THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Case No. 2009-CP-15-0595

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

v.

GENE R. SLIVKA, ... Appellant.

FINAL BRIEF OF RESPONDENT

James A. Bruorton IV
A. Bright Ariail
Rosen | Hagood
P.O. Box 893
Charleston, SC 29402
(843) 577-6726

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF ISSUES ON APPEAL

I. Was the trial court correct in denying Appellant's directed verdict as to Respondent's mechanic's lien claim and submitting the claim to the jury?

II. Was the trial court correct in denying Appellants' directed verdict as to Respondent's claim for failure to comply with S.C. Code Ann. § 27-1-15 and submitting the claim to the jury?

III. Has the Appellant properly preserved an appeal of any legal issues related to Respondent's breach of contract claim?

IV. Was the trial court correct in awarding the Respondent attorneys' fees and costs in the amount of $235,030.31 as the prevailing party under the mechanic's lien statute and S.C. Code Ann. § 27-1-15?

V. Was the trial court correct in awarding the Respondent prejudgment interest in the amount of $37,413.92?

STATEMENT OF THE CASE

This is a breach of contract lawsuit accompanied by a mechanic's lien foreclosure 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 27, 2006 between the Respondent, The Spriggs Group, P.C., and the Appellant, Gene R. Slivka ("Agreement"), (R. pp. 346 – 351) (Trial Exhibit 7). Respondent designed all building's on Appellant's Colleton County Plantation, including a 24,000 sq. ft main house, two 1,500 sq. ft. detached garages with fully finished 700 sq. ft. apartments above them, a 280 sq. ft. potting shed, a 1,000 sq. ft. conservatory, a 4,000 sq. ft. stable with four horse stalls, and a 500 sq. ft. grotto. (R. pp. 339 – 340) (Trial Exhibits 2 and 3).

Per the Agreement, Respondent was paid one half of the Agreement amount at the start of the design process. Respondent invoiced Appellant for the remaining contract balance, as well as additional agreed upon services pursuant to the Agreement and has not been paid in full. (R. pp. 354 – 365) (Trial Exhibits 8, 8(a) and 8(b)). Appellant, admittedly, has not paid Respondent any additional money since the initial one half payment in 2007. Respondent filed a mechanic's lien against Appellant'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, breach of contract accompanied by a fraudulent act, and quantum meruit. (R. pp. 376 – 386) (Trial Exhibit 10, Complaint and Amended Complaint). Appellant's Motion to Dismiss Respondent's Complaint was denied. (R. p. 1) (Order denying Motion to Dismiss). Appellant counterclaimed against Respondent for slander of title, Violation of the Frivolous Claims Sanctions Act (S.C. Code Ann. § 15-36-10), tortuous interference with contractual

relations with third parties dependent upon performance by Plaintiff, and tortuous interference with contractual relations resulting from defective notice of mechanic's lien. (R. pp. 55 – 67) (Answer and Counterclaim). Appellant sought punitive damages, fees and costs, and interest on its counterclaims. (R. pp. 55 – 67) (Answer and Counterclaim).

Prior to trial, Respondent filed a Motion to Strike Appellant's Affirmative Defenses and Counterclaims on June 23, 2010. (R. pp. 438 – 448) (Plaintiff's Motion to Strike Affirmative Defenses from Defendant's Answer and Counterclaims to Amended Complaint). Appellant filed a Motion for Summary Judgment as to all causes of action asserted by Respondent on January 17, 2011. (R. pp. 449 – 452) (Defendant's Notice of Motion and Motion for Summary Judgment). Respondent countered with its own Motion for Summary Judgment on January 31, 2011 (R. pp. 453 – 460) (Plaintiff's Notice of Motion and Motion for Summary Judgment). At the hearing on these motions, Appellant agreed to withdraw certain counterclaims and Respondent's remaining motion for summary judgment was denied. (R. pp. 2 – 3) (Order of The Honorable J. Ernest Kinard, dated April 12, 2011). Appellant's motion for summary judgment was also denied. (R. pp. 2 – 3) (Order of The Honorable J. Ernest Kinard, dated April 12, 2011). The parties proceeded to trial on all of Respondent's causes of action and on Appellant's counterclaims for slander of title, tortuous interference with contractual relations with third parties dependent upon performance by Plaintiff, and tortuous interference with contractual relations resulting from defective notice of mechanic's lien.

The Honorable William H. Seals, Jr. and the jury heard three (3) full days of testimony from witnesses for both parties. At the conclusion of Respondent's case in chief and at the conclusion of trial, Judge Seals denied Appellant's motion for directed

verdict as to Respondent's causes of action of foreclosure of mechanic's lien and failure to comply with S.C. Code Ann. § 27-1-15. Respondent voluntarily withdrew its claims for breach of contract accompanied by a fraudulent act and quantum meruit. Appellant did not seek directed verdict as to Respondent's breach of contract claim. The trial court also denied Respondent's motion for directed verdict as to Appellant's slander of title cause of action. Appellant voluntarily withdrew its claims for tortuous interference with contractual relations with third parties dependent upon performance by Plaintiff, and tortuous interference with contractual relations resulting from defective notice of mechanic's lien. Respondent's 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 Appellant's claim for slander of title. After hours of deliberation, the jury returned a unanimous verdict in favor of the Respondent on all three of its causes of action and in favor of the Respondent as to Appellant's slander of title claim. The Appellant chose not to return to the courtroom and be present for the verdict reading.

Both parties requested ten (10) days to submit post trial motions. Appellant made post trial motions seeking judgment as a matter of law on the Respondent's foreclosure of mechanic's lien claim and as to Respondent's claim for failure to comply with S.C. Code Ann. § 27-1-15. (R. pp. 522 – 535) (Appellant's Motion for JNOV and/or For New Trial). Respondent filed a memorandum in opposition to Appellant's motion. (R. pp. 555 – 566) (Plaintiff's Memorandum in Opposition to Defendant's Motion for Judgment Notwithstanding the Verdict and/or For New Trial). Appellant did not make a post trial motion as to the verdict rendered on Respondent's breach of contract action. The trial court denied Appellant's post trial motion. (R. pp. 24 – 25) (Order Denying Defendant's

Motion for JNOV and/or For New Trial). Appellant filed a motion pursuant to Rule 59(e) asking the trial court to alter, amend or reconsider its order. (R. pp. 567 – 573) (Defendant's Notice of Motion Pursuant to Rule 59(e), SCRCP Regarding the Court's Order Denying Defendant's Motion for JNOV and/or for New Trial). Respondent submitted a written reply to the Court. (R. pp. 574 – 575) (Respondent's September 22, 2011 Letter to Clerk of Court). Appellant's motion was denied. (R. pp. 26 – 30) (Order Denying Defendant's Motion to Alter/Amend Court's Order Denying Defendant's Motion for JNOV and/or for New Trial).

Respondent made 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, as well as interest pursuant to S.C. Code Ann. § 34-31-20(A). (R. pp. 465 – 521) (Plaintiff's Motion for Interest, Fees and Costs). Respondent's motion was supported by an Affidavit of A. Bright Ariail, Esquire of Rosen, Rosen & Hagood, LLC and N. Keith Emge, Esquire of Carlock Copeland & Stair, LLP. (R. pp. 468 – 475) (Affidavits of A. Bright Ariail, Esquire and N. Keith Emge, Esquire). Appellant filed a memorandum in opposition to Respondent's motion. (R. pp. 536 – 545) (Defendant's Memorandum in Opposition to Plaintiff's Motion for Interest, Fees and Costs). The trial court awarded the Respondent attorneys' fees and costs in the amount of $235,030.31 pursuant to S.C. Code Ann. § 27-1-15 and the Mechanic's Lien Statute. (R. pp. 14 – 23) (Order for Award of Interest, Fees and Costs). The trial court awarded Respondent prejudgment interest in the amount of $37,413.92 pursuant to S.C. Code Ann. § 34-31-20(A), making the total judgment ordered against the Appellant $446,434.76. (R. pp. 14 – 23) (Order for Award of Interest, Fees and Costs to Plaintiff). Appellant filed a motion to reconsider the trial court's order

awarding interest, fees and costs. (R. pp. 26 – 30) (Defendant's Rule 59(e), SCRCP Motion Regarding Award of Interest, Fees and Costs to Plaintiff). In reply, Respondent filed a memorandum in opposition. (R. pp. 555 – 566) (Plaintiff's Memorandum in Opposition to Defendant's Motion for Judgment Notwithstanding Verdict and/or for New Trial). Also, Respondent filed a Second Affidavit of A. Bright Ariail in further support of its claims for fees and costs. (R. pp. 593 – 595) (A. Bright Ariail Second Affidavit). Appellant's motion was denied. (R. pp. 26 – 30) (Order Denying Defendant's Rule 59(e), SCRCP Motion Regarding Award of Interest, Fees and Costs to Plaintiff).

This appeal arises from Judge Seals' denial of Appellant's motion for directed verdict and subsequent post trial motions on Respondent's 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 Respondent. (R. pp. 598 – 600) (Appellant's Notice of Appeal).

STATEMENT OF THE FACTS

Appellant approached Respondent in the fall of 2006 about a new construction project Appellant was interested in having the Respondent provide architectural and engineering work for. The project was to be Respondent's new plantation residence ("Project"). (R. pp. 206 – 209) (Trial Transcript Vol. 1 pg. 371 ln. 3 – pg. 374 ln. 19) (R. pp. 341 – 345) (Trial Exhibit 6) After communications between Appellant and Respondent, Respondent attempted to write a scope of work for the project based upon information provided by Appellant. (R. pp. 400 – 402) (Trial Exhibit 20). Respondent outlined the scope of work for the Project and set forth three assumptions as to critical details about the Project. (R. pp. 400 – 402) (Trial Exhibit 20). First, the project was

going to be located in McIntosh County, Georgia on Appellant's plantation where Respondent had previously done some work. (R. pp. 211 – 212) (Trial Transcript Vol. 1 pg. 376 ln. 22 – pg. 377 ln. 9). Second, Appellant was going to hire a reputable contractor, JT Turner, to serve as the general contractor for the project. (R. pp. 212 – 213) (Trial Transcript Vol. 1 pg. 377 ln. 10 – pg. 378 ln. 7). Third, Appellant was going to hire a civil engineer for site work on the project. (R. pp. 213 – 214) (Trial Transcript Vol. 1 pg. 378 ln. 8 – pg. 379 ln. 4). The assumptions impact the price Respondent conveyed to Appellant for the scope of design and engineering work on the Project. (R. pp. 210 – 214) (Trial Transcript Vol. 1 pg. 375 ln 11 – pg. 379 ln. 14). Respondent received no indication from Appellant that the scope outlined by Respondent had any inaccuracies. (R. p. 214) (Trial Transcript Vol. 1 pg. 379 ln. 5-14). In follow up to Respondent's initial project scope outline, Respondent prepared and submitted a proposal to Appellant for the architectural and engineering work for the Project. (R. pp. 346 – 353) (Trial Exhibit 7).

Respondent's November 20, 2006 proposal letter to Appellant forms the Agreement at issue between the parties[1]. (R. pp. 223 – 224) (Trial Transcript Vol. 1 pg. 398 ln 22 – pg. 399 ln 2) (R. pp. 346 – 353) (Trial Exhibit 7). The Agreement provides that the architectural and engineering services would be provided by Respondent for a lump sum fee with restrictions and limitations noted. (R. pp. 346 – 353) (Trial Exhibit 7). Paragraphs 1-13 of the Agreement set forth the obligations of the Appellant, including contracting directly with a civil engineering firm which ultimately was not done. (R. pp. 346 – 353) (Trial Exhibit 7). Pursuant to the terms of the Agreement, the parties agreed

[1] The parties do not dispute that a contract exists and agree that (R. pp. 400 – 402) Trial Exhibit 20 represents the Agreement.

that once construction documents began, any changes would be performed on an hourly basis. (R. pp. 346 – 353) (Trial Exhibit 7). Further, requested construction phase services by Respondent or staff would be billed on an hourly basis. (R. pp. 346 – 353) (Trial Exhibit 7). Respondent's expert, Myles Glick, testified that the contract entered between Respondent and Appellant provides for a fixed fee with additional services to be compensated at an hourly rate. (R. pp. 281 – 282) (Trial Transcript Vol. 2 pg. 561 ln. 22 – pg. 562 ln. 14). Mr. Glick testified that the fee was derived on a per sheet basis for the number of drawings to be produced to provide a basic set of drawings. He also testified that any services provided by Respondent during construction were to be done on an hourly basis. (R. pp. 279 – 280) (Trial Transcript Vol. 2 pg. 559 ln. 2 – pg. 560 ln. 17).

After the Agreement was entered into between the parties, the three critical project detail assumptions made by Respondent turned out to be different than what Respondent had anticipated based upon the information provided by Appellant. First, the location of the project was changed from McIntosh County, Georgia to Colleton County, South Carolina. (R. pp. 226 – 229) (Trial Transcript Vol. 1 pg. 404 ln. 8 – pg. 407 ln. 24). The significance of this change to the Project is Colleton County's requirement that a licensed structural engineer must prepare and stamp structural drawings for any structural work performed. (R. pp. 138 & 405 – 406) (Trial Transcript Vol. 1 pg. 210 ln. 3-17 & pg. 405 ln. 22 – pg. 406 ln. 10). Ordinarily, architects or even home builders can prepare structural drawings on residences. (R. p. 210) (Trial Transcript Vol. 1 pg. 210 ln. 3-17). As a result, Respondent was required to hire a structural engineer to produce structural drawings for every building on the Project. (R. p. 210) (Trial Transcript Vol. 1 pg. 210 ln. 12-17). Respondent invoiced Appellant for the structural drawings, which

were not part of the original Agreement, and has not been paid for this labor. (R. pp. 238 – 240) (Trial Transcript Vol. 1 pg. 432 ln. 23 – 434 ln. 20) The per sheet formula used by Respondent to charge for the structural drawings was based upon the same formula Respondent used to delete sheets from the drawings when Appellant decided he did not want to construct a boathouse. (R. pp. 224 – 225 & p. 239) (Trial Transcript Vol. 1 pg. 399 ln. 3 – pg. 400 ln. 13 & pg. 433 ln. 19-23).

Second, Appellant did not hire a civil engineer for the project. (R. pp. 221 – 222) (Trial Transcript Vol. 1 pg. 392 ln. 13 – pg. 393 ln. 6). The lack of a civil engineer creates additional costs for site grading, well, piping, septic tanks, and drainage fields. (R. pp. 213 – 220) (Trial Transcript Vol. 1 pg. 378 ln. 8 – pg. 385 ln. 1). Third, Appellant fired the general contractor and served as his own general contractor during the course of the project. (R. p. 236) (Trial Transcript Vol. 1 pg. 430 ln. 10-19). The lack of lack of a general contractor made Respondent's involvement in the project expand from what was originally proposed. For example, Respondent was asked to assist in the recommendation of independent contractors to be engaged by Appellant after Appellant terminated the general contractor. (R. pp. 235 – 236) (Trial Transcript Vol. 1 pg. 429 ln. 20 – pg. 430 ln. 5). Mr. Glick testified the minute you don't have a general contractor, the architect's work goes up exponentially. It goes through the roof in terms of time allocated. (R. pp. 283 – 284) (Trial Transcript Vol. 2 pg. 564 ln. 17 – pg. 565 ln. 4).

In addition to the critical changes in the Project details, Appellant requested numerous and complex changes during the course of the Project. Andy Bozeman, an employee of Respondent, spent hours testifying as to all the changes made to the drawings after the initial design had been prepared by Respondent. (R. p. 138) (Trial

Transcript Vol. 1 pg. 210 ln. 18 – pg. 267 ln. 19) (R. pp. 392 – 397) (Trial Exhibits 13, 14, 15, 16, 17 & 18). Pursuant to Paragraph 19 of the Agreement, "once we begin construction documents, any changes in room layout, sizes, window locations, door locations, and exterior elevation design will be performed on an hourly basis." (R. pp. 346 – 353) (Trial Exhibit 7) Respondent has invoiced Appellant for the labor associated with these changes and has not been paid. (R. pp. 354 – 363) (Trial Exhibit 8).

While the Respondent admits that it did not notify Appellant every time an additional service was being billed to the contract, Appellant's expert admitted that the contract between the parties does not set forth a notice requirement when additional services are being billed. (R. pp. 312 – 313) (Trial Transcript Vol. 2 pg. 725 ln. 13 – pg. 726 ln. 24). Each additional service requested by Appellant was billed on an hourly basis pursuant to Paragraphs 18 or 19 of the Agreement. At the end of the project, Respondent billed for the remaining contract balance, which included the construction administration services, additional design services, and reimbursable expenses for the project, but has not been paid. (R. pp. 354 – 365 & p. 278) (Trial Exhibits 8, 8(a) and 8(b); Trial Transcript Vol. 2 pg. 542 ln. 5-23). Appellant admitted at trial that he owed Respondent 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. (R. p. 110 & pp. 114 – 115) (Trial Transcript Vol. 1 pg. 130 ln. 8-12 & Vol. 1 pg. 138 ln. 1 – pg. 139 ln. 3). Appellant admitted at trial that he asked Respondent to design a garden wall, but has not paid them for it. (R. pp. 111 – 113) (Trial Transcript Vol. 1 pg. 135 ln. 23 – pg. 137 ln. 6). Further, Appellant admitted at trial that he agreed to pay Respondent for a two hour construction meeting, but has not paid them for it. (R. p. 113) (Trial Transcript

Vol. 1. pg. 137 ln 7 – 25). Despite his own admissions, Appellant has refused to pay Respondent any additional money since his initial payment in February 2007.

Appellant testified that he terminated the Respondent in December 2008. (R. p. 118) (Trial Transcript Vol. 1 pg. 152 ln. 16-18). According to Mr. Spriggs, a termination was never communicated to Respondent. (R. pp. 265 – 266) (Trial Transcript Vol. 1. pg. 465 ln. 20 – pg. 466 ln. 5). As a result, Respondent continued to perform construction administration services under the Agreement with Appellant. For example, Respondent took a call from Appellant's plumbing contractor on January 13, 2009 and Respondent worked through the details for approving a substitution of the plumbing pipe on the Project. (R. pp. 198 – 200) (Trial Transcript Vol. 1 pg. 288 ln. 23 – pg. 290 ln. 11) (R. pp. 398 – 399 & pp. 403 – 436) (Trial Exhibits 19 & 21). Further, in May 2009, Respondent provided labor to assist in the preparation of an Appraisal that was requested by Appellant. (R. p. 196) (Trial Transcript Vol. 1 pg. 286 ln. 11-25). Appellant admitted that Respondent was authorized to perform this type of labor on the Project. (R. p. 132) (Trial Transcript Vol. 1 pg. 196 ln 21-25). Appellant further admitted that he never communicated to Respondent not to respond to calls from contractors in the field. (R. pp. 131 – 134 & pp. 303 – 309) (Trial Transcript Vol. 1 pg. 195 ln. 17 – pg. 198 ln. 13 & Vol. 2 pg. 699 ln. 6 – pg. 705 ln. 7) Respondent provided labor on the Project through May 2009 not knowing it had allegedly been terminated. Respondent has invoiced Appellant for this labor pursuant to the Agreement and has not been paid. (R. pp. 354 – 365) (Trial Exhibits 8, 8(a) & 8(b)).

Despite Appellant's claim that Respondent was terminated from the project, the drawings prepared by Respondent were the sole drawings used by Appellant to obtain

permits for construction. (R. pp. 129 – 130) (Trial Transcript Vol. 1 pg. 191 ln. 17 – pg. 192 ln. 8). Respondent served as the only design professional on the Project, and Appellant used the drawings solely prepared by Respondent to construct all the buildings on his Colleton County plantation. (R. p. 129 & p. 137) (Trial Transcript Vol. 1 pg. 191 ln. 17-23 & pg. 202 ln. 22-25). Appellant had a complete set of design drawings when he allegedly terminated Respondent from the project. As of the date of the alleged termination, all buildings on the Project had been built with the exception of the 500 sq. ft. grotto. (R. pp. 118 – 119) (Trial Transcript Vol. 1 pg. 152 ln. 6 – pg. 153 ln. 4)

In February 2009, Respondent submitted invoices to the Appellant for payment in accordance with the terms of the Agreement. (R. pp. 354 – 363) (Trial Exhibit 8). Respondent testified what labor was performed related to each invoice and if the invoice related to additional labor or expenses, why it was considered additional under the Agreement. (R. pp. 232 – 258) (Trial Transcript Vol. 1 pg. 426 ln. 4 – pg. 452 ln. 15). Mr. Spriggs testified that when he sent the invoices for payment in February 2009, he was unaware of Respondent having been allegedly terminated. (R. p. 258) (Trial Transcript Vol. 1 pg. 452 ln. 16 – 19). Respondent sent additional invoices to Appellant in May 2009 and in November 2009 capturing all construction administration time for the close out of the project. (R. pp. 259 – 263) (Trial Transcript Vol. 1 pg. 453 ln. 2 – pg. 457 ln. 21). Appellant testified that upon receipt of the invoices in February, he called Respondent and disputed the amount owed. (R. p. 299) (Trial Transcript Vol. 2 pg. 654 ln. 7-9). Appellant asked Respondent to send a corrected invoice for the amount Appellant agreed he owed and he would pay it. (R. p. 121 & p. 122) (Trial Transcript Vol. 1 pg. 157 ln. 15-16 & pg. 162 ln. 8-18) The problem was Appellant's opinion of

what was left to be paid was not the same as Respondent's. Appellant admitted on more than one occasion at trial that he owed Respondent 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. (R. p. 110 & pp. 114 – 115) (Trial Transcript Vol. 1 pg. 130 ln. 8-12 & Vol. 1 pg. 138 ln. 1 – pg. 139 ln. 3). Despite knowing he owes Respondent money under the terms of the Agreement, Appellant continually refused to pay Respondent anything unless a corrected invoice was submitted. Ironically, Appellant paid Respondent the first half of the contract balance without an invoice having been submitted. (R. pp. 123 – 124) (Trial Transcript Vol. 1 pg. 163 ln. 20 – pg. 164 ln. 21).

As a result of Appellant's refusal to pay Respondent in accordance with the terms of the Agreement, Respondent placed a mechanic's lien on Appellant's property. (R. pp. 376 – 386) (Trial Exhibit 10). Appellant continued to refuse to pay Respondent. Instead, Appellant chose to post a cash bond to remove Respondent's lien from the property. (R. pp. 387 – 391) (Trial Exhibit 11). Respondent filed a lawsuit to foreclose on the mechanic's lien and asserted additional causes of action for breach of contract and quantum meruit. (R. pp. 31 – 54) (Complaint). All of Respondent's claims related to the debt Appellant owed Respondent for labor performed pursuant to the Agreement. On March 15, 2010, Respondent, by and through its counsel, made a demand on Appellant pursuant to S.C. Code Ann. § 27-1-15 asking Appellant to make a reasonable and fair investigation of Respondent's claim and paying the portion of Respondent's claim Appellant deemed valid. (R. pp. 366 – 375) (Trial Exhibit 9). Despite admittedly knowing he owed Respondent money, Appellant still refused to make any payment to Respondent, later using the fact that the parties were involved in a lawsuit as his

justification for not making payment to Respondent. Respondent 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. (R. pp. 68 – 93) (Amended Complaint). The Respondent's claims for the debt owed proceeded to a trial on the merits.

ARGUMENT

I. LABOR PERFORMED BY RESPONDENT IS A LIENABLE SERVICE PURSUANT TO SOUTH CAROLINA'S MECHANIC'S LIEN STATUTE AND FACTUAL ISSUE OF WHETHER RESPONDENT'S LIEN IS VALID AND TIMELY WAS PROPERLY SUBMITTED TO THE JURY

When reviewing the denial of a motion for directed verdict or judgment notwithstanding the verdict, this Court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party." Wintersteen v. Food Lion, Inc., 344 S.C. 32, 35, 542 S.E.2d 728, 729 (2001) (citing Steinke v. South Carolina Dep't of Labor, 336 S.C. 373, 520 S.E.2d 142 (1999)). "If the evidence as a whole is susceptible of only one reasonable inference, no jury issue is created and a directed verdict motion is properly granted." Wintersteen, at 35, 542 S.E.2d at 729 (citing Bloom v. Ravoira, 339 S.C. 417, 529 S.E.2d 710 (2000)).

"In deciding whether to grant or deny a directed verdict motion, the trial court is concerned only with the existence or non-existence of evidence." Sims v. Giles, 343 S.C. 708, 714, 541 S.E.2d 857, 861 (Ct.App.2001). The trial court can only be reversed by this Court when there is no evidence to support the ruling below. Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334 S.C. 469, 514 S.E.2d 126 (1999). If the evidence as a whole is susceptible of more than one reasonable inference, the case should

be submitted to the jury. Gamble v. International Paper Realty Corp. of S.C., 323 S.C. 367, 474 S.E.2d 438 (1996); Yadkin Brick Co. v. Materials Recovery Co., 339 S.C. 640, 529 S.E.2d 764 (Ct.App.2000); see also Weir v. Citicorp Nat'l Servs., Inc., 312 S.C. 511, 435 S.E.2d 864 (1993) (illustrating an appellate court must apply the same standard when reviewing the trial judge's decision on such motions). "When considering directed verdict and JNOV motions, neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or evidence." Boddie-Noell Properties, Inc. v. 42 Magnolia Partnership, 344 S.C. 474, 482, 544 S.E.2d 279, 283 (Ct.App.2000), cert. granted. A factual finding of the jury will not be disturbed unless there is no evidence which reasonably supports the findings of the jury." Felder v. K-Mart Corp., 297 S.C. 446, 448, 377 S.E.2d 332, 333 (1989); see also Steinke v. S.C. Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999).

A. Construction administration services performed by Respondent are within South Carolina's Mechanic's Lien Statute's meaning of labor.

Appellant argues that the architectural services performed by Respondent, which Appellant argues make Respondent's mechanic's lien timely, are not the type of services for which a mechanic's lien is allowed. Appellant contends that work performed on January 13, 2009 by Respondent is not within the statutory definition of "labor" and, as a result, Respondent's lien should be deemed untimely. Additional services were provided by Respondent pursuant to the terms of the Agreement and invoiced in May 2009[2]. (Trial Exhibit 8(a)). Until the filing of his initial appeal brief, Appellant, has not argued that the services performed in May 2009 by Respondent are not the type of services for which a

[2] Respondent provided design sketches for an appraisal of Appellant's property in May 2009. Andy Bozeman testified he was contacted by an appraiser for the Appellant and asked to provide floor plan sketches and room name information for preparation of the appraisal of Appellant's home. (R. p. 196) (Trial Transcript Vol 1 pg. 286, ln 11-25).

lien is allowed. Appellant's legal arguments in regards to the May 2009 invoices not being "labor" under the statute were not properly preserved for appeal and should be stricken from Appellant's brief. An issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 598 S.E.2d 712 (2004). Respondent's work in May 2009 renewed its lien rights against Appellant's property. However, regardless of the labor performed by Respondent in May 2009, Respondent's mechanic's lien is timely.

Appellant's argument as to the January 2009 services provided by Respondent is that the South Carolina's Mechanic's Lien Statute does not provide for lien rights associated with the performance of construction administration services. Appellant insinuates that because the statute defines labor to include the preparation of plans, specifications, and design drawings that it somehow excludes contract administration services from the type of labor for which a lien is allowed. The statute provides as follows:

> "As used in this section, **labor performed or furnished in the erection**, alteration, or repair of any building or structure upon any real estate **includes** the preparation of plans, specifications, and design drawings **and the work of making the real estate suitable as a site for the building or structure.** The work is **considered to include, but not be limited to**, the grading, bulldozing, leveling, excavating, and filling of land (including the furnishing of fill soil), the grading and paving of curbs and sidewalks and all asphalt paving, the construction of ditches and other drainage facilities, and the laying of pipes and conduits for water, gas, electric, sewage, and drainage purposes, and the disposal of any construction and demolition debris, as defined in Section 44-96-40(6), including final disposal by a construction and demolition landfill. *Any private security guard services provided by any person at the site of the building or structure during its erection, alteration, or repair is considered to be labor performed or furnished within the meaning of*

this section."

See S.C. Code Ann. 29-5-10 (emphasis added).

Appellant's argument is disingenuous and not supported by South Carolina law. Inclusion language in this section is clearly not exclusive; rather, it is meant to illustrate. How could security guard services during construction be services for which a lien is created but not architectural services overseeing and supporting proper construction of a residence? Construction administration supports erection, alteration, or repair of any building based upon plans and specifications, which are specifically identified as labor giving right to a lien. See S.C. Code Ann. 29-5-10. Construction administration labor is instrumental in delivering an appropriate residence or structure, which the statute includes in its definition of "labor". Id. Construction administration labor actually supports the erection of a building more so than the preparation of plans, specifications and design drawings related to the project.

In a 1918 decision, the South Carolina Supreme Court held that an architect who furnished the plans and specifications and supervised the construction of a building had furnished labor within the meaning of South Carolina's Mechanic's Lien Statute. Williamson v. Hotel Melrose, 110 S.C. 1, 96 S.E.2d 407 (1918). In so holding, the Court ruled that "labor furnished" was not limited to manual labor, but also encompassed mental labor. Id. Respondent is unaware of a single South Carolina case where construction administration services were excluded as the type of labor for which a lien can be filed under South Carolina's Mechanic's Lien Statute. The Appellant attempts to assert that Williamson is not precedent authority, but provides the court with no alternate opinion to the contrary.

Appellant cites Clo-Car Trucking Co., Inc. v. Clifflure Estates of S.C., 282 S.C. 573, 320 S.E.2d 51 (Ct. App. 1984) as legal precedent regarding the definition of "labor" under the South Carolina Mechanic's Lien Statute. In Clo-Car, the court found that the work performed by a clearing and grading subcontractor who was clearing land for the construction of roads did not constitute "structure" within the meaning of the statute. Id. at. 577. The court in Clo-Car dealt with the definition of "structure" and "building", not with the definition of "labor" within the mechanic's lien statute. Our case is distinguishable significantly from Clo-Car. In this case, the project is the physical construction of various buildings and/or structures on a plantation, not the clearing of land for the construction of roads. Respondent through the preparation of its design plans and specifications and its construction administration services during construction played an integral part in the erection of Appellant's main house, garages, stable, potting shed, grotto and conservatory. (R. pp. 339 – 340) (Trial Exhibits 2 and 3). The labor provided by Respondent on January 13, 1009 – January 15, 2009 includes design development services during the construction phase of the project to verify and discuss details in support of construction. (R. p. 364 and R. pp. 403 – 436) (Trial Exhibits 8(a) and 21). Specifically, labor on January 13, 2009 dealt with Respondent addressing plumbing subcontractor's request to substitute the size of plumbing lines used on the project. (R. pp. 199 – 200) (Trial Transcript Vol 1 pg 289 ln 1 – Vol 1 pg 290 ln 11) (R. pp. 398 – 399) (Trial Exhibit 19).

Other jurisdictions provide for contract administration services to support a lien and specifically exclude the preparation of plans, specifications and design drawings from the labor for which lien rights arise. In Pennsylvania, an architect has no lien for

merely drawing plans and specifications for the building, but does have rights to a lien for providing construction administration services that furthers the plans and specifications prepared. See Lee v. Du-Rite Products, Co., Inc., 366 Pa. 548, 79 A.2d 218 (1951). South Carolina follows the rule that mechanic's lien statutes, being remedial, are to be given liberal construction and the law is to be construed in a most liberal and comprehensive manner in favor of lien claimants. Clo Car, 282 S.C. at 575. The court can apply the rule of liberal construction to create a lien where one is intended by the Legislature. Id. at 576. To infer that South Carolina's Legislature would allow a lien for preparation of plans, specifications and design drawings but not the services that further and support the design is contrary to legislative intent and without merit.

B. Appellant's argument that the court should have made a determination as to whether contract administration by a design professional is included in the definition of "labor" under 29-5-90 is moot.

Defendant argues that the jury was asked improperly to interpret whether contract administration by a design professional is included in the definition of "labor" under S.C. Code Ann. § 29-5-90. The jury was properly charged as to what the law in South Carolina is as it relates to filing and enforcing a mechanic's lien. (R. pp. 321 – 328) (Trial Transcript Vol. 2 pg 826 ln 1 – pg 833 ln 18). Both the Appellant and Respondent were in agreement as to the charge given to the jury on the mechanic's lien law. (R. pp. 329 – 331) (Trial Transcript Vol. 2 pg. 844 ln 20 – pg 846 ln 8). The jury was asked to determine whether Respondent's lien was valid and timely. The jury unanimously determined that based upon the evidence presented, Respondent's lien was valid.

Appellant argues that it was incumbent upon the court to rule as to whether or not the labor at issue could legally serve as the basis for the filing of a mechanic's lien and

submitting the question to a jury is reversible error. (Appellant's Final Brief). The trial court did in fact rule as to whether or not the labor at issue could legally serve as the basis for filing of a mechanic's lien as is indicated in its denial of Appellants Motion for JNOV and/or New Trial. (R. pp. 4 – 13) (Order Denying Defendant's Motion for JNOV and/or For New Trial). Specifically, the Court ruled post trial that it is implausible that construction administration services would be excluded from the description of "labor performed or furnished in the erection, alteration, or repair of any building." (R. pp. 4 – 13) (Order Denying Defendant's Motion for JNOV and/or For New Trial). Further, the trial court ruled that construction administration work is clearly instrumental in delivering an appropriate residence or structure. (R. pp. 4 – 13) (Order Denying Defendant's Motion for JNOV and/or For New Trial).

The Appellant's argument essentially is that the trial court should have issued an order from the bench that the labor performed by Respondent was or was not considered labor based upon a legal interpretation of the statute. Appellant contends that it is reversible error for the judge to have submitted the determination of the lien's validity to the jury. If an error of law is found, the error should not be construed as reversible error. A harmless error analysis is contextual and specific to the circumstances of the case: "No definite rule of law governs [a finding of harmless error]; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial." State v. Byers, 392 S.C. 438, 447-48, 710 S.E.2d 55, 60 (2011) citing State v. Reeves, 301 S.C. 191, 193–94, 391 S.E.2d 241, 243 (1990); see also Judy v. Judy, 384 S.C. 634, 646, 682 S.E.2d 836, 842 (Ct. App. 2009) ("Generally, appellate courts will not set aside

judgments due to insubstantial errors not affecting the result).

In this case, the trial court has correctly stated that the labor performed by Spriggs falls within the definition of labor under the mechanic's lien statute. (R. pp. 4 – 13) (Order Denying Defendant's Motion for JNOV and/or For New Trial). The trial court's ruling makes Appellant's argument moot. The fact that the trial court did not issue this specific order prior to Respondent's cause of action being submitted to the jury, if in error, is an insubstantial error that does not affect the result of the case. The trial court's denial of Appellant's motion for directed verdict as to Respondent's cause of action for foreclosure of mechanic's lien indicates that the trial court determined that Respondent's labor created a right to lien the property. Based upon the evidence presented at trial, the jury determined that Respondent had provided agreed upon services to Appellant which were due and not paid. (R. p. 337) (Verdict). The determination as to the lien's validity based upon the factual dispute of its timeliness is a proper issue for the jury to decide. Therefore, submission of Respondent's cause of action for foreclosure of a mechanic's lien was proper.

C. Evidence presented at trial created a factual issue as to the timeliness of Respondent's mechanic's lien.

Appellant argues that no evidence exists that Respondent performed work which entitled it to a lien within ninety days of filing the lien that is the subject of this action. Respondent presented evidence by way of invoices, timesheets, emails and testimony that Respondent performed work on this project up to January 13, 2009 and then again in May 2009 for 3.5 hours. (R. pp. 196 – 200) (Trial Transcript Vol. 1. pg 286 ln 11 – pg 290 ln 11) (R. p. 364; pp. 398 – 399; and pp. 403 – 436) (Trial Exhibits 8(a), 19, and 21).

Appellant testified that the Respondent was authorized to respond to questions from the field from various contractors and he admitted that he never told Respondent to stop responding to these questions prior to the labor performed on January 13, 2009. (R. pp. 302 – 303) (Trial Transcript Vol. 2 pg. 698 ln 24 – pg. 699 ln 18). Respondent's mechanic's lien was filed on April 13, 2009, which is within ninety (90) days of January 13, 2009 and prior to the work performed in May 2009. (R. pp. 376 – 386) (Trial Exhibit 10). Further, Appellant testified that he asked for the appraisal which Respondent submitted details for in May 2009. (R. pp. 135 – 136) (Trial Transcript Vol. 1 pg. 200 ln. 2 – pg. 201 ln. 25). Mr. Spriggs testified that Respondent's final work effort was after the first month of 2009. (R. pp. 230 – 232) (Trial Transcript Vol. 1 pg 424 ln 17 – pg. 426 ln 3).

Respondent's foreclosure of mechanic's lien claim in this matter arises out of statutory law. Because Respondent provided extensive labor and services connected with Appellant's construction project and Appellant refused to pay for these services, Respondent is entitled to a claim under the mechanic's lien statute. In accordance with S.C. Code Ann. § 29-5-10, Respondent properly filed a mechanic's lien for services furnished in the erection, alteration, and repair of Appellant's building within ninety days of the last work performed. See Butler Contracting, Inc. v. Court Street, LLC, 369 S.C. 121, 131, 631 S.E.2d 252, 257 (2006) ("The deadline to serve and record a mechanic's lien begins running from the date the last material was furnished or work performed, ***regardless of whether such material or work is insignificant and regardless of whether the final work is delayed***, provided the reason for the delay is not to improperly extend the period for perfecting the lien.") (emphasis added).

Appellant further argues that the labor performed by Respondent in January 2009 is not part of the invoices specified in the Respondent's mechanic's lien. Under S.C. Code Ann. § 29-5-100, "no inaccuracy in such statement relating to the property to be covered by the lien, if the property can be reasonably recognized, or ***in stating the amount due for labor*** or materials shall invalidate the proceedings, unless it appear that the person filing the certificate has willfully and knowingly claimed more than is his due." Respondent's mistake in the amount stated for labor due does not invalidate the proceedings. Mr. Spriggs testified the invoice submitted in November for January's work was part of picking up the construction phase services after the first of the year. (R. p. 261) (Trial Transcript Vol. 1 pg 455 ln. 8-21). The only requirement of the law is that the statement of account be filed within ninety (90) days after person seeking a lien ceases to labor on or furnish labor or materials for such building or structure. See Wood v. Hardy, 235 S.C. 131, 110 S.E.2d 157 (1959). Regardless of when the invoices were submitted, the Respondent's timesheets, emails and testimony of both Andy Bozeman and Ken Spriggs showed evidence that Respondent labored on the project within ninety (90) days of the date in which the mechanic's lien was filed on Appellant's property. (R. pp. 403 – 436) (Trial Exhibit 21); (R. pp. 199 – 200) (Trial Transcript Vol 1 pg 289 ln 1 – Vol 1 pg 290 ln 11). Mr. Spriggs testified that while the dollar value of the labor from January 2009 was not included in the lien amount, the time was expended and documented. (R. p. 270) (Trial Transcript Vol. 1 pg. 492 ln. 11-18).

Evidence was presented before the Court that Spriggs properly followed the statutory requirements and Defendant has failed to pay for labor and services provided by Plaintiff within the scope of the mechanic's lien statute, Respondent's cause of action

under S.C. Code of Laws § 29-5-10, *et al.* against Appellant, as well as Appellant's counterclaim for slander of title were properly submitted to the jury and unanimous verdict was returned in favor of Respondent.

II. THE FACTUAL ISSUE OF WHETHER A REASONABLE INVESTIGATION AND UNDISPUTED PAYMENT WAS MADE PURSUANT TO S.C. CODE ANN. § 27-1-15 WAS PROPERLY SUBMITTED TO THE JURY AND UNANIMOUS VERDICT RETURNED IN FAVOR OF THE RESPONDENT

Appellant argues that it was undisputed that an investigation had taken place into the Respondent's claim and the Appellant did not unreasonably refuse to pay the claim upon demand. Clearly, a factual issue existed as to whether a fair and reasonable investigation was made by Appellant in compliance with S.C. Code Ann. § 27-1-15. Appellant admitted he received the March 15, 2010 demand letter from Respondent. (R. p. 120) (Trial Transcript Vol. 1 pg. 155 ln. 14-23). It is undisputed that no money has been paid to the Respondent since the March 15, 2010 demand was received by Appellant.

Under S.C. Code Ann. § 27-1-15, 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 valid***, within forty-five days from the date of mailing the demand. If a 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. See S.C. Code Ann. § 27-1-15. Appellant admitted at trial that he owed Respondent 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. (R. p. 110 & R. p. 114 – 115) (Trial

Transcript Vol. 1 pg. 130 ln. 8-12 & Vol. 1 pg. 138 ln. 1 – pg. 139 ln. 3). Appellant admitted at trial that he asked Respondent to design a garden wall, but has not paid them for it. (R. pp. 111 – 113) (Trial Transcript Vol. 1 pg. 135 ln. 23 – pg. 137 ln. 6). Further, Appellant admitted at trial that he agreed to pay Respondent for a two hour construction meeting, but has not paid them for it. (R. p. 113) (Trial Transcript Vol. 1. pg. 137 ln 7 – 25). Appellant's continual explanation for why he did not pay Respondent was that he had paid his money by paying it into escrow with the Court. Yet, Appellant wrote Respondent a letter in June of 2009, after he had paid money into the Court, indicating he would pay 50% of the $151,000 upon receipt of a corrected invoice. (R. p. 437) (Trial Defendant's Exhibit 3).

Appellant provides no legal precedent that payment into the Court constitutes compliance with S.C. Code Ann § 27-1-15. The issue as to whether a reasonable and fair investigation of Respondent's claim has been made and whether a valid portion of the claim was paid in a timely manner is a question of act. See Hardaway Concrete Company, Inc. v. Hall Contracting Corporation, 374 S.C. 216, 647 S.E.2d 488 (Ct. App. 2007)(citing Moore Elec. Supply, Inc. v. Ward, 316 S.C. 367, 450 S.E.2d 96 (Ct. App. 1994). After three full days of listening to the evidence in this case, the jury correctly and unanimously determined that Appellant had not made a reasonable and fair investigation of the claim and paid Respondent the proper portion within forty-five days of the date of the demand. (R. p. 337) (Verdict).

Further, Appellant argues that discovery in the lawsuit amounts to a fair and reasonable investigation into Respondent's claims under the statute. Appellant relies upon Carolina Steel Corporation v. Palmetto Bridge Construction, 444 F.Supp.2d 577

(D.S.C. 2006) stating that the court found that because an investigation had occurred and a dispute existed, no attorneys fees pursuant to the statute would be awarded. In Carolina Steel, the Defendant made an investigation of the claims of the Plaintiff prior to Plaintiff's demand under the statute and paid what was considered valid. This case is distinguishable from Carolina Steel in that Appellant never paid Respondent either prior to Respondent's demand or after Respondent's demand despite admitting he owed Respondent a portion of the original contract amount and additional services for a construction meeting and design of garden wall.

Appellant argues that submission of Respondent's failure to comply with S.C. Code Ann. § 27-1-15 cause of action to the jury is reversible error for the following three reasons:

1. Respondent failed to present any evidence that Appellant did not perform a fair and reasonable investigation;
2. Because claims were pending between the parties at the time Respondent's demand was made, there is no way to conclude what would have been a "valid" amount to be paid to Respondent; and
3. Because Appellant had paid an amount which exceeded the entire amount of Respondent's claim into the court, his failure to make a payment at the time the statutory demand was made cannot be said to be reasonable.

None of the three reasons set forth by Appellant are supported by legal precedent. Further, all three reasons set forth by Appellant create an issue of fact which is to be determined by a jury. The statute requires payment of whatever portion of the claim is

deemed proper to be paid within forty-five days. Appellant admits he never made payment to Respondent after receipt of the demand despite admitting he owed Respondent a portion of the remaining contract balance as well as for attendance at a construction meeting and design of garden wall. These admissions, along with Appellant's claim that ongoing litigation and money deposited with the court made it impossible for him to make payment to the Respondent presents an underlying question of fact as to whether Appellant made a reasonable and fair investigation of Respondent's claim. The jury made a unanimous decision based upon the evidence presented that Appellant had not made a reasonable and fair investigation and rendered a verdict in favor of Respondent. (R. p. 337) (Verdict). The trial court property submitted Respondent's cause of action for failure to comply with S.C. Code Ann. § 27-1-15 to the jury; therefore, an award of attorney's fees and interest against Appellant in the trial court's discretion is proper.

III. APPELLANT HAS NOT PRESERVED ANY ISSUES FOR APPEAL ON THE VERDICTED RENDERED AS TO RESPONDENT'S BREACH OF CONTRACT CLAIM.

The evidence submitted at trial supports Respondent's claim for breach of contract and a unanimous verdict in the amount of $173,990.53 was returned by the jury. (R. p. 337) (Verdict). The trial court then assessed prejudgment interest in the amount of $37,413.92 to the verdict based upon Respondent's prayer for pre-judgment interest on the amount claimed due under all causes of action. (R. pp. 14 – 23) (Order for Award of Interest, Fees and Costs to Plaintiff). Thus, the total verdict as to Respondent's breach of contract action is $211,404.45. Appellant has not raised any legal issues in its post-trial motions or on appeal to challenge the verdict as to Respondent's breach of contract

theory.

An issue cannot be raised for the first time on appeal, but must have been raised to the trial court and ruled upon by the trial judge to be preserved for appellate review. Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 598 S.E.2d 712 (2004); United Student Aid Funds, Inc. v. South Carolina Dep't of Health and Envt'l Control, 356 S.C. 266, 588 S.E.2d 599 (2003); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000); Austin v. Specialty Transp. Services, Inc., 358 S.C. 298, 594 S.E.2d 867 (Ct.App.2004); see also Ellie, Inc. v. Miccichi, 358 S.C. 78, 594 S.E.2d 485 (Ct.App.2004) (noting it is axiomatic than an issue cannot be raised for the first time on appeal). An issue is not preserved where the trial court does not explicitly rule on an argument and the appellant does not make a Rule 59(e) motion to alter or amend the judgment. Hawkins v. Mullins, 359 S.C. 497, 597 S.E.2d 897 (Ct.App.2004).

Appellant has asked the Appellate Court to reverse and remand the entire matter, but provides no legal support as to why the breach of contract action shall be reversed. No legal basis exists to challenge the jury's verdict as to Respondent's breach of contract cause of action and Appellant has taken no action to do so. The parties do not dispute that a contract existed and the issue as to whether the contract had been breached was a factual issue for the jury. Regardless of the Appellate Court's rulings as to the mechanic's lien, S.C. Code Ann. § 27-1-15, and the reasonableness of fees and cost issues, Respondent's verdict as to its breach of contract and the court's subsequent award of pre-judgment interest on that amount should not be altered.

IV. THE TRIAL COURT, IN ITS DISCRETION, PROPERLY AWARDED ATTORNEYS' FEES AND COSTS TO THE RESPONDENT AS THE PREVAILING PARTY UNDER THE SOUTH CAROLINA MECHANIC'S LIEN STATUTE AND S.C. CODE ANN. § 27-1-15.

The Respondent was awarded attorneys' fees and costs in the amount of $235,030.31 in the sound discretion of the Court. (R. pp. 14 – 23) (Order for Award of Interest, Fees and Costs to Plaintiff). The awarded fees and costs are based upon Respondent being the prevailing party by the unanimous verdict in its favor on its foreclosure of mechanic's lien cause of action and the unanimous verdict in its favor on its failure to comply with S.C. Code Ann. § 27-1-15 cause of action. (R. pp. 14 – 23) (Order Awarding Interest, Fees and Costs). The determination as to the amount of attorney's fees that should be awarded is addressed to the sound discretion of the trial court. See Seckinger v. Vessel Excalibur, 326 S.C. 382, 483 S.E.2d 775 (S.C. App. 1997). The fees awarded by the trial court are supported by statute, reasonable based upon the trial court's six factor analysis, and not excessive.

A. THE COURT'S AWARD OF ATTORNEYS' FEES IS SUPPORTED BY TWO SEPARATE STATUTES

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); Hegler v. Gulf Ins. Co., 270 S.C. 548, 243 S.E.2d 443 (1978). Both South Carolina's Mechanic's Lien Statute, S.C. Code Ann. § 29-5-10, et seq., and S.C. Code Ann. § 27-1-15 authorize an award of attorney's fees to Respondent.

1. The Court's Order establishes that the fees awarded are authorized and supported by statute.

South Carolina's mechanic's lien statute states that the costs which may arise in enforcing or defending against the lien, including a reasonable attorney's fee, may be

recoverable by the prevailing party up to the amount of the lien. See S.C. Code Ann. § 29-5-10. In this case, Respondent's filed mechanic's lien was in the amount of $198,834.53 (R. pp. 376 – 386) (Trial Exhibit 10). Appellant filed an offer of settlement in the amount of $100,000 on June 30, 2011 pursuant to S.C. Code Ann. § 29-5-20. An offer of settlement is considered rejected unless an acceptance in writing is filed and served on the party making the offer, five days before the commencement of the trial term. See S.C. Code § 29-5-10. By making no written offer of settlement, Respondent's prayed amount in its complaint is considered to be its final offer of settlement, which in this case is $198,834.53. Id. The prevailing party is determined by whose offer is closer to the verdict reached. Id. Respondent's offer of $198,834.53 is closer to the $173,990.53 unanimous verdict rendered by the jury than the Appellant's offer of $100,000. (R. pp. 14 – 23) (Order for Award of Interest, Fees and Costs to Plaintiff). Thus, Respondent is the prevailing party in the action and can be awarded attorney's fees and costs up to the amount of the lien in the sound discretion of the trial court. (R. pp. 14 – 23) (Order for Award of Interest, Fees and Costs to Plaintiff).

In addition to the attorney's fees and costs recoverable under the unanimous verdict rendered on Respondent's cause of action for foreclosure of mechanic's lien, S.C. Code Ann. § 27-1-15 provides for recovery of attorney's fees and interest at the judgment rate on the money claimed due. Contrary to the mechanic's lien statute, the attorney's fees allowable under the express provisions of S.C. Code Ann. § 27-1-15 are not limited to a maximum amount. See S.C. Code Ann. § 27-1-15. Thus, as the prevailing party under the mechanic's lien statute, Respondent is entitled to an award of costs, including

reasonable attorney's fees up to $198,834.53 and the total fees and costs incurred from the date of the March 15, 2010 demand are recoverable under S.C. Code Ann. § 27-1-15.

Appellant argues that because the trial court is basing its award on one or both of the referenced statutes, it must specify what fees are awarded under which statute. (Appellant's Final Brief). No legal authority is offered in support of Appellant's position. The cumulative effect of reading both the mechanic's lien statute and S.C. Code Ann. § 27-1-15 allows the trial court, in its discretion, to award Respondent's full amount of fees and costs requested as authorized by the statutes.

2. The fees sought by Respondent pursuant to the Mechanic's Lien Statute were properly awarded as they relate to Respondent's mechanic's lien claim.

The issue of Respondent's entitlement to attorney fees is one of statutory construction. Under South Carolina law, a prevailing party in a mechanic's lien action is entitled to recover the "[c]osts which may arise in enforcing or defending against the lien under this chapter, including a reasonable attorney's fee." S.C. Code Ann. § 29-5-10(a)(2005). The South Carolina courts have determined that allowance of attorney's fees is mandatory in mechanic's lien cases. See T.W. Morton Builders, Inc. v. von Buedingen, et al., 316 S.C. 388, 450 S.E.2d 87 (Ct. App. 1994). The amount of fees to be awarded is discretionary with the trial court. See D.A. Davis Construction Company, Inc. v. Palmetto Properties, Inc., 281 S.C. 415, 315 S.E.2d 370 (1984).

Appellant argues that Respondent's asserted and prosecuted several causes of action against Appellant separate from its claims under the Mechanic's Lien Statute, and that the fees and costs associated with those claims are not recoverable under the mechanic's lien statute. (Appellant's Final Brief). Appellant argues that only the fees

relating to the prosecution or defense of the mechanic's lien statute are reasonable fees. (Appellant's Final Brief). In support of this position, Appellant relies heavily on the Court of Appeals decision in Utilities Construction Co., Inc. of South Carolina v. Wilson, 321 S.C. 244, 468 S.E.2d 1 (Ct. App. 1996). The trial court in Utilities Construction made a determination that the contractor had failed to timely serve notice of the mechanic's lien and therefore directed verdict in favor of the land owner. Id. The contractor prosecuted the remainder of its claims and received a verdict in its favor. Id. Subsequently, the land owner was awarded attorneys' fees as a prevailing party under the South Carolina mechanic's lien statute. Id.

The issues in Utilities Construction related to an award of attorneys' fees under the mechanic's lien statute are readily distinguishable from those involved in the present case. In the case at bar, Respondent not only met its burden of going forward on the mechanic's lien issue so as to avoid a directed verdict, but also prevailed on the underlying foreclosure action through a unanimous verdict of nearly every dollar sought. (R. p. 337) (Verdict). Further, Respondent had to carry its ultimate burden of persuasion on the causes of action presented, including its breach of contract claim, to successfully foreclose the mechanic's lien. In fact, the Utilities Construction decision does not address the situation, as in the present case, where the prevailing party on the mechanic's lien foreclosure action is also the prevailing party on the underlying issues in the litigation. The Utilities Construction opinion was justifiable in limiting the prevailing party's recovery to the specific amount of time spent on the mechanic's lien issue because the land owner did not prevail on the merits of the litigation.

More important to the determination of the proper award of attorneys' fees in this

case is the fact that there is no distinction between the time devoted to the breach of contract cause of action and the mechanic's lien cause of action. All causes of action submitted by Respondent were ancillary to Respondent's mechanic's lien action, which along with Respondent's breach of contract claim, serves as the primary basis for the damages sought by Respondent. The amount of the mechanic's lien filed by the Respondent represented the amounts due Respondent from Appellant under the Agreement in this case. Respondent's prosecution of a breach of contract claim, as well as the other causes of action alleged in Respondent's complaint, were necessary for Respondent to show entitlement to the amount listed in the mechanic's lien. To hold that Respondent is not entitled to its fees for the prosecution of its underlying causes of action is to remove the force and effect of the attorneys' fee provision in the mechanic's lien statute. A party seeking to foreclose on a mechanic's lien would be entitled to the fees incurred in filing the lien but not to the fees incurred in proving that the lien was justified in the first place.

As the Utilities Construction court itself noted, the "intent of the Legislature in allowing the prevailing party in an action brought under the mechanic's lien statute to recover attorney fees and costs stems from a desire to deter both wrongful filing of liens and unjustified refusal to pay debts subject to the mechanic's lien. Utilities Construction, 468 S.E.2d at 3 (citing Cedar Creek Properties v. Cantelou Associates, Inc., 320 S.C. 483, 465 S.E.2d 774 (S.C. App. 1995). Thus, it appears from this language that the Utilities Construction court recognized that suits involving mechanic's liens require proof that debt exists. In this action, Appellant's unjustified failure to pay the debt owed to Respondent, which serves as the basis for Respondent's mechanic's lien, is the root cause

of the fees and costs incurred by Respondent in this action. Respondent is simply trying to recover its attorneys' fees associated with proving the debts owed to it by Appellant.

Appellant also contends that Respondent's defense as to Appellant's counterclaims are unrelated to the mechanic's lien issue. This contention is without merit. Appellant's counterclaims in response to Respondent's complaint are for Slander of Title, Violation of the Frivolous Claims Sanction Act, and Tortuous Interference with Contractual Relationships with Third-Parties Resulting from Defective Notice of Mechanic's Lien. (R. pp. 55 – 67 and R. pp. 94 – 104) (Answer & Counterclaims) Had Appellant been successful on these claims in the lawsuit, Respondent would not have been successful in its suit to enforce the mechanic's lien. Therefore, Respondent not only had to prove its claims were meritorious, but also had to prove that Appellant's claims were not meritorious to be able to foreclose its mechanic's lien. Because the defense of the Appellant's counterclaims was necessary to recover the attorneys' fees under the statute, Respondent is entitled to the fees incurred in defending the related claims of Appellant. See Atlantic Pipe Corp. v. Quadrangle Limited Partnership, 1993 WL 454203, *2 (Conn. Super. Ct. 1993)(holding that prevailing party was entitled to recovery of attorneys fees incurred in defending counterclaim as well as attorneys fees for grounds sued upon in the complaint).

3. The Court's award of fees under S.C. Code Ann. § 27-1-15 was not in error.

Appellant argues that the trial court erred in awarding fees under S.C. Code Ann. § 27-1-15 which both pre-date the statutory demand and which are not sufficiently intertwined with the statutory claim. If a party is found to have not complied with S.C. Code Ann. § 27-1-15, the statute provides for a recover of attorney's fees and interest at

the judgment rate on the money claimed from the date of the demand. See S.C. Code Ann. § 27-1-15 (R. pp. 14 – 23) (Order For Award of Interest, Fees and Costs to Plaintiff). Respondent incurred attorney's fees in the amount of $24,260.25 and costs in the amount of $1,962.27 prior to demand being made pursuant to S.C. Code Ann. § 27-1-15 on March 15, 2010. (R. pp. 593 – 595) (A. Bright Ariail Second Affidavit). Attorneys' fees in the amount of $184,849.35 and costs in the amount of $23,958.44 were incurred by Respondent after the S.C. Code Ann. § 27-1-15 demand was made on March 15, 2010 through the end of trial and subsequent post trial motions in July 2011. (R. pp. 593 – 595) (A. Bright Ariail Second Affidavit).

The trial court's award of the full amount of attorney's fees requested is not in error because all attorneys' fees and costs incurred by Respondent prior to March 15, 2010 are recoverable by Respondent as the prevailing party under the mechanic's lien statute. The cumulative effect of reading both the mechanic's lien statute and S.C. Code Ann. § 27-1-15 allows the trial court, in its discretion, to award Respondent's full amount of fees and costs requested as authorized by the statutes.

Appellant further argues that the award of attorney's fees under S.C. Code Ann. § 27-1-15 is in error because the Court's award also includes defense of counterclaims not related to the claim under S.C. Code Ann. § 27-1-15. As with the analysis related to the mechanic's lien statue, there is no distinction between the time devoted to the breach of contract cause of action, mechanic's lien cause of action and the failure to comply with S.C. Code Ann. § 27-1-15. Respondent's prosecution of the breach of contract claims, as well as the other causes of action alleged in Respondent's complaint, and defense of Appellant's counterclaim were necessary for Respondent to show entitlement to the debt

claimed owed and Appellant's failure to pay the proper portion.

Appellant relies heavily upon Hardaway Concrete Company, Inv. v. Hall Contracting Corporation as the basis of its arguments related to the fees and costs awarded pursuant to S.C. Code Ann. § 27-1-15. 374 S.C. 216, 647 S.E.2d 488 (Ct. Appeals 2007). The Hardaway opinion is based upon a concrete supplier for a power plant's claim against a concrete placement contractor for breach of contract and the concrete placement contractor's counterclaim in return for breach of contract. Id. Hardaway contradicts a lot of what the Appellant in this case has argued related to the verdict rendered on Respondent's claim for failure to comply with S.C. Code Ann § 27-1-15 and the subsequent award of attorney's fees by the trial court pursuant to that statute.

First, Appellant has argued that the Respondent presented no evidence that Appellant failed to perform a fair and reasonable investigation at the time it made its demand under S.C. Code Ann § 27-1-15 because litigation was pending between the parties and, through discovery, Appellant was engaged in an investigation of the merits of all claims. In this case, Respondent's demand pursuant to S.C. Code Ann § 27-1-15 was made ten months after the initial lawsuit was filed, but sixteen months prior to trial. (R. pp. 366 – 375) (Trial Exhibit 9) (R. pp. 31 – 54) (Complaint) The Amended Complaint adding Respondent's claim for fees under S.C. Code Ann. § 27-1-15 was filed less than two months from the date of demand. (R. pp. 68 – 93) (Amended Complaint). In Hardaway, the Plaintiff's claim for attorney's fees under S.C. Code Ann. § 27-1-15 was not made known to the Defendant until June 27, 2005 and the trial commenced on August 29, 2005. Hardaway, 374 S.C. at 227. The parties in Hardaway were just as much in the throes of litigation at the time the demand under S.C. Code Ann. § 27-1-15 was made as

the parties in this case. The trial court in Hardaway found that not only had the Defendant not made a fair and reasonable investigation, but that despite discovery having been ongoing, the Defendant had intentionally refused to pay Plaintiff its rightful charges in contravention of the agreement between the parties. Id. at 230. As in Hardaway, the Appellant here has failed to make a fair and reasonable investigation and intentionally refused to pay Respondent its rightful charges in contravention of the agreement between the parties. Thus, the trial court's denial of Appellant's motion for directed verdict on Respondent's cause of action for failure to comply with S.C. Code Ann. § 27-1-15 is not in error.

Second, Appellant has argued that Respondent failed to present any evidence that Appellant did not perform a fair and reasonable investigation. "Whether a party's steps taken were "reasonable and fair" is a question of fact." Hardaway, 374 S.C. at 229 (2007)(citing Moore Elec. Supply, Inc. v. Ward, 316 S.C. 367, 374-375, 450 S.E.2d 96, 100 (Ct. App. 1994). Appellant testified at trial that at the time he received the demand a lawsuit had been filed and he had hired an attorney to defend the lien and the parties were engaged in discovery. (R. p. 128) (Transcript P. 187, Ln 11-14). As stated earlier, Appellant made several admissions at trial that he owed Respondent at least a portion of the remaining contract balance and for additional services of a construction meeting and design of a garden wall. The determination of whether discovery in a lawsuit alone is a reasonable and fair investigation is a question of fact to be decided by the finder of fact, which in this case was the jury. In Hardaway, the Appellate Court determined, the evidence, which included several party admissions, supported the trial court's finding that Defendant had acted in bad faith and not made a reasonable and fair investigation. Id. at

231. In this case the jury made a unanimous determination that Appellant had not made a reasonable and fair investigation based upon the evidence presented at trial. Thus, the trial court's award of attorney's fees pursuant to S.C. Code Ann. § 27-1-15 is proper.

Third, Appellant has argued that the court was in error by awarding fees and costs under S.C. Code Ann. § 27-1-15 which were related to the prosecution of other causes of action and defense of counterclaims. In Hardaway, the underlying claims allowing for an award under S.C. Code Ann. § 27-1-15 were breach of contract claims. Here, all causes of action submitted by Respondent were ancillary to each other. The breach of contract claim, mechanic's lien claim and claim for fees under S.C. Code Ann. § 27-1-15 brought in this action by Respondent all relate to an amount claimed due by Respondent under its Agreement with Appellant. Appellant refused to pay after the debt was demandable. Respondent's prosecution of the breach of contract claims, as well as the other causes of action alleged in Respondent's complaint, were necessary for Respondent to show entitlement to the amount claimed due and Appellant's unjustified refusal to pay. As in Hardaway, the attorney's fees related to the prosecution of all of Respondent's causes of action are recoverable under S.C. Code Ann. § 27-1-15 from the date of the demand made pursuant to the statute. Thus, the trial court's award of attorney's fees pursuant to S.C. Code Ann. § 27-1-15 is proper.

4. The fees awarded by the Court are reasonable.

In determining the award of attorney's fees, the court considers 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 Collins v. Collins, 239 S.C. 170, 122 S.E.2d 1 (1961); Blumberg v. Nealco, Inc., 310 S.C. 492, 427 S.E2d 659 (1993); Dedes v. Stickland, 307 S.C. 155, 414 S.E.2d 134 (1992). The Court gives consideration to all six criteria in establishing the attorney's fees awarded and none of these factors is 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). Here, the trial court based its award on the evidence presented through the Affidavits of A. Bright Ariail and N. Keith Emge along with its impression of the case presented by Respondent's counsel at trial. (R. pp. 14 – 23) (Order For Award of Interest Fees and Costs to Plaintiff). The trial court gave consideration to all six criteria established by Collins as follows:

(1) In evaluating the nature, extent and difficulty of the legal services rendered, the trial court found that Respondent was required to expend considerably more time and effort on this case due to specific actions of the Appellant who created unnecessary delays, filed meritless motions, and forced Respondent to incur additional attorney's fees and costs above and beyond what would otherwise have been incurred. (R. pp. 14 – 23) (Order For Award of Interest Fees and Costs to Plaintiff).

(2) In evaluating the time and labor devoted to the case, the trial court found that Respondent submitted detailed billing records which clearly indicate that they are properly detailed and that the time and labor spent by Respondent's counsel is both reasonable for the effort required to litigate this case and not duplicative in any manner. (R. pp. 14 – 23) (Order For Award of Interest Fees and Costs to Plaintiff).

(3) In evaluating the professional standing of counsel, the trial court found that Respondent's legal team consisted of experienced, skilled attorneys, of high professional

standing in the community and in good standing with the Bar of this State. (R. pp. 14 – 23) (Order For Award of Interest Fees and Costs to Plaintiff).

(4) In evaluating the contingency of the fee, the trial court found that the fees charged by Respondent's counsel were on an hourly basis and not based upon a contingency of compensation. (R. pp. 14 – 23) (Order For Award of Interest Fees and Costs to Plaintiff).

(5) In evaluating the fee customarily charged in locality for similar services, the trial court found the hourly fees charged by Respondent are of those customarily charged in the locality for similar legal services. (R. pp. 14 – 23) (Order For Award of Interest Fees and Costs to Plaintiff).

(6) In evaluating the beneficial results obtained, the trial court found that Respondent obtained a substantial benefit from the legal services provided by receiving an award in close proximity to the total damages claimed and avoiding thousands of dollars in liability on Appellant's counterclaims. (R. pp. 14 – 23) (Order For Award of Interest Fees and Costs to Plaintiff).

The trial court found that the attorneys' fees and costs awarded were reasonable based upon the six criteria established by the Supreme Court of South Carolina for determining attorney's fees. (R. pp. 14 – 23) (Order For Award of Interest Fees and Costs to Plaintiff). 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). 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 the trial court

did not abuse its discretion in awarding attorney fees to Plaintiff greater than the recovery realized by Plaintiff). Thus, the trial court sufficiently analyzed all six factors under Collins and awarded Respondent reasonable fees and costs based upon this analysis.

5. **The result obtained by Respondent's counsel justifies the amount awarded by the trial court.**

Appellant argues that the result obtained by Respondent's counsel does not justify the amount awarded by the trial court. Appellant submits that it made an offer of $100,000 pursuant to S.C. Code Ann. § 29-5-20 in an effort to settle the case. (Appellant's Final Brief). As noted by Appellant, this offer was made eighteen days prior to the start of trial. Respondent rejected Appellant's offer because at the time it was made, the offer represented less than half of the actual damages sought and less than one third of the total claim. Respondent proceeded to trial, not on a meritless campaign to try and seek recovery of amounts over and above what was invoiced, but in an effort to recover the monies it was legally entitled to under the laws of this State. The lengthy and expensive trial of this matter was solely caused by Appellant's failure to pay for work performed by Respondent in accordance with the terms of the Agreement between the parties.

The cost associated with the claim for attorneys' fees and costs were driven up by a five day trial out of the residing jurisdiction of both Respondent and Appellant's counsel and by the post trial motions and extensive briefing as a result of the litany of issues raised post-trial by the Appellant after the jury's unanimous verdict. It is without question that when an action cannot be resolved prior to a trial, the fees and costs associated with the preparation of the case for trial and the time spent at trial greatly increases the fees and costs incurred. Based on the evidence presented, the jury

awarded nearly every penny sought by Respondent, making Respondent the prevailing party and entitled it to a recovery of fees and costs in the discretion of the trial court. Thus, the attorneys' fees awarded are fair and reasonable and more than justified by the result obtained.

6. The fees awarded under the S.C. Mechanic's Lien Statute are not limited to the amount of the cash bond posted by Appellant with the Clerk of Court.

Appellant argues that a bond was posted with the Court pursuant to S.C. Code Ann. § 29-5-110 which limits Respondent's total recovery to the amount of the posted cash bond. Appellant provides no legal support for this argument. The statutory language quoted by Appellant is misconstrued and nothing within the quoted language limits the judgment to the amount of the cash bond posted. See S.C. Code Ann. § 29-5-110. The statute states that judgment shall be paid out of the cash deposited. Id. It does not state that the cash deposited caps the amount of recovery.

Under South Carolina's Mechanic's Lien Statute, the cost which may arise in enforcing or defending against the lien, including a reasonable attorney's fee, may be recoverable by the prevailing party ***up to the amount of the lien***. See S.C. Code Ann. § 29-5-10. The express language of the statute indicates that a party is entitled to a judgment up to twice the amount of the lien. For example, if the mechanic's lien is for $100,000, the prevailing party can be awarded up to $100,000 in attorney's fees making the total judgment $200,000.

Appellant's filing of a bond pursuant to S.C. Code Ann. § 29-5-110 does not void the express language of the South Carolina Mechanic's Lien Statute. Under Appellant's theory, a claimant would only be entitled to attorney's fees in the amount of one third of

the lien amount in all circumstances[3]. This theory is clearly in contradiction to the legislative intent of the attorney's fees provision within the mechanic's lien statute. Appellant's interpretation of S.C. Code Ann. § 29-5-110 is inconsistent with the express language of S.C. Code Ann. § 29-5-10. Thus, the trial court's attorney's fee award is not in error and should not be reduced to the amount of the cash bond.

7. The S.C. Mechanic's Lien Statute does not exclude staff member from the definition of attorney's fees.

Appellant argues that time spent by paralegals is not recoverable in Respondent's claim for attorneys' fees as the prevailing party under the mechanic's lien statute nor under an award pursuant to S.C. Code Ann. § 27-1-15. Again, Appellant sets forth no legal basis for this assertion and South Carolina case law precedent is to the contrary. In Charleston Lumber Co. v. Miller Housing Corp., the South Carolina Court of Appeals reviewed an award of attorneys' fees that included paralegal fees in an action upon a promissory note. 458 S.E.2d 431, 438 (Ct. App. 1996); see also McElveen v. McElveen, 332 S.C. 583, 506 S.E. 2d 1 (Ct. App. 1998). The Charleston Lumber court ruled that the trial court did not abuse its discretion in awarding the attorneys fees, including the paralegal fees, because the note authorized an award of "reasonable attorney's fees." Id. The language "reasonable attorney's fees" found in the note is the same exact language found in the mechanic's lien statute.

The Affidavits of A. Bright Arial show that the legal assistant performing work on the file was (1) qualified through education, training or work experience to perform substantive legal work, (2) the substantive legal work was performed at the direction and supervision of an attorney, (3) the nature of the legal work performed, (4) the hourly rate

[3] Pursuant to S.C. Code Ann. § 29-5-110, the amount of the cash bond includes the amount of the lien plus one-third.

being charged for the legal assistant, and (5) the number of hours expended in the performance of the services by the legal assistant. The Affidavits of A. Bright Ariail satisfy the five requirements set forth and noted by Appellant in Gill Sav. Asso. v. International Supply Co., 759 S.W.2d 697 (Tex. App. Dallas 1988).

In this action, the time spent by paralegals in support of Respondent's counsel represents $29,180.85 of the total attorney's fee award. (R. pp. 593 – 595) (A. Bright Ariail Second Affidavit). The paralegal time includes 226.5 hours of billable time at $125.00 per hour from Shannon M. Skelly, the primary paralegal assigned to the file and 1.4 hours of billable time at $125.00 per hour from a second paralegal, Claire G. Whitsett. (R. pp. 593 – 595) (A. Bright Ariail Second Affidavit). Both Ms. Skelly and Mrs. Whitsett are qualified legal professionals with thirty (30) years of combined paralegal experience whose time billed in this matter supported the legal services provided and furthered the prosecution of the case. (R. pp. 593 – 595) (A. Bright Ariail Second Affidavit). In addition, 8.76 hours were billed to Plaintiff at $110.00 per hour for legal research performed by law clerks. (R. pp. 593 – 595) (A. Bright Ariail Second Affidavit). Thus, the trial court's discretion in awarding paralegal fees as part of the overall attorneys' fees award is proper under the mechanic's lien statute and under S.C. Code Ann. § 27-1-15.

V. THE TRIAL COURT'S AWARD OF PREJUDGMENT INTEREST TO RESPONDENT IS SUPPORTED BY STATUTE

Appellant argues that the trial court's award of prejudgment interest is not supportable by South Carolina law. The trial court's award of prejudgment interest will not be disturbed on appeal unless the trial court committed an abuse of discretion. Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 435, 673 S.E.2d 448, 457-58

(2009); citing Jacobs v. Am. Mut. Fire Ins. Co., 287 S.C. 541, 544, 340 S.E.2d 142, 143 (1986). In this case, the trial court's award of prejudgment interest in the amount of $37,413.92 beginning from the date of February 9, 2009, to the date of petition for attorneys' fees is supported by statute. (R. pp. 14 – 23) (Order for Award of Interest, Fees, and Costs). Respondent sought pre-judgment interest in its complaint as to all causes of action against Appellant.

South Carolina law allows prejudgment interest on obligations to pay money from the time when payment is demandable, if the sum due is capable of being reduced to certainty. See GTR Rental, LLC v. DalCanton, 547 F.Supp.2d 510 (D.S.C. 2008). Under South Carolina law, the fact that a sum claimed due is disputed does not render the claim unliquidated for purposes of an award of prejudgment interest. Id. Pursuant to S.C. Code Ann. § 34-31-20(A), the legal rate of interest shall be eight and three-fourths percent per annum in all cases of accounts stated and in all cases wherein any sum or sums of money shall be ascertainable and, being due, shall draw interest according to law. See S.C. Code Ann. § 34-31-20(A). The trial court's award of prejudgment interest to the Respondent was made in accordance with this statute.

Respondent issued a letter to Appellant on February 9, 2009 attaching invoices for professional services in support of the sum due. (R. pp. 354 – 363) (Trial Exhibit 8). As of February 9, 2009, Respondents claim for the sum due is demandable. Respondent's invoices submitted to Appellant included services for design and preparation of construction documents, revisions to drawings per Appellants request, requested construction phase services, and reimbursable expenses incurred by Respondent on behalf of Appellant during the two year period of providing services under the parties'

Agreement. (R. pp. 354 – 365) (Trial Exhibit 8, 8(a) & 8 (b)). The total amount due and demanded by Respondent on February 9, 2009 was $198,834.53. (R. pp. 354 – 363) (Trial Exhibit 8). Respondent submitted an additional invoice on May 21, 2009 in the amount of $437.50 and an invoice on November 16, 2009 for $1,085. (R. pp. 364 – 365) (Trial Exhibit 8(a) & (b)). The fact that Respondent disputes the amount of the money demandable by Appellant does not make the claim unliquidated. Respondent later submitted a demand pursuant to S.C. Code Ann. § 27-1-15 on March 15, 2010 asking Appellant to make a reasonable a fair investigation of Respondent's claim and pay the undisputed amount within forty-five days. (R. pp. 366 – 375) (Trial Exhibit 9). Appellant admits no money has been paid by Appellant to Respondent since Respondent's February 9, 2009 demand. (R. pp. 116 – 118) (Trial Transcript Vol. 1 pg. 150 ln 7 – pg. 152 ln 15)

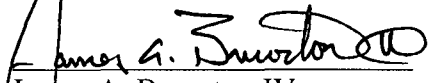
Appellant argues that the Court awarded pre-judgment interest in an amount pursuant to S.C. Code Ann. § 27-1-15 and is limited to prejudgment interest from the date of the demand under that statute. (Appellant's Brief). It is not disputed that Respondent made its demand pursuant to S.C. Code Ann. § 27-1-15 on March 15, 2010 (R. pp. 366 – 375) (Trial Exhibit 9). However, the award of prejudgment interest is not based solely on the verdict on Respondent's cause of action for failure to comply with S.C. Code Ann. § 27-1-15. (R. pp. 14 – 23) (Order for Award of Interest, Fees & Costs to Plaintiff). Had the trial court's award of prejudgment interest been limited to Respondent's cause of action for failure to comply with S.C. Code Ann. § 27-1-15 then the trial court's award of interest would include interest not awardable under this statute. However, the trial court awarded prejudgment interest to the Respondent on the verdict reached, which includes

an award under Respondent's breach of contract claim. Even if the trial court was in error in its award of prejudgment interest under S.C. Code Ann. § 27-1-15, such error would be harmless, as Respondent is entitled to prejudgment interest under S.C. Code Ann. § 34-31-20(A) based upon the unanimous verdict on its cause of action for breach of contract. Thus, Respondent is still entitled to pre-judgment interest based upon South Carolina's interest statute.

CONCLUSION

For the above mentioned reasons, the Court should affirm the jury verdict and judgment entered by the 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,



James A. Bruorton IV
A. Bright Ariail
Rosen | Hagood
151 Meeting St., Suite 400
Charleston, SC 29401
(843) 577-6726
(843) 724-8036 (f)
Attorneys for Respondents

July 20, 2012
Charleston, SC

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Case No. 2009-CP-15-0595

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

v.

GENE R. SLIVKA, ... Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Respondents complies with Rule 211(b), SCACR.

James A. Bruorton, IV
B. Bright Ariail
Rosen | Hagood
PO Box 893
Charleston, SC 29402
(843) 577-6726
Attorneys for Respondent

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Case No. 2009-CP-15-0595

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

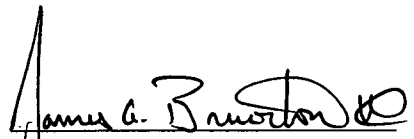
v.

GENE R. SLIVKA, ... Appellant.

PROOF OF SERVICE

I certify that I have served the Final Brief of Respondent on Appellant by depositing a copy of it in the United States Mail, postage prepaid, on July 20, 2012, addressed to their attorney of record, Robert T. Lyles, Jr., Esquire, Lyles & Lyles, LLC, Post Office Box 773, Charleston, South Carolina, 29402.

July 20, 2012



James A. Bruorton, IV
A. Bright Ariail
Rosen | Hagood
PO Box 893
Charleston, SC 29402
(843) 577-6726
Attorneys for Respondent