH's fees from the affidavits and billing records requires no familiarity with the trial. Indeed, the indications are that a remand to the same trial judge would result in significant waste of the parties' time and resources and judicial resources if he again fails to follow the law.

[13] Another illustration of the trial judge's lack of impartiality is his startling conclusion that this Court characterized CREH's conduct as "lamentable." In its Opinion, this Court held that Brilin did not offer any evidence to support the public interest element of a UTPA claim, and stated: "Brilin, at most, showed that CREH's quotes were higher than the ones Brilin collected. Even if the quotes were artificially inflated or fraudulent, the practice—while lamentable—occurred between the parties in the course of their landlord-tenant relationship." (R. p. __) (CTA Op. at p. 7). During the remand hearing, counsel for CREH pointed out that this Court was giving a hypothetical, as evidenced by the use of the phrase "even if." (R. p. __) (Hr'g Tr. 26:17–27:6). Despite the obviousness of this fact, the trial judge stated: "The COA characterized part of Plaintiff's conduct as lamentable. This Court disagrees with Plaintiff's assertion that the COA was merely addressing a 'hypothetical.'" (R. p. __) (Remand Order p. 8 n.18).

The court's partiality became evident at the remand hearing and in the Remand Order itself, and CREH's counsel contested the court's reliance on trial demeanor at the hearing. (Hr'g Tr. 28:5–10, 32:1–15). The request that proceedings on remand be heard by a different judge concerns the form of this Court's own mandate, which Rule 220(a) authorizes this Court to shape.

## CONCLUSION

After this Court's reversal of the UTPA judgment, the verdict that remains is a net verdict for CREH on the parties' competing claims under the Lease. Under *Heath* and *Seckinger*, CREH is the prevailing party. The lower court reached a contrary result only by (i) creating a confusing percentage-of-recovery comparison of amount requested to the amount recovered, a test that *Heath* forecloses, (ii) substituting its own view of credibility and demeanor for the jury's verdict, (iii) speculating about the jury's motives, and (iv) relying on the reversed UTPA theory and on settlement discussions.

CREH respectfully requests that this Court (1) reverse the Remand Order's determination that Brilin is the prevailing party under paragraph 28(g) of the Lease and its award of attorney's fees and costs to Brilin; (2) hold that CREH is the prevailing party under paragraph 28(g) as a matter of law; (3) vacate the net award to Brilin of $49,267.40 and direct entry of judgment for CREH on the net verdict of $6,089.13, together with the $7,076.07 in costs previously awarded by this Court; and (4) remand for determination of the reasonable attorney's fees and costs CREH incurred in the trial, the first appeal, the remand proceedings, and this appeal,[14] with instructions that the remand be assigned to a different circuit judge.

[14]Paragraph 28(g) awards fees "incurred in connection with the proceeding," which includes the appellate and remand proceedings CREH was forced to undertake to correct the erroneous UTPA judgment. *Cf. Austin v. Stokes-Craven Holding Corp.*, 406 S.C. 187, 750 S.E.2d 78 (2013) (holding that denial of fees under Rule 222, SCACR,

This the 5th day of October, 2026.

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did not preclude the circuit court on remand from awarding appellate fees to which the party was otherwise entitled). *See also Taylor v. Medenica*, 332 S.C. 324, 504 S.E.2d 590 (1998) (even though appellate court awarded Respondents some attorneys' fees and costs as allowed by Appellate Rule 222, Respondents could seek to recover the balance of additional appellate attorneys' fees in the circuit court on remand under the UTPA).