THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
FEB 22 2016
SC Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2012-CP-02-02382
Appellate Case Tracking No.: 2015-001115

Prescott & Sons Construction, LLC, ... Respondent,

v.

Larry Rogers and Michelle Rogers, ... Appellants.

FINAL BRIEF OF APPELLANTS LARRY ROGERS AND MICHELLE ROGERS

M. David Scott
Jordan, Rauton, & Scott, LLC
146 East Main St.
Lexington, SC 29072
Tel: (803)-785-7878
Fax: (803)-785-7880
dscott@jrslawsc.com

Attorney for Appellants Larry Rogers and Michelle Rogers

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF ISSUES ON APPEAL

I. Did the trial court commit a prejudicial abuse of discretion by admitting emails sent by Mrs. Prescott to Appellants when those emails were not disclosed during discovery, the emails were the only proof that any subcontractor invoices were sent to Appellants, and the trial court failed to properly consider whether exclusion was the appropriate sanction for Respondent's failure to disclose?

II. Did the trial court commit an error of law by not granting a directed verdict for Appellants on Respondent's breach of contract claims when Respondent did not introduce any evidence that Appellants did not pay any invoices that they actually received and a certificate of occupancy was never issued?

III. Did the trial court err by denying Appellants' motion for a new trial when the jury verdict was so confused that it is not clear what was intended and the jury verdict is contrary to the fair preponderance of the evidence?

IV. Did the trial court err in awarding Respondent attorney's fees and costs when it did not make findings of facts about the reasonableness of the attorney's fees and costs?

STATEMENT OF THE CASE

On September 21, 2012, Respondent Prescott and Sons Construction, LLC ("Prescott"), a contracting and home building company, filed a Summons and Complaint against Appellants Larry and Michelle Rogers ("the Rogers") arising out of a residential construction contract. Respondent alleged five causes of action. (R. pp. 24–28). Respondent's First and Second Cause of Action for breach of contract allege that Appellants owe Respondent $8,400.82—the balance of eight unpaid invoices to various subcontractors. (R. pp. 24–26). Respondent's Third Cause of action alleges breach of contract accompanied by fraudulent act. (R. pp. 26–27). Respondent's Fourth Cause of Action for breach of contract alleges that Appellants owe Respondent $15,000 in unpaid builder's fees. (R. pp. 27–28). Finally, Respondent's Fifth Cause of Action alleges quantum meruit and unjust enrichment arising out of the residential construction project. (R. p. 28). Appellants filed

an Answer and Counterclaims alleging slander of title, wrongfully filed and frivolous lien, and breach of contract. (R. pp. 33–43).

The case proceeded to trial before Judge Early and a jury on January 20 and 21, 2015. (R. p. 94). At the close of all of the evidence, counsel for Appellants and Respondent informed the trial judge that each party was only proceeding with its respective breach of contract claims and abandoned all the remaining claims and counterclaims. (R. p. 301). The jury returned a verdict of $18,166.03 for Respondent, finding that Appellants had breached the contract. (R. pp. 411–12).

Following the verdict, Appellants made a written motion for JNOV and a new trial, which were denied in separate orders on March 24, 2015, and May 12, 2015, respectively. Respondent filed a motion for attorney's fees and costs, which was granted on April 29, 2015. On May 12, 2015, Appellants filed a timely Notice of Appeal and retained the undersigned to represent them in these proceedings. The undersigned learned upon ordering the transcripts of the proceedings below that the trial court's court reporter's vehicle was broken into on June 3, 2015 and all court reporting equipment and backups were stolen. While Appellants were able to obtain a copy of the trial transcript, the transcript of the post-trial motions hearing has been lost.

STATEMENT OF FACTS

In 2011, Appellants contacted Josh Prescott, a licensed residential contractor and owner of Respondent Prescott & Sons, LLC, and asked him for an estimate to build a garage and a sunroom. (R. p. 134, lines 5–12). After Respondent provided an estimate, Appellants paid an architect to draw up blueprints for the additions. (R. p. 135, lines 7–11). Before proceeding with those additions, Appellants hired Respondent to do some internal

work on their house, including laying tiles and making some minor repairs. (R. p. 136, lines 18–21). After this interior work was completed, Appellants told Respondent they were ready to move forward on the garage and sunroom project. (R. p. 137, lines 2–3).

Appellants entered into a contract with Respondent on April 5, 2012 ("the first contract"), which provided that Appellants were to pay Respondent on a "cost-plus" basis. (R. p. 137, lines 16–19). The first contract stated that Respondent was to build an attached garage, a sunroom, a patio, and a concrete basement pad. (R. p. 138, lines 7–10). In consideration for this work, Appellants agreed to pay Respondent the cost of the work plus fifteen percent (15 %). (R. p. 138, lines 13–16). After the landscaping project began to spiral out of control, Appellants informed Respondent that they could not afford to pay those costs—which greatly exceeded Respondent's estimate—and fifteen percent to Respondent. (R. pp. 139–141). Thereafter, Appellants and Respondent entered into a new contract, dated May 1, 2012 ("the second contract") and invalidated the first contract. (R. p. 140, lines 13–18).

The second contract stated that Respondent would no longer be engaged in the landscaping process but would be required to build the garage, porch, sunroom, and patio. (R. p. 142, lines 5–11). The second contract no longer required that Respondent build a concrete basement pad. (R. p. 145, lines 6–14). However, the second contract did contemplate possible changes in the scope of the work to be performed, and made provisions therefor. (R. pp. 84, 86). In consideration for completion of this work, Appellants agreed to pay Respondent a $25,000 flat fee for his services. (R. p. 142, lines 7–8). The second contract further stated that Respondent would be paid in five monthly installments of $5,000 and "if project does not last 5 months, remaining balance of $25,000 is due upon

issuance of Certificate of Occupancy." (R. pp. 85, 143, lines 6–18). If the project exceeded five months, Respondent was to be paid $2,500 per month. (R. p. 85). The second contract also required Respondent to send all subcontractor invoices to Appellants so that Appellants could make timely payments. (R. p. 85).

During the construction, Appellants inquired about what it would cost to get the concrete basement pad built. (R. p. 145, lines 6–14). Improvements to the basement were explicitly included in the first contract (*see* R. pp. 78–82), but not specifically included in the second contract. According to Josh Prescott's trial testimony, Appellant Larry Rogers called him approximately two months into the project and told Prescott that he expected him to build the basement for free. (R. p. 149, lines 1–22). Prescott testified that Appellant Larry Rogers then fired him when he refused to do the work for free. (R. p. 149, lines 1–22). At this point in the project, Appellants had paid Respondent $10,000 to cover the two months of work actually completed as of that date. (R. p. 262, lines 13–15). Soon thereafter, Prescott received invoices from a number of subcontractors who had done work on the project. (R. p. 151). Prescott testified that he received the following invoices from subcontractors, which Appellants never paid for:

1. Crazy Joe Containers for $291.35
2. Crazy Joe Containers for $354.23
3. Crazy Joe Containers for $309.38
4. Samuel Ruvucalbus for $500
5. Portable Service for $89.30
6. Barrett Windows & Door for $367.68
7. Hutto Roofing for $3,000

8. Cornerstone Concrete for an unknown amount approximating $177.[1]

(R. pp. 152–55). During his testimony, Prescott admitted that he did not bring emails or other proof to court showing that he had sent these invoices to Appellants. (R. p. 162, line 20).

After Respondent ceased working on the project, a city inspector conducted an inspection of the work done to Appellants' home. (R. 157, lines 14–21). The work did not pass inspection and a letter with several correction notices was issued. (R. p. 157, lines 18–21). Specifically, the inspector testified that he conducted an inspection on June 29, 2012 and found deficiencies in the roof, the ceiling, the framing, the windows, and generally on the worksite.[2] (R. pp. 230–31). As a result, Prescott admitted that a Certificate of Occupancy was never issued for Appellants' home and Appellants had to hire a new contractor to come in and fix the deficiencies in Respondent's construction. (R. pp. 161, 316).

ARGUMENTS

I. The trial court committed a prejudicial abuse of discretion by admitting emails sent by Mrs. Prescott to Appellants when those emails were not disclosed during discovery, the emails were the only proof that any subcontractor invoices were sent to Appellants, and the trial court failed to properly consider whether exclusion was the appropriate sanction for Respondent's failure to disclose.

Respondent predicates its first breach of contract argument on Appellants not paying eight subcontractor invoices as the second contract required. Indeed, Paragraph Eight

[1] Mr. Prescott was unable to testify as to the exact amount of the invoice, and Chris Allen, the head of Cornerstone Concrete, testified that the amount owed was "maybe 170, like, around 177 probably after tax." (R. p. 198, lines 15–16). Respondent's Complaint lists the amount as $177.88. (R. p. 24).

[2] Respondent was also fined $500 by the South Carolina Department of Labor, Licensing, and Regulation. (R. p. 158, lines 13–20).

of the second contract does require Appellants to "pay all costs of the Work." (R. p. 85). However, the second Contract also requires Respondent to "supply the subcontractors (sic) and material suppliers (sic) invoices to the [Appellants]." (R. p. 85)

During his testimony, Mr. Prescott admitted that he had no proof that the subcontractor invoices at issue were ever submitted to Appellants. (R. p. 163, lines 6–8 ("Q: Okay. And you submit those invoices today with no proof that [Appellants] ever actually received it, correct? A: That's right")). Later in the trial, seemingly aware that Respondent's breach of contract case *required* such evidence, Respondent's counsel informed the trial court that he had obtained some emails indicating that the subcontractor invoices were indeed sent to the Appellants. (R. p. 236). Appellants informed the trial court that they had not been provided these emails during discovery and were only now receiving them midway through the trial. (R. pp. 236–38). Respondent then called Mrs. Ashley Prescott to testify about the emails. (R. p. 238, lines 1–12). When Respondent sought to admit the emails by way of Mrs. Prescott, Appellants lodged a timely objection to admission of the documents as they were not produced during discovery and Appellants had no meaningful opportunity to review them or prepare for cross-examination. (R. p. 242). The trial court overruled Appellants' objection without explanation. (R. p. 242, line 22).

Appellants maintain that the trial court committed prejudicial error by allowing Respondent to introduce these emails despite them not being produced to Appellants during the discovery process. *See* Rule 26, SCRCP; Rule 37 SCRCP (outlining the general provisions and obligations of parties while conducting discovery). This Court has required trial courts to weigh several factors when determining whether to exclude evidence that was not disclosed during the discovery process. *See Jamison v. Ford Motor Co.*, 373 S.C.

248, 270, 644 S.E.2d 755, 767 (Ct. App. 2007) ("'In deciding what sanction to impose for failure to disclose evidence during the discovery process, the trial court should weigh the nature of the interrogatories, the discovery posture of the case, willfulness, and the degree of prejudice.'" (quoting *Samples v. Mitchell*, 329 S.C. 105, 111, 495 S.E.2d 213, 216 (Ct. App. 1997))). Although the admission or exclusion of evidence is typically a matter for the sound discretion of the trial court, this Court has held that "[a] failure to weigh the required factors demonstrates a failure to exercise discretion and amounts to an abuse of discretion." *Id.* Thus, the trial court's failure to conduct this balancing test is a *per se* abuse of discretion. *See id.*

Even when the trial court commits an abuse of discretion in admitting evidence, the error must be prejudicial to warrant reversal. *Rutledge v. St. Paul Fire and Marine Ins. Co.*, 286 S.C. 360, 369, 334 S.E.2d 131, 137 (Ct. App. 1985) (citations omitted). Here, the admission of the evidence without conducting a proper balancing test was plainly prejudicial as the evidence was the *only* evidence that demonstrated that Appellants received subcontractor invoices that were allegedly unpaid. These emails and invoices were clearly within the scope of the discovery propounded by the parties in this case. (*See* R. pp. 67–68). In fact, the Appellants had to later move to compel production of these documents. (*See* R. p. 59). Yet Respondent did not produce any of the emails or attached invoices until midway during trial. Moreover, there is substantive evidence of willfulness on the part of Respondent in concealing this evidence. During Mrs. Prescott's testimony, she made several unsolicited and inflammatory comments directed at Appellants' defense that they never received the subcontractor invoices. (*See, e.g.*, R. p. 243, lines 5–12 ("I did not know the issue of I-didn't-receive-invoices were going to be an issue. We – I probably shouldn't say

that. . . . After two and a half years you would think I-didn't-have-invoices-so-I-didn't-pay would not be an excuse. So I had no idea that this was going to be an issue."). Accordingly, the failure of the trial court to consider any of these factors in ruling on the admissibility of the emails and attached invoices is a *per se* abuse of discretion that prejudiced Appellants and warrants reversal and a new trial.

II. The trial court committed an error of law by not granting a directed verdict for Appellants on Respondent's breach of contract claims.

At the conclusion of Respondent's case-in-chief, Appellants moved for a directed verdict on all of Respondent's breach of contract claims, contending (1) that the Certificate of Occupancy was never issued and therefore Respondent was not entitled to the additional $15,000 in monthly payments; and (2) Respondent only introduced evidence that three invoices were submitted to Appellants but did not specific *which* invoices or whether those invoices were actually paid. (R. pp. 248–49). The trial court denied the motion. (R. p. 249, lines 2–7). Following the jury verdict, Appellants filed a motion for JNOV arguing identical grounds, which was also denied by the trial court. As detailed below, Appellants contend that these rulings were legal error.

A. Standard of Review

"A motion for a judgment notwithstanding the verdict (JNOV) is merely a renewal of the directed verdict motion." *Jamison v. Hilton*, 413 S.C. 133, 139, 775 S.E.2d 58, 61 (Ct. App. 2015) (citing *Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 496 (Ct. App. 2006)). "When reviewing the trial court's ruling on a motion for a directed verdict or a JNOV, this court must apply the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *Id.* (citing *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 27–28, 602 S.E.2d 772, 782 (2004)). "In

deciding such motions, '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.'" *Id.* at 139, 775 S.E.2d at 62 (quoting *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000)). "The appellate court will reverse the circuit court's ruling on a directed verdict motion only when no evidence supports the ruling or the ruling is controlled by an error of law." *Fay v. Grand Strand Reg'l Med. Ctr.*, 412 S.C. 185, 193, 771 S.E.2d 639, 644 (2015) (citing *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434–35, 629 S.E.2d 642, 648 (2006)).

B. Appellants are entitled to a directed verdict on Respondent's First and Second Causes of Action (Breach of Contract) because Respondent did not introduce any evidence that Appellants did not pay any invoices that they actually received.

As detailed above, the admission of the email and attached invoices during Mrs. Prescott's testimony was erroneous because the trial court did not consider the required factors. If the Court reaches the merits of whether the emails and invoices should have been excluded rather than remanding for a new trial, Appellants maintain that under a fair reading of the balancing factors, particularly the late stage of disclosure, demonstrable evidence of willfulness, and the degree of prejudice, exclusion was the appropriate remedy for this discovery abuse. Absent the one email that Respondent introduced during Mrs. Prescott's testimony that had three invoices attached to it, there is no evidence that Appellants were provided with *any* invoices that were unpaid. Thus, because Respondent was required to submit these invoices to Appellants under the second contract, the trial court should have granted a directed verdict. (*See* R. p. 85 ("The Builder will supply the subcontractors and material suppliers invoices to the Buyer.")).

However, even if the evidence was properly admitted, the trial court nonetheless improperly denied Appellants' motion for a directed verdict. Respondent's Complaint claims that eight invoices were unpaid. (R. p. 24). Mr. Prescott also testified that eight invoices were unpaid. (R. pp. 152–55). Yet Respondent only introduced one relevant email that was sent to Appellant Michelle Rogers, which had three invoices attached to it. (R. p. 244, lines 14–17). Mrs. Prescott did not testify which three invoices were attached to that email and there is no evidence that those three invoices were a subset of the eight invoices referenced in Respondent's Complaint. Accordingly, there is no evidence that Appellants received any invoices that they did not pay and the trial court should have directed a verdict for Appellants.

C. Appellants are entitled to a directed verdict on Respondent's Fourth Cause of Action (Breach of Contract) because a certificate of occupancy was never issued.

Paragraph Eight of the second contract states that Respondent was to be paid a builder's fee of $25,000, which was to be paid in five monthly installments of $5,000. (R. p. 85). The second contract further states that "[i]f project does not last 5 months, remaining balance of $25,000 is due upon issuance of Certificate of Occupancy." (R. p. 85). As detailed below, Respondent was paid for the two months of work that it completed and introduced no evidence at trial that a Certificate of Occupancy was issued. Thus, the trial court should have granted a directed verdict for Appellants on Respondent's Fourth Cause of Action as Respondent was paid all the money it was owed under the contract.

"'The law in this state regarding the construction and interpretation of contracts is well settled.'" *Lee v. Univ. of S.C.*, 407 S.C. 512, 517, 757 S.E.2d 394, 397 (2014) (quoting *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 46, 747 S.E.2d 178 (2013)).

"'In construing a contract, it is axiomatic that the main concern of the court is to ascertain and give effect to the intention of the parties.'" *Id.* (quoting *Progressive*, 405 S.C. at 46, 747 S.E.2d at 184). "'Parties are governed by their outward expressions and the court is not at liberty to consider their secret intentions.'" *Id.*

"'If its language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect.'" *Id.* at 517–18, 757 S.E.2d at 397 (quoting *Progressive*, 405 S.C. at 46, 747 S.E.2d at 184). "Courts 'are without authority to alter an unambiguous contract by construction or to make new contracts for the parties. A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully.'" *Id.* at 518, 757 S.E.2d at 397 (quoting *S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant*, 379 S.C. 645, 655, 667 S.E.2d 7, 13 (Ct. App. 2008)).

It is uncontested that Respondent only worked for two months on the project. (*See, e.g.,* R. p. 262, lines 11–12). It is also uncontested that Appellants paid Respondent $10,000 to cover the monthly payments for those two months of work. (*See* R. p. 262, lines 13–15). The second contract requires that Respondent adduce evidence that a Certificate of Occupancy was issued in order to entitle it to any additional remuneration. (*See* R. p. 85). During Respondent's case-in-chief, the city building inspector testified that he conducted an inspection of the home after Respondent's services were ended. (R. pp. 228–232). Respondent's work did not pass inspection and a corrective notice was issued. (R. p. 157, lines 18–19). Specifically, the inspector testified that he found deficiencies in the roof, the ceiling, the framing, the windows, and generally related to the condition of the

worksite. (R. pp. 230–31). As a result of these deficiencies, a Certificate of Occupancy was never issued—a fact that even Mr. Prescott admitted during his testimony. (R. p. 161, lines 8–10, 230–31, 316).

To rebut the failure to obtain a Certificate of Occupancy, Respondent called several subcontractors to testify that they would have repaired the deficiencies noted in the inspector's report for no charge if Appellants had given them that opportunity. (R. pp. 219–220, 227). Although these subcontractors and the building inspector testified that Mr. Prescott was not allowed back on the worksite, the second contract contains no provision that would allow such remediation in order to satisfy the condition necessary for accelerated payment of the remaining installments—i.e., issuance of a Certificate of Occupancy.

The second contract does *permit* Appellants to provide Respondent with an opportunity to cure any defects if Respondent's work is terminated. (*See* R. p. 87 ("Buyers *may* deliver to Builder written notice of such condition, and if Builder has not cured (or if such condition may not be immediately cured, begun to cure) such condition thirty days after receipt of such notice, Buyers may terminate the employment of the Builder, take possession of the Residence and of all materials and may finish the Residence by whatever reasonable method Buyers may deem expedient." (emphasis added))). However, the second contract does not *require* that Appellants provide Respondent with this opportunity to remediate any deficiencies, which is most notably demonstrated by the use of the permissive "may" in the second contract as opposed to the mandatory "shall."

In sum, there is no evidence that Respondent is entitled to the additional $15,000 builders fee because there was never a Certificate of Occupancy issued. Perhaps implicitly acknowledging this fact, Respondent instead argued to the jury that Appellants did not give

Respondent the opportunity to fix the defects that it created. Such argument was improper for the jury because Respondent's case fails as a matter of law, and the unilateral attempt by Respondent to alter the terms of the second contract after the fact is contrary to the well-established contract principles of this state. *See* 17A Am. Jur. 2d *Contracts* § 507 ("[O]ne party to a contract may not unilaterally alter its terms."); *see also Layman v. State*, 368 S.C. 631, 640, 630 S.E.2d 265, 269 (2006) ("Once [a] bargain is formed, and the obligations set, a contract may only be altered by mutual agreement and for further consideration."). Accordingly, the trial court should have granted Appellants' motion for a directed verdict.

III. The trial court erred by denying Appellants' motion for a new trial.

Following the jury's verdict, Appellants filed a written motion for a new trial, contending that the jury verdict was confused and contrary to the fair preponderance of the evidence. The trial court denied the motion. As detailed below, the extent and substance of the damages awarded by the jury is entirely unclear and the jury verdict is contrary to the preponderance of the evidence as it plainly includes an award for the $15,000 builders fee when the very language of the contract does not provide for such an award.

A. Appellants are entitled to a new trial on Respondent's breach of contract claims because the jury verdict is so confused that it is not clear what was intended.

"A jury verdict should be upheld when it is possible to do so and carry into effect the jury's clear intention." *Johnson v. Parker*, 279 S.C. 132, 135, 303 S.E.2d 95, 97 (1983). "However, when a verdict is so confused that the jury's intent is unclear, the safest and best course is to order a new trial." *Id.* (citing *Lorick & Lowrance, Inc. v. Julius H. Walker & Co.*, 153 S.C. 309, 150 S.E. 789, 792 (1929)). Here, the intent of the jury is unclear from

the verdict. Respondent claimed that eight invoices were unpaid, but only introduced evidence that three invoices (which may not have been a subset of those eight invoices) were sent to Appellants in compliance with the second contract. (R. pp. 24, 85, 244). Of course, Appellants contend that these three invoices were improperly admitted at trial, but even to the extent they were properly admitted, it is not clear what damages the jury's award reflects.

B. Appellants are entitled to a new trial on Respondent's breach of contract claims because the jury verdict is contrary to the fair preponderance of the evidence.

"[A] trial judge may grant a new trial upon the facts if the judge determines the verdict 'is contrary to the fair preponderance of the evidence.'" *McEntire v. Mooregard Exterminating Servs., Inc.*, 353 S.C. 629, 633, 578 S.E.2d 746, 748 (Ct. App. 2003) (quoting *Dent v. Redd*, 270 S.C. 585, 586, 243 S.E.2d 460, 460 (1978)). "Unlike a motion for directed verdict, the trial judge weighs the evidence under the thirteenth juror doctrine and need not view it in the light most favorable to the opposing party." *Id.* (citations omitted). The trial court's denial of a motion for new trial must be reversed if the trial court abused its discretion. *Id.*

Here, the trial court's order denying Appellants' motion for a new trial is clearly erroneous. The trial court found that "it appears the evidence presented to the jury includes the signed contract stating the Defendants would pay Plaintiff $25,000.00 in addition to costs of materials and labor." (R. p. 5). That is a misstatement of the unambiguous language of the second contract, which plainly states that Appellants were required to pay all invoices that they received from Respondent and that Respondent was to be paid $5,000

per month for five months and if the work terminated early was only to receive the remainder of the $25,000 if a Certificate of Occupancy was issued. (*See* R. p. 85).

The evidence is undisputed that no Certificate of Occupancy was issued, so any award of damages including the $15,000 balance of the builder's fee is contrary to the weight of the evidence. The total of the eight invoices claimed by Respondent is $5,089.92—substantially less than the jury award in this case. Therefore, it logically follows that the jury must have awarded a part or whole of the $15,000 builder's fee. Therefore, the verdict is contrary to the fair preponderance of the evidence, for Respondent was not entitled to *any* portion of the builder's fee under the unambiguous language of the second contract. Similarly, the only evidence that Appellants received any invoices from Respondent was the email and attachments introduced during Mrs. Prescott's testimony. Although Appellants maintain this evidence was improperly admitted, to the extent that it was proper for the jury's consideration it does not suffice to support a jury verdict of any damages given the lack of clarity as to which invoices were sent and the lack of clarity in the jury's award of the invoices for which it awarded damages.

IV. The trial court erred by awarding Respondent attorney's fees and costs because the trial court did not make findings of fact about the reasonableness of the attorney's fees and costs.

"The general rule is that attorney's fees are not recoverable unless authorized by contract or statute." *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993) (citations omitted). "When there is a contract, the award of attorney's fees is left to the discretion of the trial judge and will not be disturbed unless an abuse of discretion is shown." *Id.* (citing *Baron Data Sys., Inc. v. Loter*, 297 S.C. 382, 383, 377 S.E.2d 296, 297 (1989)). "There are six factors to consider in determining an award of attorney's fees: 1)

nature, extent, and difficulty of the 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 the locality for similar services; and 6) beneficial results obtained." *Id.* at 494, 427 S.E.2d at 660 (citing *Collins v. Collins*, 239 S.C. 170, 179, 122 S.E.2d 1, 4–5 (1961)).

Initially, Appellants note that if this Court reverses on any of the previous issues and finds that Appellants are entitled to a directed verdict on Respondent's breach of contract claims or that Appellants are entitled to a new trial, the attorney's fees and costs award are necessarily mooted as Respondent would no longer be a prevailing party.[3] However, if this Court does not reverse on these issues, Appellants maintain that the award of attorney's fees and costs was nonetheless inappropriate.[4]

Specifically, Appellants contend that the trial court did not make specific findings of fact on the record for all of the factors listed above. While the trial court's order does list those factors and purports to analyze them, in reality the order just classifies each of the factors as "reasonable." There is no analysis of the nature, extent, and difficulty of the legal services rendered. There is no analysis or recitation of the amount of time and labor

---

[3] If this Court only finds that Appellants are entitled to a partial directed verdict on either the unpaid invoice claim or the certificate of occupancy claim, a remand would be appropriate for the trial court to reevaluate the award of attorney's fees and costs. *See Blumberg*, 310 S.C. at 494, 427 S.E.2d at 660 (noting that the degree of beneficial results obtained is a necessary factor when considering an award of attorney's fees and costs).

[4] The dispute over attorney's fees and costs at trial centered on whether Respondent could seek fees and costs pursuant to the contract despite not presenting evidence of the same at trial. Appellants acknowledge that the law of this State does seem to permit litigants to seek fees and costs in a post-trial motion even when the fees and costs are sought under a contract in a breach of contract action.

devoted to the case. There is no analysis of what the customary rate for such legal services is in the Aiken area. Indeed, Respondent's counsel's affidavit is not even mentioned in the trial court's order. Simply put, an award of fees and costs is not reasonable merely because the trial court labels it reasonable, for the case law of this State requires the trial court to explain *why* those fees and costs are reasonable. *See Blumberg*, 310 S.C. at 494, 427 S.E.2d at 661 ("On appeal, absent sufficient evidentiary support on the record for each factor, the award should be reversed and the issue remanded for the trial court to make specific findings of fact."). The trial court's failure to articulate findings of fact in support of its order awarding attorney's fees and costs is exacerbated in this case by the absence of the transcript of the hearing on fees and costs. In short, the record before this Court does not provide even a minimally adequate platform to enable appellate review.

Accordingly, Appellants request that this Court remand the matter to the trial court so that it may make specific findings of fact on the record in order to enable meaningful appellate review. Appellants note that the scope of the remand would *only* encompass the attorney's fees and costs incurred during the litigation below and request that this Court make clear that Respondent is not permitted to seek additional attorney's fees and costs incurred on appeal.[5]

CONCLUSION

For the reasons stated above, this Court should enter a directed verdict for Appellants on all of Respondent's breach of contract claims. Alternatively, this Court should

[5] Respondent's exclusive remedy for costs on appeal is Rule 222, SCACR.

grant Appellants a new trial. Regardless of the Court's holding on the directed verdict and new trial issues, the award of attorney's fees and costs should be reversed.

Respectfully submitted,

February 16 2016

M. David Scott
S.C. Bar No.: 68667
Jordan, Rauton, & Scott, LLC
146 East Main St.
Lexington, SC 29072
Tel: (803)-785-7878
Fax: (803)-785-7880
dscott@jrslawsc.com

Attorney for Appellants Larry Rogers and Michelle Rogers

RECEIVED
FEB 22 2016
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2012-CP-02-02382
Appellate Case Tracking No.: 2015-001115

Prescott & Sons Construction, LLC, ... Respondent,

v.

Larry Rogers and Michelle Rogers, ... Appellants.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below he served counsel for Respondent Prescott & Sons Construction, LLC with a copy of the *Record on Appeal*, *Final Brief of Appellants Larry Rogers and Michelle Rogers*, and *Final Reply Brief of Appellants Larry Rogers and Michelle Rogers* by hand-delivery, at the below listed addresses clearly indicated on said envelope this the 22nd day of February, 2016, addressed as follows:

Lir Patrick Derieg
1924 Barnwell St.
Columbia, South Carolina 29201
Attorney for Respondent

By: _____
M. David Scott