

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

William H. Seals, Jr., Trial court Judge

Appellate Case No. 2015-001457

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SC Court of Appeals

THE SPRIGGS GROUP, P.C.,..... Respondent,

v.

GENE R. SLIVKA, Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. Was the trial court correct in awarding Respondent attorneys' fees in the amount of \$213,019.12?
- II. Did the trial court comply with the Court of Appeals request for clarification as to the attorneys' fees being awarded?
- III. Was the trial court correct in awarding Respondent attorneys' fees related to Appellant's prior appeal of original trial matters and further appeal of the Court of Appeals' decision to the South Carolina Supreme Court?

STATEMENT OF THE CASE

This matter was initiated on July 8, 2009 and involves a mechanic's lien foreclosure under S.C. Code Ann. § 29-5-10 *et seq.* and demand for payment of attorneys' fees under S.C. Code Ann. § 27-1-15 related to architectural services rendered pursuant to a written agreement dated November 17, 2006 between Respondent ("Spriggs") and the Appellant ("Defendant Slivka"). In accordance with the Agreement, Spriggs was paid one half of the Agreement amount at the start of the design process. Spriggs invoiced Defendant Slivka for the remaining contract balance, as well as additional agreed upon services pursuant to the Agreement and has not been paid in full. Defendant Slivka, admittedly, has not paid Spriggs any additional money since the initial one half payment in 2007.

Spriggs filed a mechanic's lien against Defendant Slivka's property on April 13, 2009 and commenced a foreclosure action on the lien on July 8, 2009, asserting claims of foreclosure of mechanic's lien, breach of contract, and quantum meruit/unjust enrichment. Defendant Slivka's subsequent Motion to Dismiss Spriggs' Complaint was denied. Defendant Slivka counterclaimed against Spriggs for slander of title, violation of the Frivolous Claims Sanctions Act, tortious interference with contractual relations with third parties dependent upon performance by Plaintiff, and tortious interference with contractual relations resulting from defective notice of mechanic's lien.

On March 15, 2010, Spriggs, by and through its counsel, made a demand on Defendant Slivka pursuant to S.C. Code Ann. § 27-1-15 asking Defendant Slivka to make a reasonable and fair investigation of Spriggs' claim and paying the portion of Spriggs' claim Defendant Slivka deemed valid. Despite admittedly knowing he owed Spriggs money, Defendant Slivka refused to make any payment to Spriggs, later using the fact that

the parties were involved in a lawsuit as his justification for not making payment to Spriggs. Spriggs then amended its complaint to add a cause of action for failure to comply with S.C. Code Ann. § 27-1-15 and breach of contract accompanied by a fraudulent act.

The Honorable William H. Seals, Jr. and the jury heard three (3) full days of testimony from witnesses for both parties. Spriggs voluntarily withdrew its claims for breach of contract accompanied by a fraudulent act and quantum meruit. Defendant Slivka voluntarily withdrew its claims for tortious interference with contractual relations with third parties dependent upon performance by Plaintiff and tortious interference with contractual relations resulting from defective notice of mechanic's lien. At the conclusion of Spriggs' case in chief and at the conclusion of trial, Judge Seals denied Defendant Slivka's motion for directed verdict as to Spriggs' causes of action of foreclosure of mechanic's lien and failure to comply with S.C. Code Ann. § 27-1-15. The Court also denied Spriggs' motion for directed verdict as to Defendant Slivka's slander of title cause of action. Defendant Slivka failed to seek a directed verdict as to Spriggs' breach of contract claim. Spriggs' claims of foreclosure of mechanic's lien, breach of contract and failure to comply with S.C. Code Ann. § 27-1-15 were submitted to the jury along with Defendant Slivka's claim for slander of title. After hours of deliberation, the jury returned a unanimous verdict in favor of the Spriggs on all three of its causes of action and in favor of the Spriggs as to Defendant Slivka's slander of title claim.

Defendant Slivka made a post-trial motion seeking judgment notwithstanding the verdict as a matter of law on Spriggs' foreclosure of mechanic's lien claim and as to Spriggs' claim for failure to comply with S.C. Code Ann. § 27-1-15. The trial court denied Defendant Slivka's post-trial motion seeking judgment notwithstanding the verdict.

Defendant Slivka then filed a motion pursuant to Rule 59(e) asking the trial court to alter, amend or reconsider its order. Spriggs submitted a written reply to the Court and Defendant Slivka's motion was denied.

Spriggs filed a post-trial motion seeking attorneys' fees and costs based on both S.C. Code Ann. § 27-1-15 and the Mechanic's Lien Statute. The trial court awarded Spriggs attorneys' fees and costs in the amount of \$235,030.31. Defendant Slivka filed a motion to reconsider the trial court's order awarding attorneys fees and costs, which was thereafter denied.

Defendant Slivka appealed Judge Seals' denial of Defendant Slivka's motion for directed verdict and subsequent post-trial motions on Spriggs' causes of action for foreclosure of mechanic's lien and failure to comply with S.C. Code Ann. § 27-1-15 and Judge Seals' post-trial award of interest, fees and costs to Spriggs. After receiving briefs and hearing oral arguments by Counsel, the Court of Appeals issued a unanimous decision determining that Spriggs' services fell within the definition of labor contained in Section 29-5-10(a) and affirming the trial court's award of pre-judgment interest and denial of Defendant Slivka's directed verdict motions as to Spriggs' S.C. Code Ann § 27-1-15 and mechanic's lien claims. See Spriggs Grp., P.C. v. Slivka, 402 S.C. 42, 738 S.E.2d 495, 502 (Ct. App. 2013)(now unpublished)(hereinafter "Ct. of Appeals Opinion"). The Court of Appeals reversed the trial court's award of attorney's fees and remanded the issue for further consideration. Id. Specifically, the Court of Appeals ordered the trial court to identify the statutory authority for its award and the fees incurred under each statute. Id. Defendant Slivka then submitted a petition to the Court of Appeals for a rehearing, which subsequently was denied. See Spriggs Grp., P.C. v. Slivka, Appellate Case No. 2011-

204366 (unpublished) (Ct. App. Mar. 22, 2013).

Next, Defendant Slivka submitted a Writ of Certiorari to the South Carolina Supreme Court appealing two issues from the Court of Appeals Opinion. First, whether the trial court erred in failing to direct a verdict in favor of the Defendant Slivka as to the Spriggs' Mechanic's Lien Claim because the Spriggs' Lien was not timely as a matter of law. Second, whether the trial court erred in failing to direct a verdict in favor of the Defendant Slivka as to the Spriggs' Claim pursuant to S.C. Code Ann. § 27-1-15 because the evidence was undisputed that an investigation had taken place into the Spriggs' Claim in the form of formal discovery, no portion of the claim was undisputed, and the Defendant Slivka had already deposited an amount which exceeded the entire claim with the Court. After receiving briefs and hearing oral arguments by Counsel, the Supreme Court issued an Opinion that Writ of Certiorari had been improvidently granted and asking the Court of Appeals to depublish its Opinion. Thus, the Court of Appeals decision determining that Spriggs' services fell within the definition of labor contained in Section 29-5-10(a) and that the trial court properly denied Defendant Slivka's directed verdict motions as to Spriggs' S.C. Code Ann. § 27-1-15 and mechanic's lien claims is still the law of the case in this matter. Spriggs is the prevailing party on Defendant Slivka's prior appeal on all issues, except the award of attorneys' fees which was remanded back to the trial court for further hearing to clarify the statute the trial court was issuing the award of attorneys fees under.

Upon issuance of the Remittitur, a hearing was held before Judge Seals on May 7, 2015. As a result of that hearing, the trial court issued an Order dated June 3, 2015 awarding Spriggs \$213,019.12 in attorneys fees, which in total is \$22,011.19 less than the

original attorneys fee award rendered in the trial court's October 3, 2011 Order originally appealed by the Defendant Slivka. The trial court did not award Spriggs any costs.

At the May 7, 2015 hearing, Spriggs sought from the trial court an award of attorneys fees under S.C. Code Ann. § 27-1-15 at the trial court level as well as for Defendant Slivka's prior appeal of the S.C. Code Ann. § 27-1-15 cause of action which Spriggs was the prevailing party on at the Court of Appeals level and ultimately the prevailing party on through the Supreme Court's decision not to change the Court of Appeals ruling on the S.C. Code Ann. § 27-1-15 cause of action. Of the \$213,019.12 awarded by the trial court, \$151,684.12 was awarded as trial court level fees and \$61,335 was awarded as appellate court level fees. A motion pursuant to Rule 59 was filed by the Defendant asking Judge Seals to reconsider his June 3, 2015 Order, which was denied by Order on June 26, 2015. Defendant filed the second notice of appeal in this case on July 6, 2015, now 6 years after the original case filing of July 9, 2009 and 4 years after the unanimous jury verdict in Plaintiff's favor on July 22, 2011.

STATEMENT OF THE FACTS

Defendant Slivka approached Spriggs in the fall of 2006 about a new construction project Defendant Slivka was interested in having Spriggs provide architectural and engineering work for. The project was to be Spriggs' new plantation residence. Spriggs prepared and submitted a proposal to Defendant Slivka for the architectural and engineering work for the Project. Spriggs' November 20, 2006 proposal letter to Defendant Slivka forms the Agreement at issue between the parties. The Agreement provides that the architectural and engineering services would be provided by Spriggs for a lump sum fee with restrictions and limitations noted. Pursuant to the terms of the Agreement, the parties

agreed that once construction documents began, any changes would be performed on an hourly basis. Further, requested construction phase services from Spriggs or staff would be billed on an hourly basis. A voluminous amount of design changes and additional services were requested by Defendant Slivka of Spriggs during the course of the project. At the end of the project, Spriggs billed for the remaining contract balance, which included the construction administration services, additional design services, and reimbursable expenses for the project, not yet paid.

Defendant Slivka admitted that he owed Spriggs at least a portion of the remaining contract balance and would have paid it had a proper invoice for only the amount he agreed was owed was submitted. Defendant Slivka further admitted to owing the second half of the original contract balance, but refused to pay Spriggs for it. Defendant Slivka admitted that he asked Spriggs to design a garden wall, but has refused to pay Spriggs for it. Further, Defendant Slivka admits that he agreed to pay Spriggs for a two hour construction meeting, but has not paid Spriggs for it. Despite his own admissions, Defendant Spriggs has refused to pay Spriggs any additional money since his initial payment in February 2007.

As a result of Defendant Slivka's refusal to pay Spriggs in accordance with the terms of the Agreement, Spriggs placed a mechanic's lien on Defendant Slivka's property. Defendant Slivka continued to refuse to pay Spriggs. Instead, Defendant Slivka chose to post a cash bond to remove Spriggs' lien from the property. Spriggs filed a lawsuit to foreclose on the mechanic's lien and asserted additional causes of action for breach of contract and quantum meruit. All of Spriggs' claims related to the debt Defendant Slivka owed Spriggs for labor performed pursuant to the Agreement. On March 15, 2010, Spriggs, by and through its counsel, made a demand on Defendant Slivka pursuant to S.C.

Code Ann. § 27-1-15 asking Defendant Slivka to make a reasonable and fair investigation of Spriggs' claim and paying the portion of Spriggs' claim Defendant Slivka. Despite admittedly knowing he owed Spriggs money, Defendant Slivka still refused to make any payment to Spriggs, later using the fact that the parties were involved in a lawsuit as his justification for not making payment to Spriggs. Spriggs then amended its complaint to add a cause of action for failure to comply with S.C. Code Ann. § 27-1-15 and breach of contract accompanied by a fraudulent act.

Spriggs' claims for the debt owed proceeded to a trial on the merits where the jury unanimously found in favor of the Spriggs on its claims for Breach of Contract, Foreclosure of the Mechanic's Lien claim and failure to comply with the requirements of S.C. Code Ann. § 27-1-15 and rendered a verdict in the amount of \$173,990.53 in favor of the Plaintiff. By way of an Order filed September 7, 2011, which was amended and filed on October 3, 2011, the Court awarded Spriggs \$37,413.92 in prejudgment interest and attorneys fees and costs in the amount of \$235,030.21. See October 3, 2011 Trial Court Order. In its October 3, 2011 Order, the trial court did not distinguish as to whether the attorneys fees and costs were being awarded under the S.C. Mechanic's Lien statute, S.C. Code Ann. § 27-1-15, or both.

Defendant Slivka appealed to the Court of Appeals stating that the Spriggs' lien was not timely and did not meet the definition of labor under the mechanic's lien statute and that Defendant Slivka was not liable under S.C. Code Ann. § 27-1-15 because Spriggs' demand was made while the parties were in litigation and because the Defendant Slivka had deposited an amount that exceeded the entire amount of the Spriggs' claim with the Court to bond off the lien. The Court of Appeals rejected both of these arguments, finding

for the Spriggs on both of these issues. See Ct. of Appeals Opinion. The further appeal to the Supreme Court was initially granted and then rejected by the Supreme Court as being improvidently granted.

In this matter, Spriggs has prevailed (1) at trial through a unanimous verdict on all its causes of action submitted to the jury; (2) on all legal issues appealed to the Court of Appeals, including the fact that the trial court did not abuse its discretion in awarding attorneys fees to the Spriggs. The Court of Appeals did reverse the award of attorneys fees and asked the trial court to clarify which statute the attorneys fees were being awarded; and (3) on all legal issues appealed to the Supreme Court, as the Supreme Court did not reverse the Court of Appeals' Opinion and the Court of Appeals' Opinion remains the law of this case.

ARGUMENT

I. **THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING ATTORNEYS FEES TO SPRIGGS**

- (1) **This Appellate Court has already ruled that the Trial court did not abuse its discretion in awarding attorney's fees to Spriggs.**

As stated in the Court of Appeals prior decision in this case, S.C. Code Ann. § 27-1-15 and § 29-5-10 of the South Carolina Code both authorize an award of attorney's fees to Spriggs. See Ct. of Appeals Opinion Pg. 7. The decision to award or deny attorneys' fees under a state statute will not be disturbed on appeal absent an abuse of discretion. Kiriakides v. Sch. Dist. Of Greenville County, 382 S.C. 8, 675 S.E.2d 439 (2009). In its prior review of the trial court's award of attorneys fees to Spriggs, which is greater than the award now at issue before the Court of Appeals, the Court of Appeals found no abuse of discretion by the trial court.

In his prior appeal, Slivka made several arguments challenging the trial court's initial attorneys' fees award which were addressed by the Court of Appeals in its February 6, 2013 Opinion. First, Slivka argued that Spriggs was not entitled to recover \$28,619.25 in staff member fees as part of its attorneys' fees award. The Court of Appeals found that these fees are recoverable by Spriggs and that the Trial court did not abuse its discretion in awarding them. See Ct. of Appeals Opinion Pg. 9.

Second, Slivka argued that Spriggs' total recovery of fees is limited to the amount of the cash bond Slivka posted with the Clerk of Court pursuant to S.C. Code Ann. § 29-5-110. The Court of Appeals rejected this argument and specifically noted that the attorneys' fees awarded under the mechanic's lien statute are recoverable by the prevailing party up to the amount of the lien, which in this case is for \$198,834.53. See Ct. of Appeals Opinion Pg. 9-10.

Finally, Slivka argues that the attorney's fees awarded by the trial court are not reasonable and the trial court order fails to specify which fees were awarded pursuant to which statute. The Court of Appeals did not find that the attorney's fees award shocked the conscience of the Court or was unreasonable. See Ct. of Appeals Opinion Pg. 10. The Court of Appeals did find that the trial court order is unclear as to which fees were awarded under which statutory authority as the fee award exceeds the amount permitted under the mechanic's lien statute. See Ct. of Appeals Opinion Pg. 10. Thus, the attorneys fee award was reversed and remanded back to the trial court for clarification.

The Court of Appeals in its prior decision did not find the amount of attorneys' fees awarded by the trial court to Spriggs to be unreasonable, nor did it find that the trial court abused its discretion in awarding the fees to Spriggs. This Court should not deviate from

its prior decision as to whether the amount awarded is reasonable and not an abuse of discretion, especially given the fact that the original trial level attorney's fee award has been substantially reduced. If it was not unreasonable then, it should not be considered unreasonable now.

(2) The trial court in response to the Court of Appeals instructions has properly clarified the statute under which its attorney's fee award to Spriggs is being made.

In its prior decision, the Court of Appeals found the trial court's Order to be unclear, so it reversed the attorney's fees award and remanded the issue of attorneys' fees to the trial court for reconsideration ordering the trial court to clearly identify the statutory authority for its award and the fees incurred under each statute. See February 6, 2013 Court of Appeals Opinion.

Attorney's fees are recoverable if they are authorized by contract or by statute. See South Carolina Dept. of Social Services v. Tharp, 312 S.C. 243, 439 S.E.2d 854 (1994). As established by the law of this case, S.C. Code Ann. § 27-1-15 of the South Carolina Code authorizes an award of attorney's fees to Spriggs in this case. See Ct. of Appeals Opinion Pg. 7. The unanimous verdict reached as to Defendant's failure to comply with S.C. Code Ann. § 27-1-15 provides for a recovery of attorneys' fees without any limitation as to the maximum amount that can be awarded under the statute. See S.C. Code Ann. § 27-1-15. The trial court has clarified its attorneys fee award and has awarded a total of \$213,019.12 in attorney's fees to Spriggs pursuant to S.C. Code Ann. § 27-1-15. No award has been made under the South Carolina Mechanic's Lien Statute.

As the Court of Appeals notes in its prior decision, Slivka failed to cite any legal precedent to support his arguments in defense of Spriggs' S.C. Code Ann. § 27-1-15 cause

of action; therefore, the Court of Appeals found them to be abandoned on appeal. See Court of Appeals Opinion. The attorney's fee award by the trial court is authorized and now properly sets forth the statutory authority under which it is authorized.

(3) The trial court did not abuse its discretion in awarding Spriggs \$213,715.25 in attorneys fees in its June 3, 2015 Order.

In the current Order being appealed by Slivka, the trial court awarded attorneys' fees at the trial court level of \$152,380.25, which is \$82,650.00 less than the original award rendered on October 3, 2011. The trial court has also awarded Spriggs \$61,335.00 for attorneys' fees incurred by Spriggs during the course of Slivka's first round of appeals.

Slivka argues that the trial court based its award of attorneys fees on unpermissible factors requiring a reversal of the award. In its June 3, 2015 Order, the trial court sets forth the factors it relied upon in determining whether to award Spriggs attorneys fees. In determining the award of attorneys' fees, the trial court considered six factors: (1) nature, extent, and difficulty of legal services rendered; (2) time and labor devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) fee customarily charged in locality for similar services and (6) beneficial results obtained. See June 3, 2015 Order Pg. 5. These six factors are the factors established by the South Carolina Supreme Court to be used in making a determination of an award of attorneys fees. See Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997). Consideration should be given to all six criteria in establishing reasonable attorney's fees; none of these factors is considered controlling. Baron Data Systems, Inc. v. Loter, 297 S.C. 382, 377 S.E.2d 296 (1989)(citing Darden v. Witham, 263 S.C. 183, 209 S.E.2d 42 (1974)). The trial court in its October 3, 2011 Order and its June 3, 2015 Order sets forth the evidence presented and relied upon in assessing each of these factors. See October 3, 2011 Order and June 3, 2015 Order.

Slikva presents to the Court that the trial court used improper factors including the litigation efforts of Defendant Slivka in the underlying matter. The trial court's reference to the tortious history of this case, motion practices of Defendant Slivka, difficulty of Spriggs in getting Defendant to participate in discovery, etc... is an assessment by the trial court of the reasonableness of the fees being awarded, not a factor in whether they should be awarded. The time and labor devoted to the case (which is the second factor to be considered in assessing attorneys fees under the laws of South Carolina) by Spriggs' counsel was increased as a result of Defendant Slivka's actions. The Affidavits presented by Spriggs to the Court set forth the amount of attorneys fees sought by Spriggs, the reasonableness of the fee customarily charged, and an explanation as to the work that had to be performed supporting those fees. See Arial Affidavit; Arial Second Affidavit; N. Keith Emge Affidavit and James A. Bruorton IV Affidavit. A lot of that work was related to fees and costs driven up by the actions of Defendant Slivka. See Ariail Affidavit ¶ 5.

The trial court has not sanctioned Mr. Slivka to deter him from further litigation. The trial court has awarded Spriggs attorneys fees supported by affidavits as authorized by § 27-1-15 of the South Carolina Code. Such award is based upon the six factors set forth as the prevailing factors to consider and the trial court's Orders assess each one of those factors in detail.

As stated by the Court in its June 3, 2015 Order, Defendant Slivka certainly has the right to litigate this matter to the fullest. The Court further stated its certain that while Defendant Slivka had a right to litigate this matter to the fullest, he must appreciate the risk as outlined in S.C. Code Ann. § 27-1-15 that he could be held responsible for the attorney's fees incurred by Plaintiff during the course of litigation. See June 3, 2015 Order Pg. 6.

Defendant Slivka's vigorous litigation of this claim does not relieve him of his responsibility to pay for Plaintiff's legal fees when he does not ultimately prevail on the issues being so vigorously litigated.

II. THE AWARD OF ATTORNEYS FEES TO SPRIGGS IS NOT EXCESSIVE AS ALREADY PREVIOUSLY ESTABLISHED BY THE SOUTH CAROLINA COURT OF APPEALS

1. All of Spriggs' causes of action are based upon a core set of intertwined facts.

Defendant Slivka argues that the fees awarded to Spriggs should be reduced or discounted based on the fact that the claims brought and prevailed on by Spriggs were more than just the failure to comply with S.C. Code Ann. § 27-1-15, under which the Court awarded Spriggs its attorneys fees. In truth, the amount of fees allocable to the S.C. Code Ann. § 27-1-15 violation cause of action, cannot be easily separated, if at all, because all of the causes of action are based upon a core set of intertwined facts. Thus, no deduction or reduction to the fee request is warranted based on the amount of time expended by Plaintiffs' counsel on other causes of action. See Hensley v. Eckhart, 461 U.S. 424 (1983)(noting that, in litigation based on "a common core of facts, an attorney's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis") and Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 691 S.E.2d 135 (2010)(declining to dissect a counsel's affidavit where violations under the statutory claim were based on the same body of evidence underlying the claims for fraud and constructive fraud). To the extent such fees can be separated, the trial court was diligent in reviewing Spriggs' counsel's time record detail and deducting time entries not recoverable. See June 3, 2015 Order.

Here, Slivka's failure to pay Spriggs for architectural services rendered and the evidence surrounding the same sets forth a common core of facts for Spriggs breach of contract, foreclosure of mechanic's lien and failure to comply with S.C. Code Ann. § 27-1-15 causes of action. The same time spent by Spriggs' counsel in investigating, developing, advancing, and litigating the S.C. Code Ann. § 27-1-15 claim served Plaintiff's efforts in advancing the other causes of action and vice versa. The Court in Austin went on to observe, "Furthermore, to award Austin his claim in its entirety would be consistent with the precedent of this Court. Cf. Taylor v. Nix, 307 S.C. 551, 416 S.E.2d 619 (1992)(finding award of attorney fees under the Dealer's Act was warranted even though fee affidavit was not itemized for time spent for claim under the Act and that spent for the nonstatutory cause of action)." Austin, 387 S.C. at 57, 691 S.E.2d at 153.

The trial court was diligent in its review of submitted time records and analysis under each of the six factors established by the Supreme Court in awarding the attorneys fees to Spriggs. No evidence exists that the trial court abused its discretion in making its award.

2. The trial court's award is not disproportionate to the verdict

Slivka wrongly states that the trial Court's attorney's fee award shocks the conscience. The Court of Appeals in its February 6, 2013 Opinion states "Although the amount of attorney's fees awarded in this case, compared to the jury award, may not shock the conscience of this court, the needle is definitely moving on the seismograph." See Court of Appeals Opinion Pg. 9. The attorney's fee awarded before the Court in February 6, 2013 was in the amount of \$235,030.31. The trial court has reduced the initial award of trial level attorney's fees to Spriggs by \$82,650 for an award of \$152,380.25. If the initial

award of \$235,030.31 did not shock the conscience of this court, a lesser award of \$152,380.25 should not shock the conscience of this court either.

There is no requirement that an attorney's fee be less than or comparable to a party's monetary judgment. See Taylor v. Medencia, 331 S.C. 575, 503 S.E.2d 458 (1998). In this case, the trial court found that in an action litigated like this one, a fee comparable to a party's monetary judgment does not even seem probable. See June 3, 2015 Order Pg. 7. South Carolina Courts have approved awards of attorney's fees where the fee substantially exceeded the actual recovery. Id. at 582; see also Baron Data Systems, Inc. v. Loter, 297 S.C. 382, 377 S.E.2d 296 (1989)(finding that trial court did no abuse its discretion in awarding attorney fees to Plaintiff greater than recovery realized by Plaintiff).

Here, the evidence before the Court by way of Affidavit proves that Plaintiff's counsel 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, and forced Plaintiff to incur additional attorney's fees and costs above and beyond what would otherwise have been incurred. See Ariail Affidavit ¶ 5. Ms. Ariail's Affidavit outlines the actions by Defendant that drove up the attorney's fees in this case. For example, Defendant was uncooperative regarding his deposition, postponing it on several occasions, including a last minute cancellation after several requests by him that it be postponed again. Plaintiff was forced to file a Motion to Compel to get Defendant Slivka to appear for his deposition. See Ariail Affidavit ¶ 5. While the actions of Defendant Slivka are not a factor to be used in determining whether attorney's fees should be awarded, they do support the reasonableness of the fee awarded and the time and labor devoted to the case, which is a factor to be considered by the court.

3. Defendant Slivka's Offer of Settlement and Spriggs Partial Execution of Judgment has no bearing on Attorneys' Fee Award.

Defendant Slivka attempts to use his \$100,000 Offer of Settlement made before trial and/or Spriggs Partial Execution of Judgment as a means to argue that the attorneys fee award to Spriggs should be reduced. The arguments are disingenuous and misleading.

First, Defendant Slivka asserts that Defendant Slivka offered to pay Spriggs \$100,000.00 in full settlement of the entire case before trial and therefore an award of fees above should be reduced because Plaintiff Spriggs refused to ever counter and elected to proceed to trial. See Appellant's Initial Brief Pg. 11. Defendant Slivka made an Offer of Settlement under the South Carolina's Mechanic's Lien Statute. The Offer of Settlement was rejected by Plaintiff Spriggs and the amount of Spriggs' Mechanic's Lien serves as the counter under the Mechanic's Lien Statute. See S.C. code Ann. § 29-5-10. While Defendant Slivka did present the Offer of Settlement, the Offer of Settlement was a strategic move under the Mechanic's Lien Statute to try and put Defendant Slivka in a position to be the prevailing party under the Mechanics Lien statute if the jury had returned a verdict to Spriggs in an amount closer to Defendant Slivka's \$100,000.00 Offer of Settlement than the amount of Sprigg's Mechanic's Lien.

Under S.C. Code Ann. § 29-5-10, the determination of prevailing party is based on one verdict in the action. The party whose Offer of Settlement is closer to the verdict reached is considered the prevailing party in the action and is to be awarded attorneys fees by the Court. See S.C. Code Ann. § 29-5-10. Had the jury returned such a verdict, Defendant Slivka would have been asking the Court to award him all of his fees dealing with the common core of facts in this case. Defendant Slivka's lost the game of chess, yet he is now trying to use that strategic move to somehow argue that Spriggs should be

penalized for rejecting the Offer of Settlement. The law does not provide such a penalty and Defendant Slivka has set forth no legal precedent substantiating his position. Further, an amount offered in settlement is not a factor to be considered by the court in assessing attorneys fees.

Second, Defendant Slivka represents to the Court, that while the appeal was pending, Plaintiff secured the cash bond deposited by Slivka on January 11, 2012, in the amount of \$269,070.03. See Appellant's Brief Pg. 4. Defendant Slivka further represents that this is full payment of the jury verdict for damages, plus interest, plus a marginal amount of attorneys' fees. Id. Defendant Slivka argues that because the jury award had already been paid in full, when the appeal was pending and the attorneys fee award was remanded, Spriggs should get nothing in the way of fees. Id. at. 12. Defendant Slivka's assertions are an attempt to mislead the Court that the jury award has somehow been satisfied by Slivka. This fact is simply not true. No such voluntary payment has ever been made by Defendant Slivka. All that has ever been paid voluntarily by Defendant Slivka is one-half of the original contract amount between Defendant Slivka and Spriggs more than eight (8) years ago despite Defendant Slivka's admissions that he owed Spriggs more money. Defendant Slivka posted a cash bond to remove Spriggs' mechanic's lien from his property.

When judgment was entered by the Court, Plaintiff partially executed on that Judgment through the trial court's September 12, 2011 Order filed October 3, 2011 requiring the bond to be released to Plaintiff. See October 3, 2011 Order Pg. 5; see also Partial Execution of Judgment filed February 9, 2012. Had Plaintiff not taken the steps to execute on the Judgment, no money would ever have been voluntarily paid by Defendant

Slivka. Defendant Slivka now tries to argue that somehow he is entitled to a reduction in an attorneys' fees award because Spriggs took action to execute on a Judgment entered by the Court. The law does not provide for such a penalty and Defendant Slivka has not provided any such authority.

III. THE TRIAL COURT PROPERLY AWARDED ATTORNEYS FEES TO SPRIGGS FOR THE APPEAL AS SPRIGGS IS THE PREVAILING PARTY ON THE CLAIMS GIVING RISE TO THE FEE AWARD IN SLIVKA'S PRIOR APPEAL

Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court. See Flexon v. PHC-Jasper, Inc., 413 S.C. 561, 776 S.E.2d 397 (Ct. App. 2015). The law of the case applies both to issues explicitly decided and to those issues that were necessarily decided in the appeal. Id. at 403. Here, the February 6, 2013 Court of Appeals Opinion is the law of this case. By prevailing on its Mechanic's Lien and S.C. Code Ann. § 27-1-15 claims, Spriggs is entitled to receive an award of attorneys fees through the authority of those statutes. At the appellate level, Spriggs prevailed on all legal issues related to the Mechanics Lien and S.C. Code Ann. § 27-1-15 causes of Action. The Court of Appeals issued a unanimous decision determining that Spriggs' services fell within the definition of labor contained in Section 29-5-10(a) and affirming the trial court's denial of Defendant Slivka's directed verdict motions as to Spriggs' S.C. Code Ann. § 27-1-15 and mechanic's lien claims. See Court of Appeals Opinion.

Defendant Slivka then submitted a petition to the Court of Appeals for a rehearing, which subsequently was denied. Spriggs Grp., P.C. v. Slivka, Appellate Case No. 2011-204366 (unpublished) (Ct. App. Mar. 22, 2013). Next, Defendant Slivka submitted a Writ

of Certiorari to the South Carolina Supreme Court appealing two issues from the Court of Appeals Opinion. First, whether the trial court erred in failing to direct a verdict in favor of the Defendant Slivka as to the Spriggs' Mechanic's Lien Claim because the Spriggs' Lien was not timely as a matter of law. Second, whether the trial court erred in failing to direct a verdict in favor of the Defendant Slivka as to the Spriggs' Claim pursuant to S.C. Code Ann. § 27-1-15 because the evidence was undisputed that an investigation had taken place into the Spriggs' Claim in the form of formal discovery, no portion of the claim was undisputed, and the Defendant Slivka had already deposited an amount which exceeded the entire claim with the Court.

After receiving briefs and hearing oral arguments by Counsel, the Supreme Court issued an Opinion that Writ of Certiorari had been improvidently granted, dismissing the same, and asking the Court of Appeals to depublish its Opinion. See Supreme Court Opinion. Thus, the unanimous decision by the Court of Appeals determining that Spriggs' services fell within the definition of labor contained in Section 29-5-10(a) and that the Trial Court properly denied the Defendant Slivka's directed verdict motions as to Spriggs' Section 27-1-15 and mechanic's lien claims is still the law of the case in this matter. Spriggs is the prevailing party on Defendant Slivka's prior appeal on all issues related to the two causes of action that give authority for an attorneys fee award.

IV. THE AWARD OF ATTORNEYS FEES TO SPRIGGS RELATED TO SLIVKA'S PRIOR APPEAL ARE NOT EXCESSIVE

As stated above, the February 6, 2013 Court of Appeals' Opinion is the law of this case. That unanimous decision makes Defendant Spriggs the prevailing party on the issues related to S.C. Code Ann. § 27-1-15 that were appealed by Defendant Slivka. As a result, Spriggs can be awarded attorneys fees by the trial court related to Defendant Slivka's

appeal. Defendant Slivka relies upon City of Charleston v. Masi, 362 S.C. 505, 609 S.E.2d 301 that Spriggs is not entitled to attorneys fees because the Supreme Court did not rule on the merits of the case. City of Charleston provides no authority for Defendant Slivka's position in this case. Here, Spriggs degree of success can be measured given that Spriggs has prevailed on all legal issues related to S.C. Code Ann. § 27-1-15 appealed by Slivka. The Supreme Court's dismissal of Defendant Slivka's certiorari does not somehow make Defendant Slivka the prevailing party on those issues. Spriggs is the prevailing party through the February 6, 2013 Court of Appeals Opinion, which is the legal precedent for this case.

The trial court has awarded Spriggs \$61,335 in appellate court fees under S.C. Code Ann. § 27-1-15. A party is entitled to recover attorneys' fees and costs for appellate and post-appellate work not limited by the amount provided for in the appellate court rule when the party is otherwise entitled to recover such fees/costs under a statute. See Austin v. Stokes-Craven Holding Corp., 406 S.C. 187, 750 S.E.2d 78 (2010). The authority of the appellate court to grant fees under appellate rules and the trial court's authority to grant appellate fees under statutory authority are not mutually exclusive. Id. at 199; see also McDowell v. South Carolina Department of Social Services, 304 S.C. 539, 405 S.E.2d 830 (1991); Muller v. Myrtle Beach Golf and Yacht Club, 313 S.C. 412, 438 S.E.2d 248 (1993).

The trial court has the authority under Austin to award Spriggs attorneys fees for appellate and post-appellate work given that S.C. Code Ann. § 27-1-15 entitles Spriggs to a recovery of attorneys fees. Defendant Slivka argues that the Court's Award of the full fees requested by Spriggs for appellate and post-appellate work are not all recoverable under S.C. Code Ann. § 27-1-15. The trial court did not award the full amount of the fees

requested by Spriggs. See Affidavit of James A. Bruorton IV ¶ 10.

Further, the trial court spent considerable time reviewing the time records submitted by Spriggs in support of its attorneys fees and costs request, including weekend and evening time. See June 3, 2015 Order. The trial court, after reviewing the Rosen Hagood cumulative invoice in detail for many hours over the weekend and in the evenings after court, discounted the fee award to Spriggs by more than \$32,000 so that the total award did not include an award of fees for Spriggs two causes of action the Court dismissed before trial or for the breach of contract claim. See June 3, 2015 Order Pg. 7. All the attorney's fees awarded to Spriggs are for attorney's fees incurred after the date of the S.C. Code Ann. § 27-1-15 demand, which was made on March 15, 2010. See June 3, 2015 Order Pg. 7. The attorney's fees award does not include an award of any costs to Spriggs, as costs are not recoverable under S.C. Code Ann. § 27-1-15. See June 3, 2015 Order Pg. 7.

The \$61,335.00 awarded in attorneys fees by the trial court for appellate and post-appellate work is authorized and reasonable. Full briefing, development of the record on appeal and oral arguments were held at both the Court of Appeals and Supreme Court level in this case. See Affidavit of James A. Bruorton IV ¶ 5. An award of \$61,335.00 in attorneys fees for 3 ½ years of appeal is not unreasonable nor should it shock the conscience of the Court. The total attorneys fee awarded to Spriggs for the trial level and the appellate level is \$22,011.19 less than the original attorneys fee award this Court found not to shock the conscience.

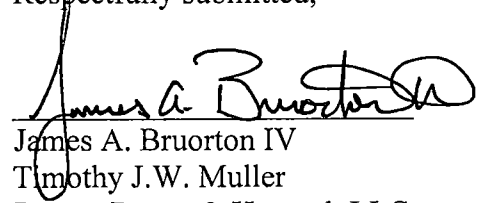
CONCLUSION

The Trial Court spent substantial time and diligence in reviewing the time records before the Court and reviewing the facts of this case in assessing the attorneys fees

awarded. The decision to award or deny attorney's fees under a statute will not be disturbed on appeal absent an abuse of discretion. See Kiriakides v. Sch. Dist. Of Greenville County, 382 S.C. 8, 675 S.E.2d 439 (2009). Any such abuse of discretion is non-existent in this case.

For all the above mentioned reasons, the Court should affirm the attorneys fee award entered by the trial court. The appellate court may affirm any ruling, order, decision or judgment upon any grounds appearing in the Record on Appeal. See SCACR 220(c).

Respectfully submitted,



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October 28, 2015
Charleston, SC

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas
William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2015-001457

THE SPRIGGS GROUP, P.C.,..... Respondent,

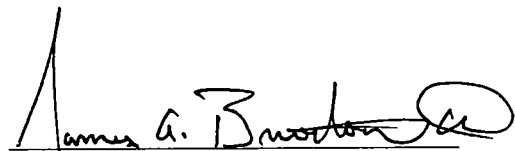
v.

GENE R. SLIVKA, Petitioner.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondent and Respondent's Designation of Matter for the Record on Appeal by depositing a copy of it in the United States Mail, postage prepaid, on October 28, 2015, to Petitioner's attorney of record, Robert T. Lyles, Jr., Esquire, Lyles & Lyles, LLC, 342 East Bay Street, Post Office Box 773, Charleston, South Carolina, 29402.

October 28, 2015



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