STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE NINTH CIRCUIT COURT OF COMMON PLEAS
MIKELL ROSS SCARBOROUGH, PRESIDING MASTER-IN-EQUITY

APPELLATE CASE NUMBER: 2016-002366

Emory J. Infinger and Associates Construction Company, Inc.....Respondent,

v.

North Charleston Community Interfaith Shelter, Inc., Bobby Knight, in his official capacity as Chairman and President of Board for The Good Neighbor Center, Bank of America, N.A., S.CS State Housing and Development Authority, Atlantic Construction Services, Inc., L & W Corporation d/b/a CK Supply, Now Mechanical, Inc. Wilson and Associates Electrical Contractor, Inc., Defendants,

Of whom North Charleston Community Interfaith Shelter, Inc., is the.....Appellant.

RESPONDENT'S FINAL BRIEF

Respectfully submitted,

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STATEMENT OF THE CASE

This is a straight-forward case involving a property owner's failure to pay its contractor the amount due pursuant to the terms and conditions of a written contract.

On February 6, 2012, Respondent, Emory J. Infinger & Associates Construction Company, Inc. ("Infinger") filed and served a mechanic's lien against North Charleston Community Interfaith Shelter (the "Shelter") arising out of the general construction of a new dormitory building (the "Project") located at 1905 Burton Lane a/k/a 2713 Spruill Avenue in North Charleston, South Carolina (the "Property"). Infinger foreclosed its lien by filing a Lis Pendens, Summons and Complaint on May 1, 2012 ("Infinger's Lawsuit"). In conjunction with its filing, Infinger mailed a certified letter to the Shelter pursuant to S.C. Code §27-1-15 demanding payment of $196,412 due for work performed at the Property. The Shelter and Good Neighbor Center accepted service of the Lis Pendens and Complaint on May 7, 2012. Defendants Bobby Knight, The Good Neighbor Center and North Charleston Community Interfaith Shelter filed an Answer to the Complaint on July 18, 2012. The S.C. State Housing Finance and Development Authority ("Housing Authority"), a defendant by virtue of its mortgage on the Shelter's Property, filed an Answer to the Complaint on January 14, 2013. Infinger joined many of its subcontractors on the Project and other interested entities as additional defendants by virtue of their respective interests in the Property.

Many of Infinger's subcontractors on the Project filed their own liens and foreclosure actions against the Property, and in those actions included breach of contract and payment bond claims against Infinger. The subcontractor's actions were consolidated into Infinger's Lawsuit by Order dated August 14, 2013. On October 8, 2013, the Court entered a Scheduling Order in Infinger's Lawsuit requiring mediation before November 11, 2013, discovery to be complete by November 22, 2013, dispositive motions to be filed no later than November 29, 2013, and trial on or after December 16, 2013.

The Shelter deposed Infinger's 30 (b) (6) corporate designee on November 7, 2013. The case was mediated on November 20, 2013. Many of the parties settled at the mediation; however, the entire case was not resolved and Infinger's Lawsuit continued. On March 13, 2014 the Court entered a Form 4 Order transferring the case to the Master-in-Equity. A Mutual Stipulation of Dismissal of certain parties and certain claims was filed on August 5, 2014 dismissing all parties and claims from the case except for Infinger, the Shelter and the Housing Authority. On October 29, 2014 the Court issued a Form 4 dismissing the case for failing to pay the filing fee to Master-in-Equity. The case was restored by Entry of Order on November 25, 2014.

On March 3, 2015, the Court granted the Shelter's counsel's motion to be relieved, and gave the Shelter until May 1, 2015 to retain new counsel. The Shelter obtained new counsel and Infinger's Lawsuit continued. The case was scheduled for trial in September 2015. On September 28, 2015, the Master granted the Shelter's motion for a continuance, gave the Shelter (at its request) until November 6, 2015 to reach a settlement with Infinger, and scheduled trial for December 2015 if no agreement could be reached.

The Shelter filed a motion for summary judgment on November 23, 2015 asserting five grounds upon which it was entitled to judgment as a matter of law, and filed a motion to amend its answer to assert additional defenses. The trial was scheduled for December 8, 2015. The Shelter's motion for summary judgment and motion to amend its pleadings to assert additional affirmative defenses were heard on the morning of December 8, 2015 prior to trial. The Master denied the Shelter's motion for summary judgment, except as to ground number three which he found moot due to the prior dismissal of the claims against Defendant Bobby Knight individually. The Master granted the Shelter's Motion to Amend its Answer. During pre-trial motions the Shelter requested that the Master order the parties to arbitrate the dispute. The Shelter's motion was denied. The case was tried on December 8, 2015 following the disposition of pre-trial motions.

The Master issued his final Order dated March 11, 2016 granting judgment to Infinger in the sum of One Hundred Ninety-Six Thousand Four Hundred Twelve and 00/100 ($196,412.00) Dollars, attorney's fees of Thirty-Three Thousand Four Hundred Eighty-Five and 97/100 ($33,485.97) Dollars and costs of One Thousand Four Hundred Fifty and 74/100 ($1,440.74) Dollars, which Order was filed March 18, 2016. Appellant's Motion for new trial and motion to reconsider were denied. A notice of appeal was filed.

STATEMENT OF THE FACTS

The Shelter entered an agreement (the "Agreement") with Infinger dated December 10, 2010 for the design and construction of a building located at 1905 Burton Lane a/k/a 2713 Spruill Avenue in North Charleston, South Carolina (the "Project"). R. p. 51, line 15 - p. 53, line 4. Pursuant to their Agreement, and in consideration of the labor, services and materials to be provided by Infinger, the Shelter agreed to pay Infinger a total Contract Sum of $799,456 as modified by executed change

orders. R. p. 174-221. From March 1, 2011 through September 9, 2011 the Shelter approved Change Orders 1 - 6 to the Agreement which increased the Contract Sum from $799,456 to $920,333. R. p. 118, line 2 - p. 122, line 3.

The Shelter's primary funding sources for the construction of the Project were a United States Department of Veterans Affairs ("VA") capital grant and a loan from the Housing Authority. R. p. 122, lines 4-11. Upon receiving Payment Applications from Infinger, the Shelter requested draws from the VA and the Housing Authority. R. p. 122, line 4 - p. 124, line 6. In or around November 16, 2011 the VA suspended the funding of draw requests made by the Shelter for the construction work by Infinger based on the increased costs of the Project and the Shelter's inability to provide matching funds for the increased grant funds it was requesting. R. p. 125, line 24 - p. 126, line 16. As a result of the VA's actions the Shelter told Infinger it would be unable to pay it for the services it was providing to the Project. R. p. 126, lines 13-16; R. pp. 285-286.

Infinger was ready, willing and able to complete construction of the Project but suspended its work as a result of non-payment. R. p. 136, line 14 - p. 137, line 4. Exhibit A to the Agreement at § A.9.7.1 permitted Infinger to suspend the work for the Shelter's failure to pay amounts due under the Agreement. R. pp. 174-221. Infinger mailed a letter to its subcontractors dated November 7, 2011 notifying them of its plan to temporarily suspend the work at the Project due to non-payment. Infinger's subcontractors stopped their work on the day that Infinger mailed its letter or days shortly thereafter. R. p. 113, line 24, p. 114, line 8; R. pp. 17-34 Complaint Para. 20-22 and Exhibit A - Verified Statement. Infinger also recommended that the building be secured and covered in order to protect it from the elements. By letter dated December 26, 2011 to the Shelter, Infinger expressed its continuing concern regarding the exposed condition of the building and recommended that the

rescue option it had previously recommended be undertaken in order to protect the current investment in the unfinished building. R. p. 81, line 7 - p. 82, line 8. Infinger also inquired about the Shelter's plans to continue or abandon the Project. Ultimately, the Shelter was not able to secure additional funding from the VA or other sources in order to continue with the construction and the building remains as it did when construction was suspended in mid-November 2011. R. p. 178, lines 13-16.

Article 5 of the Agreement and § A.9 of Exhibit A to the Agreement set forth the terms and conditions of the pay application process. R. pp. 174-221. Pursuant to those terms and conditions, Infinger submitted nine Payment Applications to the Shelter for labor, services and materials it provided to the Project. Infinger's Pay Applications totaled $664,215 but it only received payments from the Shelter totaling $467,803 leaving an unpaid balance of $196,412. R. p. 83, line 14 - p. 85, line 22. Mr. Knight, the Shelter's Board Chairman and its representative under the Agreement with Infinger, executed all six change orders to the Agreement and did not dispute that Infinger's balance under the Agreement was $196,412. R. p. 121, line 20 - p. 122, line 3. Rather, Mr. Knight asserted that the balance due Infinger was the responsibility of the VA and/or Housing Authority and not the Shelter.

On February 6, 2012, Infinger filed and served a mechanic's lien against the Shelter arising out of the general construction of a new dormitory building located at 1905 Burton Lane a/k/a 2713 Spruill Avenue in North Charleston, South Carolina. Infinger's Project Manager, David Haun, issued a verified statement of account which was attached to its mechanic's lien verifying that Infinger was due $196,412, and that ninety (90) days had not elapsed since the last date Infinger had performed work at the Property. R. p. 85, line 23 - p. 86, line 9. Infinger foreclosed its lien by filing

a Lis Pendens, Summons and Complaint on May 1, 2012, within six months of the last labor, services and materials it provided to the Shelter. Infinger mailed a certified letter to the Shelter pursuant to S.C. Code §27-1-15 demanding payment of $196,412 due under the Agreement. The Shelter accepted service of the Lis Pendens and Complaint on May 7, 2012.

STANDARD OF REVIEW

An action to foreclose a mechanic's lien is an action at law in South Carolina. *Keeney's Metal Roofing, Inc. v. Palmieri*, 345 S.C. 550, 553, 548 S.E.2d 900, 901 (Ct. App. 2001). "In an action at law, tried without a jury, the judge's findings will not be disturbed unless they are without evidentiary support." *King v. PYA/Monarch, Inc.*, 317 S.C. 385, 388-89, 453 S.E.2d 885, 888 (1995). "His findings are equivalent to those of a jury in an action at law." *Id.* at 389, 453 S.E.2d at 888.

An action for breach of contract seeking money damages is an action at law. *Sapp v. Wheeler*, 402 S.C. 502, 507, 741 S.E.2d 565, 568 (Ct. App. 2013). An appellate court will not disturb the master's findings of fact unless the findings are found to be without evidence reasonably supporting them." *Silver v. Aabstract Pools & Spas, Inc.*, 376 S.C. 585, 590, 658 S.E.2d 539, 541–42 (Ct. App. 2008).

It is in the sound discretion of the trial judge to determine whether administrative remedies must be exhausted, and a judge's decision will not be disturbed on appeal absent an abuse thereof. *Hyde v. S.C. Dep't of Mental Health*, 314 S.C. 207, 208, 442 S.E.2d 582, 582-83 (1994).

Admission of expert testimony is within the sound discretion of the trial judge and will not be overruled absent a finding of an abuse of discretion and prejudice to the complaining party. *Lee v. Suess*, 318 S.C. 283, 457 S.E.2d 344 (1995).

ARGUMENT

I. This Court should uphold the Master-in-Equity's Judgment in favor of Infinger where the evidence demonstrated Infinger's right to a mechanic's lien.

Infinger is entitled to a mechanic's lien where it filed and served its lien and a sworn verified statement ninety (90) days or less from the last time it provided labor, services or material to the Project, and thereafter commenced and filed its Lis Pendens and Summons and Complaint within six months after the last day it provided labor, services or material to the Project. S.C. Code §29-5-10(a) (2007); S.C. Code §29-5-90 (2007); and S.C. Code §29-5-120 (A) (2007).

The Shelter's argument that the Master-in-Equity lacked subject matter jurisdiction to grant Infinger a mechanic's lien where it allegedly failed to comply with the requirements of the statute is based on a faulty premise. Subject-matter jurisdiction is the "power to hear and determine cases of the general class to which the proceedings in question belong." Dove v. Gold Kist, 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994). Here, the Master undisputedly had subject-matter jurisdiction to decide this foreclosure action. Rule 53(b) SCRCP. Although the Shelter purports to challenge the jurisdiction of the court to render judgment in favor of Infinger on its mechanic's lien, in reality the Shelter is challenging whether the Master properly exercised his authority given the Shelter's assertion that the mechanic's lien is invalid.

As the Shelter never raised the issue of whether Infinger's mechanic's lien was valid during trial or in any post-trial motion, it is not, therefore, allowed to challenge the validity of the mechanic's lien for the first time on appeal. "It is axiomatic that an issue cannot be raised for the first

time on appeal." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). An argument not presented to the master on the record is not preserved for appellate review. *See Knight v. Waggoner*, 359 S.C. 492, 496, 597 S.E.2d 894, 896 (Ct. App. 2004) (stating appellants' justifications for a specific finding were asserted for the first time on appeal and, therefore, were not preserved for appellate review); Rule 210 (c), SCACR (record on appeal shall not include matter which was not presented to lower court). In recently clarifying the law on the presentation and use of additional sustaining grounds in an appeal, the Court emphasized that it did not "mean to dilute the important principle that all parties should raise all necessary issues and arguments to the lower court and attempt to obtain a ruling." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000).

Moreover, the Shelter mischaracterizes the evidence where it asserts that Infinger ceased providing labor or material to the Project on or before November 7, 2011. The evidence demonstrated that Infinger's subcontractors continued working for days shortly after the letter dated November 7, 2011. Even taken in the light most favorable to the Shelter, the earliest "last date of work" would be on November 8, 2011 thereby making the 90th day on February 6, 2012 not February 5, 2012 as asserted by the Shelter. Additionally, Infinger's project manager authenticated his verified statement attached to Infinger's Complaint and Mechanic's Lien verifying that Infinger's lien was filed within ninety (90) days of the last time it provided labor and/or materials to the Project. Accordingly, the Shelter's assertion that Infinger's lien was dissolved on Sunday, February 5, 2012, the ninety-first (91st) day after the date of Infinger's letter to its subcontractors, is without merit.

As there is clear evidentiary support that Infinger's lien was filed ninety days or less from Infinger's last day of work, the Master's finding should not be disturbed. *See King v. PYA/Monarch*,

Inc., 317 S.C. 385, 388-89, 453 S.E.2d 885, 888 (1995). Likewise, the Shelter's assertion that it was the prevailing party and entitled to attorney's fees on the mechanic's lien claim is without merit. Further, for the reasons set forth above, the Court's award of attorney's fees to Infinger is valid under its lien claim, as well as under Infinger's claim pursuant to S.C. Code §27-1-15 which the Shelter did not appeal.

II. This Court should uphold the Master-in Equity's Judgment in favor of Infinger where the evidence demonstrated that the Shelter failed to pay Infinger for the agreed upon amounts due under the contract.

The Agreement provided for a pay application procedure whereby the contractor would submit a sworn application for payment for the amount due and owing, and the owner would review it and certify the amount due. Infinger submitted nine Payment Applications to the Shelter for labor, services and materials Infinger provided to the Project. The Shelter's Board President certified all nine Payment Applications which totaled $664,215 and forwarded them to the VA and Housing Authority for payment. Infinger only received payments from the Shelter totaling $467,803 leaving an unpaid balance of $196,412. The Shelter's Board President conceded that the only reason Infinger wasn't paid in full was because the VA suspended the Shelter's grant.

The Shelter now contends that Infinger breached the Agreement by filing a mechanic's lien and lawsuit for breach of contract before exhausting its contractual remedies. This argument is posited despite the unequivocal trial testimony by the Shelter's Board President that he notified Infinger that the Shelter's funding was frozen and that the Shelter could no longer pay Infinger which resulted in the suspension of the work, and where the Agreement permitted Infinger to file a mechanic's lien. *See* § A.4.2.5 of Exhibit A to the Agreement at R p. 197.

More importantly, Infinger's action of suspending the work based on non-payment was in express compliance with the Agreement. § A.9.7.1 of Exhibit A at R. p. 204 to the Agreement specifically provides that:

> *[i]f for reasons other than those enumerated in § A.9.5.1[1] the Owner does not issue a payment within the time period required by § 5.1.3 of the Agreement, then the Design-Builder may, upon seven additional day's written notice to the Owner, stop the Work until payment of the amount owing has been received.*

The Shelter's attempt to characterize its failure to pay Infinger as a "dispute" covered by Article A.4 and its circular logic that Infinger is barred for seeking payment for work performed or materials provided prior to October 21, 2011 are an obvious attempt to avoid an undisputed debt.

Even if the Shelter's characterization of a failure to comply with contractually-mandated remedies is analogous to a failure to exhaust administrative remedies which is disputed, the Shelter's argument that Infinger's alleged actions "deprived the trial court of subject matter jurisdiction" would still fail. The South Carolina Supreme Court has explained that:

> "[t]he doctrine of exhaustion of administrative remedies is generally considered a rule of policy, convenience and discretion, rather than one of law, and is not jurisdictional." *Ward v. State*, 343 S.C. 14, 17 n. 5, 538 S.E.2d 245, 246 n. 5 (2000) (citations omitted). In contrast, "subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong." *Id.* "Thus, the failure to exhaust administrative remedies goes to the prematurity of a case, not subject matter jurisdiction." *Id.*

Moreover, it is in the sound discretion of the trial judge to determine whether administrative remedies must be exhausted, and a judge's decision will not be disturbed on appeal absent an abuse thereof. *Hyde v. S.C. Dep't of Mental Health*, 314 S.C. 207, 208, 442 S.E.2d 582, 582-83 (1994).

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[1] § A. 9.5.1 provides the Owner the right to withhold payment under certain circumstances such as defective work, the Contractor not paying its subs, Contractor failing to perform, among others, and is not applicable hereto.

In this case, the Shelter hasn't demonstrated an abuse of discretion by the Master, and in fact, the Shelter didn't even raise the issue of Infinger's alleged failure to exhaust contractually-mandated remedies at trial, and therefore that issue was not preserved for appeal. *Creech v. South Carolina Wildlife and Marine Resources Dep't*, 328 S.C. 24, 491 S.E.2d 571 (1997). Even assuming that Infinger was required to follow the contractual dispute procedures as alleged by the Shelter, such a process would have been futile where the Shelter conceded from the outset that Infinger was due the money and was not being paid because of the VA's actions. *See Brown v. James*, 389 S.C. 41, 54, 697 S.E.2d 604, 611 (Ct. App. 2010) [a commonly recognized exception to the requirement of exhaustion of administrative remedies exists when a party demonstrates that pursuit of administrative remedies would be a vain or futile act].

III. The Master-in-Equity properly denied the Shelter's motion to compel arbitration.

On the morning of trial, three and one-half (3 ½) years after the Complaint was filed, the Shelter orally moved to compel arbitration. This was the first time during the litigation that the Shelter moved for arbitration. The sole basis offered by the Shelter in support of its "right" to arbitrate was that its seventeenth affirmative defense in its Answer filed on July 16, 2012 stated that *[t]hese Defendants plead for arbitration to the extent that any valid and binding contract that the parties might have entered required arbitration of this dispute.* The Shelter did not make a substantive argument by written motion prior to trial or even offer an oral explanation on the day of trial as to why it waited until the day of trial to seek arbitration.

"The right to enforce an arbitration clause may be waived." *Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 131, 713 S.E.2d 799, 807 (Ct. App. 2011). "In order to establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration." *Liberty*

Builders, Inc. v. Horton, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999). "There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case." *Id.*

South Carolina considers three factors when determining whether a party has waived its right to compel arbitration: (1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration; (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and (3) whether the non-moving party was prejudiced by the delay in seeking arbitration. *Davis*, 394 S.C. at 131, 713 S.E.2d at 807. "To establish prejudice, the non-moving party must show something more than mere inconvenience." *Id.* In addition to the above factors, it is important to consider the extent to which the parties have availed themselves of the circuit court's assistance. See *id.* at 133, 713 S.E.2d at 808.

Infinger's Lawsuit was filed on May 1, 2012 containing claims for foreclosure of mechanic's lien, breach of contract and recovery pursuant to S.C. Code § 27-1-15 . The case was mediated and partially settled in 2014. The case continued on before the Master - in - Equity. The case was finally tried on December 8, 2015. On the morning of trial the Shelter's counsel asked the court to compel the parties to arbitrate their dispute on the basis that the Shelter's Answer included a general affirmative defense that the dispute resolution clause in the Agreement provided for arbitration.

Infinger's counsel contested the Shelter's untimely demand where the Shelter had: 1) never sought to compel arbitration during the 3 ½ year pendency of the lawsuit; 2) participated in extensive written discovery, deposition discovery, motion hearings, status hearings, and a court-ordered

mediation; and 3) where Infinger had incurred substantial time, cost and efforts in preparing the case for trial and would have been prejudiced had the case been further delayed by arbitration.

The Shelter's inclusion of the potential right to arbitration as an affirmative defense without ever moving to compel arbitration until the day of trial does not constitute a demand for arbitration as now asserted by the Shelter. Moreover, the Shelter's characterization of the discovery process as being "limited and minor" is simply inaccurate where the parties engaged in extensive document production, written discovery, requests for admissions, and a SCRCP 30(b)(6) deposition was taken. Moreover, the Shelter clearly availed itself of the court's assistance, where, among other things, it participated in court-ordered mediation, filed multiple motions with the court, including a motion for summary judgment, and sought the court's assistance in settlement resolution. Finally, Infinger would have been substantially prejudiced had the case been ordered to arbitration after Infinger had incurred substantial time and cost in preparing its case, had its witnesses present at trial and was ready to proceed.

For all of the above reasons, the Master did not err when he denied the Shelter's motion to compel arbitration.

IV. The Master-in-Equity properly determined Infinger's damages.

The Shelter cites § A.9.3.2 of Exhibit A to the Agreement at R. p. 202 which provides in relevant part that: *[p]ayments shall be made on account of materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work* in an attempt to support the argument that the Master erred by failing to breakdown materials incorporated into the structure and materials stored. The Shelter contends that the Master's alleged failure in this regard infected his damage award.

The Shelter's contention is misplaced where the Shelter's Board President testified at trial that Infinger was owed the amount of money certified as due under the pay application process, and where the pay applications included billing for *all labor and materials and equipment delivered and suitably stored.* There was no reason for the Master to breakdown the materials incorporated into the structure where the Shelter's Board President acknowledged and agreed that he signed and agreed to the amounts owed to Infinger, and there was no evidence offered by the Shelter to the contrary. When the Shelter raised this issue following the close of evidence, the Master pointed out that the Shelter didn't offer any evidence to dispute that the stored materials weren't incorporated into the Project, and then set forth the evidence in the record that supported his ultimate damage award. R. p. 154, line 3 - p. 188, line 6. Specifically, the Master noted Infinger's compilation of billings and payments showing an unpaid balance of $196,412 which was entered without objection, and noted that it was consistent with the percentage of completion as determined by the Housing Authority's inspector. R. p. 283; R. p. 83, line 4 - p. 85, line 22.

The Shelter also contends without any supporting law or argument that the Master incorrectly determined that the Shelter's expert's proffered testimony invaded the province of the Court. The Shelter called David Raymond LaRow, a principal of a development and economic finance consulting company for affordable housing and non-profit organizations, as its first witness. R. p. 141, line 22 - p. 142, line 17. The purpose of LaRow's testimony according to the Shelter was for "validating the understanding of work completed and bricks and mortar in place". R. p. 142, line 24 - p. 143, line 4. Infinger objected to LaRow based on the Shelter's failure to identify him until the day of trial, not having a chance to depose him prior to trial, and that any opinions or conclusions

that he may give regarding the terms and conditions of the contract were the province of the court. R. p. 143, lines 6-15.

The Master ruled that any opinions that LaRow would offer regarding the contract terms would be interfering with the province of the Court, but allowed the Shelter to proffer LaRow's testimony for the record. R. p. 143, line 16 - p. 144, line 8. LaRow explained that "bricks and mortar in place is the specific percentage of the work that has been completed as defined by the scope of work". R. p. 145, lines 17-25. He also provided an explanation about what terms are usually included in the payment provisions in construction contracts; however, he acknowledged that he hadn't reviewed the contract documents between the Shelter and Infinger. R. p. 146 - p. 147, line 8.

The trial court is charged with the duty of determining issues of law. As a part of this duty, the trial court serves as the gatekeeper and must decide whether the evidence submitted by a party is admissible pursuant to the Rules of Evidence as a matter of law. The admission of expert testimony is governed by Rule 702, SCRE, which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

See Watson v. Ford Motor Co., 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010).

In this case, even though LaRow wasn't identified as an expert witness until he was called at trial and could have been excluded on that basis alone, a review of his proffered testimony demonstrates that the Master's decision to exclude LaRow's testimony was not in error where the Master decided it was unnecessary for his interpretation of the terms of the Agreement. R. p. 147, lines 23-25. Specifically, it is unclear as to what possible assistance LaRow's testimony could have

offered the Master where LaRow hadn't even reviewed the contract documents between the Shelter and Infinger. As the Shelter has neither demonstrated that the Master abused his discretion nor shown how the Shelter was prejudiced, there is no reversible error. *Lee v. Suess*, 318 S.C. 283, 457 S.E.2d 344 (1995)(admission of expert testimony is within the sound discretion of the trial judge and will not be overruled absent a finding of an abuse of discretion and prejudice to the complaining party).

CONCLUSION

For the foregoing reasons, the Master-in-Equity's Order granting Judgment in favor of Emory J. Infinger and Associates Construction Company, Inc. should be upheld where there was evidentiary support for each of the Master's rulings.

Respectfully Submitted,

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