

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

RECEIVED

OCT 01 2015

SC Court of Appeals

CASE NO.: 2009-CP-15-0595

THE SPRIGGS GROUP, P.C.,Respondent,

v.

GENE R. SLIVKA, Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT ABUSE ITS DISCRETION AND COMMIT CLEAR ERROR OF LAW BY CONSIDERING IRRELEVANT AND IMPROPER FACTORS IN AWARDING ATTORNEYS FEES TO SPRIGGS?
- II. DID THE TRIAL COURT ABUSE ITS DISCRETION BY AWARDING ATTORNEYS FEES THAT ARE EXCESSIVE RELATIVE TO THE RECOVERY OF SPRIGGS?
- III. DID THE TRIAL COURT ABUSE ITS DISCRETION BY AWARDING ATTORNEYS FEES WHICH ARE CLEARLY NOT RECOVERABLE UNDER THE STATUTE AUTHORIZING THE FEES?
- IV. DID THE TRIAL COURT ABUSE ITS DISCRETION BY AWARDING ATTORNEYS FEES TO SPRIGGS THAT WERE INCURRED IN AN APPEAL IN WHICH SPRIGGS WAS NOT THE PREVAILING PARTY?

STATEMENT OF THE CASE

This matter was instituted on July 8, 2009, and involves a claim under the Mechanics Lien Statute and §27-1-15. It was tried before a jury on July 18, 2011 through July 22, 2011 and a final judgment, dated July 22, 2011 was entered for the Plaintiff. Defendant appealed to the Court of Appeals which affirmed in part and reversed in part by order dated February 3, 2013. Defendant filed a petition for Writ of Certiorari dated April 19, 2013 which was granted. The matter was briefed and argued and by Order dated March 18, 2015, the Supreme Court ordered that the Court of Appeals cease publishing its order and dismissing certiorari.

The matter was remanded back to the trial court which held a hearing on May 7, 2015 and issued an order dated June 3, 2015 awarding Plaintiff attorneys fees. A motion pursuant to Rule 59 was filed by Defendant on June 8, 2015 which was denied by order dated June 26, 2015. A notice of appeals was filed on July 6, 2015.

FACTS

This matter commenced when a mechanic's lien was filed by the Spriggs Group, P.C. (hereinafter "Spriggs") against the home of Defendant Gene R. Slivka, known as New Julianton Plantation and located in Colleton County, SC. New Julianton consists of several buildings including a main house, two garages, a conservatory, a grotto, and a barn, all of new construction but built in the historical style. Pursuant to an agreement, Spriggs was to provide architectural design services. The Notice of Mechanic's Lien in the amount of \$193,834.53 was filed on April 13, 2009. The lien was bonded off by Mr. Slivka pursuant to his payment of \$269,070.83 to the clerk of court. Plaintiff filed suit to foreclose on said lien on July 8, 2009. On March 15, 2010, eight (8) months after suit was filed, Spriggs made a demand for payment pursuant to

SCRCF §27-1-15 (the "Demand"). In May, 2010, the complaint was amended to add causes of action including a failure to comply with SCRCF § 27-1-15 (the "Act"). Prior to trial, in conformance with the Mechanic Lien Statute, Slivka made an offer of settlement in the amount of \$100,000.00 on June 30, 2011, to which Spriggs did not respond.

The case was tried before a jury in Colleton County beginning on July 18, 2011 through July 22, 2011, just two years after the initial filing, with neither party ever requesting a continuance. The jury entered a verdict in favor of Spriggs on the causes of action under the Mechanic's Lien Statute, breach of contract, and failure to comply with the Act and awarded \$173,990.53 without specifying which of that amount was related to which cause of action. The claims for breach of contract with fraudulent intent and quantum meruit had been dismissed and withdrawn respectively. Additionally, the jury found in favor of Spriggs on Slivka's slander of title action. The amount awarded by the jury was \$19,844.00 less than the amount of the mechanic's lien and \$73,990.53 more than Slivka's pre-trial settlement offer pursuant to the mechanic's lien statute.

By way of an order filed on September 7, 2011, which was amended and filed on October 3, 2011, the court awarded Spriggs \$37,413.92 in prejudgment interest and attorney's fees in the amount of \$235,030.31. The trial court did not distinguish between fees awarded for the Act and those awarded under the Mechanics Lien Statute (nor did the trial court take into account fees incurred for causes of action pursued by Spriggs that were dismissed before or during trial). Even after explicit requests by Slivka to specify the basis for the award, which were vigorously opposed by Spriggs, the trial court refused to clarify its award of attorneys fees. And all post-trial motions were denied and judgment in the amount of \$446,434.76 was entered.

The original appeal then ensued.

While the appeal was pending, Plaintiff secured the cash bond deposited by Slivka on January 11, 2012, in the amount of \$269,070.03. This represents full payment of the jury verdict for damages (\$173,990.53) (which was not appealed), all interest awarded (\$37,413.12), and \$57,666.38 in attorneys fees.

On appeal, Slivka argued that the trial court had committed errors of law relating to the Mechanics Lien Statute and the Act and that the trial court had abused its discretion with respect to its award of attorneys fees in that the fees were excessive and the trial court had refused to specify the specific statutory basis for the fees awarded, thereby depriving Slivka of the opportunity to defend the award of fees. Spriggs responded fully to the appeal, incurring fees associated with all of those arguments.

In its order, the Court of Appeals agreed with Slivka that the trial court submitted the issue of the mechanics lien to the jury in error, but found it harmless error. The trial court did not address Slivka's arguments under the Act, finding that those arguments had been abandoned. The Court of Appeals then remanded the attorneys fee award back to the trial court to clarify the basis for the award (as had been requested by Slivka and opposed by Spriggs). In doing so, the Court of Appeals expressed surprise at the amount of the award and cautioned the trial court not to award fees incurred for causes of action that had been dismissed. Certiorari was requested by Slivka and was granted by the Supreme Court. Following oral arguments, the Supreme Court declined to decide the merits of the appeal and issued an order that the opinion of the Court of Appeals be de-published and certiorari was dismissed. The matter was remanded back to the trial court for reconsideration and clarification of the attorneys fee award, as Slivka had requested

in his appeal.

On remand, Spriggs again asked the trial court to award all of its trial phase attorneys fees, additional interest, and to award \$61,335.85 for attorneys fees incurred during the appeal. After thorough briefing and oral arguments, the trial court clarified its earlier order and limited the statutory basis of the award of attorneys fees to the Act. No attorneys fees were awarded under the Mechanics Lien Statute, meaning that this appeal is limited to the courts award of fees under the Act. (In limiting its grounds for the award to the Act, the trial court was apparently seeking to avoid the language of the Mechanics Lien Statute which limited attorneys fees to the amount of the lien.)

The trial court awarded attorneys fees at trial level of \$152,380.25 under the Act, reducing the total fees awarded at the trial level by \$82,650.00. The trial court then awarded Spriggs fees incurred by Spriggs during the appeal, totaling \$61,335.00, the entire amount requested by Spriggs.

Over the objections of Slivka, in making his award the trial court made the following findings that are relevant to the issues raised in this appeal:

- *This case has a tortious history...*
- *The South Carolina Court of Appeals affirmed the ruling of this Court that construction administrative services performed by an architect are considered labor under the mechanic's lien statute and that whether a reasonable and fair investigation was made under S.C. Code Ann. §27-1-15 was a question for the jury. In the eyes of this Court, those two issues were the substantive legal arguments presented on appeal.*
- *Plaintiff was required to expend considerably more time and effort on this case due to specific actions of the Defendant who created unnecessary delays, filed meritless motions, as well as obtained*

new council during the course of the litigation, thus forced the Plaintiff to incur additional attorneys fees and costs above and beyond what would otherwise have been incurred. See Ariail Affidavit ¶ 5. Further, Plaintiff has not endured 3 ½ years of appeals, with oral arguments at both the Court of Appeals and Supreme Court levels prevailing on the substantive legal issues that were appealed. Henceforth, further appeals are expected.

- *A review of the procedural case history shows that Defendant Slivka filed seven (7) motions in this case, of which four (4) separate hearings had to be held. Six (6) of these motions and three (3) of these hearings took place before Mr. Lyles had been substituted in for Defendant Slivka's prior counsel. (Defendant Slivka did not prevail on any substantive motion he made before the circuit court.) This Court is informed that Defendant Slivka failed to show up for his scheduled deposition and after rescheduling his deposition numerous times, Plaintiff found it necessary to file a motion to compel for the production of Defendant Slivka for his deposition. Defendant Slivka finally appeared for his deposition after it had been scheduled for the fourth time. The detail of the motions and discovery difficulties Plaintiff had with Defendant Slivka are outlined in the Affidavit of A. Bright Ariail filed July 27, 2011. See Ariail Affidavit ¶ 5.*
- *Defendant Slivka certainly has the right to litigate this matter to the fullest, which he undoubtedly has. However, I am certain with the Defendant's business acumen and council from a very competent lawyer in Mr. Lyles, that he fully understood he had a right to litigate this matter to the fullest, but at the same time must appreciate the risk as outlined in S.C. Code Ann. §27-1-15 and the mechanic's lien statute, that he could be held responsible for the attorney's fees incurred by Plaintiff during the court of litigation. These statutes have this provision for a reason. It is more than apparent to this Court, and as stated in the record at the remand hearing, this case has been an arduous undertaking by the Plaintiff with tremendous negative repercussions as a result. These negative repercussions in the eyes of the this Court have been driven by what appears to be the calculative and intentional actions of Defendant Slivka.*

(June 3, 2015 Order for Award of Attorneys Fees to Plaintiff)

STANDARD OF REVIEW

The decision to award attorneys fees is a matter within the sound discretion of the trial judge and the award will not be reversed on appeal absent an abuse of discretion. *See Marquez v. Caudill*, 376 S.C. 229, 656 S.E.2d 737 (2008) the abuse-of-discretion standard of review for attorney fees awarded pursuant to statute, an appellate court will not reverse an award unless it is based on an error of law or is without any evidentiary support. *Williamson v. Middleton*, 374 S.C. 419, 649 S.E.2d 57 (Ct. App. 2007) aff'd in part, rev'd in part, 383 S.C. 490, 681 S.E.2d 867 (2009).

ARGUMENT

- I. THE TRIAL COURT ABUSED ITS DISCRETION BY AWARDING FEES BASED UPON IMPROPER FACTORS INCLUDING THE LITIGATION EFFORTS OF SLIVKA DURING THE UNDERLYING MATTER, DAMAGES OSTENSIBLY SUFFERED BY SPRIGGS BECAUSE OF THE LITIGATION AND IN AN EFFORT TO DETER MR. SLIVKA FROM EXERCISING HIS RIGHTS TO APPEAL THE TRIAL COURTS ORDER.

The trial court based its award of attorneys fees on unpermissible factors and the award should be reversed and vacated.

Section 27-1-15 provides as follows:

Whenever a contractor, laborer, design professional, or materials supplier has expended labor, services, or materials under contract for the improvement of real property, and where due and just demand has been made by certified or registered mail for payment for the labor, services, or materials under the terms of any regulation, undertaking, or statute, it is the duty of the person upon whom the claim is made to make a reasonable and fair investigation of the merits of the claim and to pay it, or whatever portion of it is determined as valid, within forty-five days from the date of mailing the demand. *If the person fails to make a fair investigation or otherwise unreasonably refuses to pay the claim or proper portion, he is liable for reasonable attorney's fees and interest at the judgment rate from the date of the demand.*

Thus, for a violation of the Act, Slivka was obligated to pay a *reasonable* attorneys fee. The law in South Carolina is clear that in awarding attorneys fees a trial court is to consider the following six factors:

1. The nature, extent and difficulty of the legal services rendered;
2. The time and labor necessarily devoted to the case;
3. The professional standing of counsel;
4. The contingency of compensation;
5. The fee customarily charged in the locality for similar legal services; and
6. The beneficial results obtained.

Baron Data Systems, Inc. v. Loter, 297 S.C. 382, 377 S.E.2d 296 (1989).

Further, regarding the award of attorneys' fees generally, the American Rule provides that attorneys' fees are not recoverable absent a statutory or contractual obligation to pay them. See *South Carolina Dept. of Social Services v. Tharp*, 312 S.C. 243, 439 S.E.2d 854 (1994); *Hegler v. Gulf Ins. Co.*, 270 S.C. 548, 243 S.E.2d 443 (1978) (“[A]ttorneys’ fees are not recoverable unless authorized by contract or by statute.”) Exceptions to the American Rule are “carved out with great caution because liberality of attorneys’ fees awards against the non-prevailing party have a chilling effect on open access to the courts.” *Eagle Bluff, LLC v. Taylor*, 237 P.3d 173, 179 (2010). Statutes allowing attorneys’ fees are in derogation of the common law, and consistent with the law related to contractual attorneys’ fees, statutes authorizing fees must be strictly construed. See *Dowaliby v. Chambers*, 334 S.C. 558, 544 S.E.2d 646 (Ct. App. 2001) (“Statutes allowing attorneys’ fees are in derogation of the common

law and must be strictly construed.”).

In clear derogation of the American Rule, and the common law, in awarding attorneys fees, the trial court considered a number of irrelevant factors, which are not among the six, clear factors the court is authorized by law to consider. Specifically, the trial court supported its award by referring to the “tortious [sic] history” of the litigation (which, by implication, the court believed was Slivka’s fault), to the anecdotal record of discovery and motions practice employed by Slivka and his prior counsel, and to the likelihood that Slivka would again seek relief in the appellate courts. Further, the trial court relied upon a belief that the litigation had been an “arduous undertaking” and had “tremendous repercussions” for Spriggs, evidence of which is entirely missing and would be completely irrelevant. The trial court also refers to the litigation actions of Slivka as “calculative and intentional” which is exactly what they were, as opposed to haphazard and accidental. None of those findings is the least bit probative on the issue of attorneys fees under the Act.

By referring to and apparently relying on those facts, the trial court has used the award of attorneys fees to sanction Slivka and deter him from exercising his right to fully litigate, and appeal the case. That is an abuse of discretion because nothing in the Act and nothing in the common law suggests that attorneys fees can or should be used for such purposes. *See DeWils Interiors v Dines*, 106 Idaho 288, 678 P.2d 80 (1984) (Statute providing for award of attorney fees to prevailing parties in actions involving disputes in specified types of commercial transactions is facially neutral and exhibits no punitive purpose, and determination of reasonable fee under the statute should not be colored by characterizing the award as a penalty.)

Faced with a claim against him, Slivka complied with the law and fully exercised his rights a litigant. If Slivka or his counsel engaged in frivolous proceedings, §15-36-10, S.C. Code authorizes the imposition of sanctions and fees under certain circumstances for frivolous practices in litigation. Similarly, the South Carolina Rules of Civil Procedure authorize, in limited circumstances, the imposition of sanctions for egregious conduct is the conduct of discovery (see, Rule 37, *SCRCP*). Both of those fee shifting devices set forth the criteria upon which the fee shifting mechanism operates to provide relief when a party engages in frivolous proceedings or violates an order in the discovery process. Spriggs made no such motions and there were not findings or proof, that either of those tools applied to the conduct of Slivka during the litigation and prior to trial.

Further, neither the Act nor the common law supports the trial court's decision to award Spriggs un-proven and unrecoverable "soft damages" related to the difficulty of litigation or some unquantifiable repercussions resulting from it.

By considering factors beyond the six factors the court was to consider under the law, and by using an award of attorneys fees as a tool to impose sanctions on prior litigation conduct, award Spriggs additional damages for the effects of the litigation he himself commenced, and to deter Slivka from exercising his rights as a litigant, the trial court abused his discretion and his award should be reversed and vacated.

II. THE TOTAL AWARD IS EXCESSIVE IN LIGHT OF THE RESULT OBTAINED

The award of fees in this case is clearly excessive relative to the benefit obtained. First, the entire award is excessive relative to the amount in controversy under the Act, the award of the jury and the circumstances of the case relative to the Act. Second, the trial Court awarded fees

to Spriggs for the appeal in which Spriggs was not the prevailing party or, at most, was a prevailing party.

The trial court has awarded attorneys fees pursuant to the Act of \$213,715.25. Those fees represent 122% of the jury award, 288% over the net sum awarded by the jury over and above what Slivka offered before trial, and 281% of what Spriggs contended at trial was the undisputed amount that triggered liability under the Act. Further, the Demand came after Slivka had already deposited the sum of \$269,070.83 into the court pursuant to the mechanics lien statute. The award is clearly excessive and should be reduced substantially to more accurately reflect the "beneficial result" obtained by Spriggs.

While attorneys fees over and above a jury verdict may be allowed, there is precedent for the reversal or reduction of such an award as well. See, also *Carter-Moit Engineering Company v. McDaniels*, 273 S.C.34, 353 SE.2d 515 (1999).

The totality of this award shocks the conscience not simply because of its relationship to the jury award or the amount in controversy under the Act, but also when taken into consideration relative to the other facts of the case. First, when the Demand was made, \$269,070.83 was already on deposit with the Court, and was available to satisfy the entire amount of the jury verdict. Second, throughout the litigation Spriggs continually asserted that Slivka's failure to pay 1/2 of the agreed upon fee, \$76,000, which was the amount that was undisputed and that triggered liability under the Act. Third, Slivka offered to pay in excess of that, \$100,000, in full settlement of the entire case, before trial. Spriggs refused to ever counter and elected to proceed to trial. Third, at the trial court level Spriggs opposed Slivka's request for clarification of the attorneys fee award, resulting in Slivka's successful appeal.

III. THE ATTORNEY FEES FOR THE APPEAL ARE NOT AVAILABLE BECAUSE SPRIGGS WAS NOT THE PREVAILING PARTY.

The trial court's finding that the only substantive issues on appeal related to the Mechanics Lien Statute and the Act ignore both the fact that the appeal was, in part, to secure the clarification that the trial court previously denied, and that the clarification resulted in a sharp reduction in the fees awarded to Spriggs in the underlying matter. By ignoring these facts, and awarding Spriggs \$61,335.00 in appellate fees, which is (again) 100% of the fees Spriggs requested for the appeal, the trial court has unfairly penalized Slivka for his success on appeal.

Where a party is not the prevailing party, or prevails only partially, which is all Spriggs can possibly claim with respect to the appeal, he is not entitled to recover all of his fees, if any. See, *Prevatte v. Asbury Arms*, 302 S.C. 413, 417, 396 S.E.2d 642, 644 (Ct. App. 1990) (If a party is not the primary prevailing party or prevails only partially, the factor of beneficial results accomplished will weigh in favor of reducing the fee, since the time and labor devoted to the issues he lost should not, in equity, be charged against the opposing party who prevailed on those issues. In cases of this type, only in rare instances should the fee approach or exceed the verdict amount.) Where a party loses on appeal, as Slivka believes Spriggs did here since the jury award had already been paid, in full, when the appeal was pending and the attorneys fee award was remanded, as requested by Slivka, the party should get nothing in the way of fees. See, *Hardaway Concrete Co. v. Hall Contracting Corp.*, 374 S.C. 216, 232-33, 647 S.E.2d 488, 496 (Ct. App. 2007). Because Slivka prevailed on appeal, the trial court abused its discretion in awarding Spriggs attorneys fees for the appeal.

IV. THE ATTORNEY FEES FOR THE APPEAL ARE EXCESSIVE IN LIGHT OF THE BENEFICIAL RESULT OBTAINED.

Further, the trial court acknowledges that there was at least one substantive issue on appeal which was unrelated to the Act, with that being the Mechanics Lien Statute. By awarding Spriggs 100% of his requested fees for the appeal, the trial court unquestionably awarded Spriggs fees unrelated to the Act which are not recoverable under the Act.

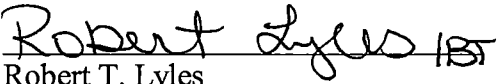
Finally, also over Slivka's objections, the trial court even awarded Spriggs fees incurred when the Supreme Court accepted, then dismissed certiorari without ruling on the merits. This, too, was an abuse of discretion. See *City of Charleston v. Masi*, 362 S.C. 505, 510, 609 S.E.2d 301, 304 (2005). (The District is not a prevailing party because its degree of success is nonexistent given that the circuit court did not specifically find for either party and because the case was being dismissed as moot.)

CONCLUSION

The trial court has abused its discretion in awarding attorneys fees to Spriggs. First, it improperly considered factors that were irrelevant to the issue and awarded fees it believed to be punitive, a deterrent and to compensate Spriggs for unrecoverable harm he ostensibly suffered. Second, the fees awarded were grossly excessive to the benefit obtained. Third, the court abused its discretion by awarding fees incurred by Spriggs for the appeal won, at least in part, by Slivka and awarded Spriggs fees on appeal that were unrelated to the Act under which the attorneys fees were awarded. For the foregoing reasons, the trial court's order should be reversed and vacated.

Respectfully submitted,

September 28, 2015


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SC Court of Appeals

William H. Seals, Jr., Circuit Court Judge

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v.

GENE R. SLIVKA, Appellant.

PROOF OF SERVICE

I certify that I have served the Initial Brief on The Spriggs Group, P.C. by depositing a copy of it in the United States Mail, First Class postage prepaid, on September 28, 2015, addressed to their attorney of record, James A. Bruorton, IV, Esquire, Rosen, Rosen, & Hagood, LLC 151 Meeting Street, Suite 400, Charleston, South Carolina 29401.

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September 28, 2015

The Honorable Jenny Abbott Kitchings
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SC Court of Appeals

Re: *The Spriggs Group, P.C. vs. Slivka,*
Colleton County Case No. 2009-CP-15-0595

Dear Ms. Kitchings,

Enclosed for filing with regard to the above-referenced matter, please find the following:

- 1) Initial Brief of Appellant with Proof of Service; and
- 2) Designation of Matter to be Included in the Record on Appeal with Proof of Service.

With kindest regards, I remain

Very truly yours,

LYLES & LYLES, LLC

Brooke Trevino

Brooke Trevino
Paralegal

/bt

cc: Clerk, Colleton County Court of Common Pleas
James Bruorton, Esquire
Mr. Gene R. Slivka

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