

2013-000800
RECEIVED

APR 19 2013

S.C. Supreme Court

RECEIVED

APR 18 2013

S.C. Supreme Court

STATE OF SOUTH CAROLINA
In the Supreme Court

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, ... Petitioner.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI
(Volume 1 of 2)

Robert T. Lyles, Jr.
Lyles & Lyles, LLC
342 East Bay Street
Charleston, South Carolina 29401
(843) 577-7730
Attorneys for Petitioner

Other Counsel of Record

A. Bright Ariail, Esquire
James A. Bruorton, IV, Esquire
Rosen, Rosen & Hagood, LLC
151 Meeting Street, Suite 400
Post Office Box 893
Charleston, S.C. 29402
(843) 577-6726
bariail@rrhlawfirm.com
cbruorton@rrhlawfirm.com
Attorneys for Respondent

INDEX

Court of Appeals Opinion Number 5081..... (S.C. Ct. App. filed February 6, 2013)	A
Slivka's Petition for Rehearing and Supporting Memorandum, ... dated February 21, 2013	B
Court of Appeals' Ruling on Petition for Rehearing.....	C
Final Brief of Appellant, dated July 19, 2012.....	D
Respondents' Brief, dated July 20, 2012	E
Reply Brief of Appellants, dated July 19, 2012.....	F
Record on Appeal	G

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The Spriggs Group, P.C., Respondent,

v.

Gene R. Slivka, Appellant.

Appellate Case No. 2011-204366

Appeal From Colleton County
William H. Seals, Jr., Circuit Court Judge

Published Opinion No. 5081
Heard January 10, 2013 – Filed February 6, 2013

**AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED**

Robert T. Lyles, Jr., of Lyles & Lyles, LLC, of
Charleston, for Appellant.

A. Bright Ariail and James Atkinson Bruorton, IV, both
of Rosen Rosen & Hagood, LLC, of Charleston, for
Respondent.

LOCKEMY, J.: In this action for foreclosure of a mechanic's lien and breach of contract, Gene Slivka argues the circuit court erred in (1) submitting a question involving the interpretation of section 29-5-10(a) of the South Carolina Code (2007) to the jury; (2) failing to direct a verdict; and (3) awarding The Spriggs Group, P.C. (Spriggs) attorney's fees, costs, and interest. We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL BACKGROUND

This case arises from a dispute between Slivka and Spriggs regarding Spriggs' provision of architectural services for Slivka's home. Spriggs designed all of the buildings on Slivka's Colleton County plantation (the property), including the main house, two detached garages with apartments, potting shed, conservatory, stable, and grotto. Pursuant to a November 17, 2006 written proposal (the Agreement), Spriggs was to receive a fixed fee of \$161,500 for its architectural and engineering design services, and hourly fees for any additional services. The fixed fee was subsequently reduced to \$152,402. Slivka paid half of the fee at the start of the design process and agreed to pay the remainder upon completion of the project.

According to Slivka, he terminated Spriggs on December 12, 2008. Slivka contends he picked up the remaining drawings from Spriggs' office and told Spriggs he did not want any more drawings. Spriggs, however, continued to perform its services under the Agreement. According to Ken Spriggs, principal of Spriggs, he was unaware Slivka had allegedly terminated Spriggs. In February 2009, Spriggs submitted four invoices totaling \$198,834.53 to Slivka for payment in accordance with the terms of the Agreement. Slivka admitted he owed Spriggs \$76,201, the balance of the Agreement price, but disputed the additional charges and refused to pay Spriggs. Spriggs provided services to Slivka pursuant to the Agreement through May 2009.

As a result of Slivka's failure to pay Spriggs in accordance with the terms of the Agreement, Spriggs filed a mechanic's lien against the property on April 13, 2009. Slivka continued to refuse to pay Spriggs and posted a \$265,112.71 cash bond to remove the lien from the property. Thereafter, on July 8, 2009, Spriggs commenced a foreclosure action on the lien. In an amended complaint filed in May 2010, Spriggs asserted claims for foreclosure of mechanic's lien, breach of contract, breach of contract accompanied by a fraudulent act, quantum meruit, and failure to comply with section 27-1-15 of the South Carolina Code (2007). Slivka counterclaimed for slander of title, violation of the Frivolous Claims Sanctions Act, tortious interference with contractual relationships with third parties dependent upon performance by Spriggs, and tortious interference with contractual relationships with third parties resulting from defective notice of mechanic's lien.

On June 30, 2011, Slivka offered to settle the case for \$100,000, but Spriggs did not accept the offer. Prior to trial, Spriggs filed a motion to strike Slivka's affirmative defenses and counterclaims. Thereafter, Slivka filed a motion for summary judgment as to all of Spriggs' causes of action. Spriggs countered with

its own motion for summary judgment. At the motions hearing, Slivka agreed to withdraw certain counterclaims, and the circuit court denied both motions for summary judgment.

The parties proceeded to trial on all of Spriggs' causes of action and on Slivka's counterclaims for slander of title, tortious interference with contractual relationships with third parties dependent upon performance by Spriggs, and tortious interference with contractual relationships with third parties resulting from defective notice of mechanic's lien. At trial, Spriggs asserted the additional charges in its invoices were a result of Slivka's demands and changes, and they were billed pursuant to the Agreement. Slivka maintained the additional charges were not contemplated when the Agreement was made and Spriggs had a duty to advise him before performing and charging for additional work.

At the conclusion of Spriggs' case, the circuit court denied Slivka's directed verdict motions as to Spriggs' causes of action for foreclosure of mechanic's lien, breach of contract, and failure to comply with section 27-1-15. The circuit court also denied Spriggs' motion for a directed verdict as to the section 27-1-15 claim. Spriggs withdrew its claims for breach of contract accompanied by a fraudulent act and quantum meruit. Following Slivka's case, the circuit court denied Spriggs' motion for a directed verdict as to Slivka's slander of title claim. Slivka also renewed his directed verdict motions as to Spriggs' causes of action for foreclosure of mechanic's lien and failure to comply with section 27-1-15. The circuit court ruled both causes of action would be submitted to the jury.

Spriggs' foreclosure of mechanic's lien, breach of contract, and failure to comply with section 27-1-15 claims were submitted to the jury, along with Slivka's slander of title claim.¹ Following deliberations, the jury returned a verdict in favor of Spriggs on all three of its causes of action and on Slivka's slander of title cause of action. The jury awarded Spriggs \$173,990.53 in actual damages. Slivka made a post-trial motion seeking a judgment notwithstanding the verdict (JNOV) and/or a new trial on Spriggs' foreclosure of mechanic's lien and failure to comply with section 27-1-15 claims.² The circuit court denied Slivka's JNOV motion and his subsequent Rule 59(e), SCRCP, motion to alter or amend. Spriggs made a post-trial motion seeking attorney's fees, costs, and interest. The circuit court granted the motion and awarded Spriggs \$235,030.31 in attorney's fees and costs and

¹ Slivka withdrew both of his tortious interference with contractual relationships claims.

² Slivka did not appeal the jury's verdict on Spriggs' breach of contract claim.

\$37,413.92 in prejudgment interest. Thereafter, the circuit court denied Slivka's Rule 59(e) motion to alter or amend. This appeal followed.

LAW/ANALYSIS

I. Statutory Interpretation

Slivka argues the circuit court erred in submitting the question of whether the services provided by Spriggs in January 2009 fell within the definition of "labor" contained in section 29-5-10(a) of the South Carolina Code (2007) to the jury. We agree but find no reversible error.

Pursuant to section 29-5-90 of the South Carolina Code (2007), a mechanic's lien

shall be dissolved unless the person desiring to avail himself thereof, within ninety days after he ceases to labor on or furnish labor or materials for such building or structure, serves upon the owner . . . a statement of a just and true account of the amount due him, with all just credits given, together with a description of the property intended to be covered by the lien. . . .

Section 29-5-10(a) states:

[L]abor 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. . . .

For its lien to be timely, Spriggs must have performed labor, within the definition contained in section 29-5-10(a), on or after January 13, 2009. According to Andy Bozeman, a Spriggs employee, Spriggs addressed a plumbing subcontractor's request to substitute the size of plumbing lines used on the project on January 13, 2009. Bozeman also communicated with a mechanical engineer and answered questions regarding the plumbing line substitution.

At trial, Slivka argued that while the timeliness of the lien was a question of fact for the jury to decide, whether the construction administration services performed by Spriggs on January 13, 2009, fell within the statutory definition of labor was a question of statutory interpretation for the court. In response, Spriggs argued the question before the jury was one of timeliness, and the services it provided on January 13, 2009, were clearly within the definition of labor. The circuit court decided,

as to the mechanic's lien itself, I'm just going to submit it to the jury. I'm going to read them the statute. I'm going to give them the charge It's kind of long and redundant but y'all can argue whether that is service that falls within the mechanic's lien statute. And of course you can argue the timeliness and all of that kind of stuff.

Slivka contends the question of whether Spriggs' work fell within the purview of the mechanic's lien statute was erroneously submitted to the jury. Spriggs maintains the jury was properly instructed to determine whether its lien was valid and timely. Spriggs also notes the circuit court ruled post-trial it was "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."

We find the circuit court erred in submitting the question of whether Spriggs' work fell within the purview of the mechanic's lien statute to the jury. *See Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007) (holding the issue of interpretation of a statute is a question of law for the court). However, this error was harmless because, as discussed below, we find the

construction administration services proved by Spriggs fell within the definition of labor contained in 29-5-10(a).

II. Timeliness of the Lien

Slivka argues the circuit court erred in denying his motion for directed verdict because Spriggs' lien was not timely. We disagree.

"When reviewing the denial of a motion for directed verdict or JNOV, this Court must employ the same standard as the [circuit] court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *Welch v. Epstein*, 342 S.C. 279, 299, 536 S.E.2d 408, 418 (Ct. App. 2000). "The [circuit] court must deny the motions when the evidence yields more than one inference or its inference is in doubt." *Id.* at 300, 536 S.E.2d at 418. "This Court will reverse the [circuit] court only when there is no evidence to support the ruling below." *Id.* "When considering directed verdict and JNOV motions, neither the [circuit] court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." *Id.* at 300, 536 S.E.2d at 419.

First, Slivka contends the work performed by Spriggs on January 13, 2009, does not fall within the definition of labor contained in section 29-5-10(a) because none of Spriggs' work involved "the preparation of plans, specifications, and design drawings." Slivka maintains none of the work performed by Bozeman occurred on site, and the work only amounted to construction administration services. Slivka argues the circuit court erred in relying on *Williamson v. Hotel Melrose*, 110 S.C. 1, 96 S.E. 407 (1918), in finding construction administration services are a type of labor for which a mechanic's lien may be filed under the mechanic's lien statute. In *Williamson*, our supreme court determined an architect who furnished plans and specifications and "superintended" the construction of a project had performed labor within the meaning of the mechanic's lien statute. 110 S.C. at 1, 96 S.E. at 411. At the time, the mechanic's lien statute did not include the definition of labor contained in the current statute. The statute at the time afforded a lien to "any person to whom a debt is due for labor performed or furnished." *Id.*

Slivka maintains *Williamson* is not applicable because the current version of the mechanic's lien statute, section 29-5-10(a), contains specific activities determined by the legislature to be "labor" and does not include construction administration services. Slivka argues the legislature could have included off-site construction administration services of a design professional in its definition of labor but it chose not to. Furthermore, Slivka maintains Spriggs was not on-site directing the

work on the property like the architect in *Williamson*. Ken Spriggs testified he was not directing any work or supervising the construction.

We find the construction administration services provided by Spriggs are labor pursuant to the definition of labor in section 29-5-10(a). While the statute provides labor "includes the preparation of plans, specifications, and design drawings," it also states labor includes "the work of making the real estate suitable as a site for the building or structure." Here, Spriggs' discussions with the plumber and engineer in January 2009 were part of its architectural services overseeing the proper construction of the property.

Slivka also contends the circuit court erred in finding work performed by Spriggs in May 2009 supported the timeliness of the lien filed on April 13, 2009. At trial, Bozeman testified he provided design sketches for an appraisal of the property in May 2009. Slivka argues this work could not support the timeliness of Spriggs' lien because it was allegedly performed after the lien was filed. We find the circuit court did not err because the court's order does not explicitly say, as alleged by Slivka, that the May 2009 services were performed within ninety days of April 13, 2009. While the circuit court order mentions the May 2009 services, it notes these services were performed after the lien was filed. The court also specifically notes the lien was filed within ninety days of January 13, 2009. Accordingly, we affirm the circuit court's denial of Slivka's motion for a directed verdict on Spriggs' mechanic's lien claim.

III. Attorney's Fees, Costs, and Interest

"A party cannot recover attorney's fees unless authorized by contract or statute." *Cullen v. McNeal*, 390 S.C. 470, 491, 702 S.E.2d 378, 389 (Ct. App. 2010). Here, sections 27-1-5 and 29-5-10 of the South Carolina Code (2007) both authorize an award of attorney's fees to Spriggs. Pursuant to section 27-1-15,

[w]henEVER a contractor, laborer, design professional, or materials supplier has expended labor, services, or materials under contract for the improvement of real property, and where due and just demand has been made by certified or registered mail for payment for the labor, services, or materials under the terms of any regulation, undertaking, or statute, it is the duty of the person upon whom the claim is made to make a reasonable and fair investigation of the merits of the claim and to pay it, or

whatever portion of it is determined as valid, within forty-five days from the date of mailing the demand. If the person fails to make a fair investigation or otherwise unreasonably refuses to pay the claim or proper portion, he is liable for reasonable attorney's fees and interest at the judgment rate from the date of the demand.

Additionally, pursuant to section 29-5-10(a), "[t]he costs which may arise in enforcing or defending against the lien. . . , including a reasonable attorney's fee, may be recovered by the prevailing party." "The fee must be determined by the court in which the action is brought but the fee and court costs may not exceed the amount of the lien." *Id.*

The following six factors should be considered when determining reasonable attorney's fees: "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services." *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997). "The decision to award or deny attorneys' fees under a state statute will not be disturbed on appeal absent an abuse of discretion." *Kiriakides v. Sch. Dist. of Greenville Cnty.*, 382 S.C. 8, 20, 675 S.E.2d 439, 445 (2009). "An abuse of discretion occurs when the conclusions of the [circuit] court are either controlled by an error of law or are based on unsupported factual conclusions." *Id.* "Similarly, the specific amount of attorneys' fees awarded pursuant to a statute authorizing reasonable attorneys' fees is left to the discretion of the trial judge and will not be disturbed absent an abuse of discretion." *Id.*

A. Section 27-1-15

Slivka argues the circuit court erred in denying his motion for a directed verdict on Spriggs' failure to comply with the section 27-1-15 claim. We disagree.

Slivka contends Spriggs failed to present any evidence Slivka did not perform a fair and reasonable investigation because at the time Spriggs made its demand under the statute the parties were involved in litigation initiated by Spriggs. We find whether a fair and reasonable investigation of Spriggs' claim has been made and whether a valid portion of the claim was paid in a timely manner are questions of fact for the jury. *See Hardaway Concrete Co., Inc. v. Hall Contracting Corp.*, 374 S.C. 216, 229, 647 S.E.2d 488, 495 (Ct. App. 2007) (holding whether a party

made a fair and reasonable investigation of the merits of a claim is a question of fact).

Additionally, Slivka argues at the time the demand was made it was impossible to determine the "valid" amount due because of the parties' pending claims against each other for damages. Finally, Slivka maintains his failure to make a payment at the time of the demand was not unreasonable because he had already paid the court a cash bond exceeding the amount of Spriggs' claim. Slivka fails to cite any legal precedent to support these arguments. Accordingly, we find these arguments are abandoned on appeal. *See Bennett v. Investors Title Ins. Co.*, 370 S.C. 578, 599, 635 S.E.2d 649, 660 (Ct. App. 2006) (noting when an appellant fails to cite any supporting authority for his position and makes conclusory arguments, the appellant abandons the issue on appeal).

B. Amount of Attorney's Fees and Costs

Slivka argues the circuit court erred in awarding Spriggs \$235,030.31 in attorney's fees and costs. We agree.

The circuit court determined Spriggs was entitled to \$235,030.31 in attorney's fees and costs pursuant to sections 29-5-10 and 27-1-15. The court further found the fees and costs awarded were reasonable based upon the six criteria established by the supreme court. The circuit court noted, "[Spriggs] was required to expend considerably more time and effort on this case due to specific actions of [Slivka] who created unnecessary delays, filed meritless motions, and forced [Spriggs] to incur additional attorney's fees and costs above and beyond what would otherwise have been incurred."

First, Slivka argues Spriggs was not entitled to recover \$28,619.25 in staff member fees as part of its attorney's fees award. We find the circuit court did not abuse its discretion in including staff member fees in its award of attorney's fees. We note Slivka fails to cite any legal precedent to support this argument. Additionally, this court has upheld attorney's fees awards which included paralegal fees. *See McElveen v. McElveen*, 332 S.C. 583, 602, 506 S.E.2d 1, 11 (Ct. App. 1998); *Charleston Lumber Co. v. Miller Housing Corp.*, 318 S.C. 471, 484, 458 S.E.2d 431, 439 (Ct. App. 1995).

Next, Slivka contends Spriggs' total recovery is limited to the amount of the cash bond he posted with the clerk of court. Slivka argues that pursuant to section 29-5-110 of the South Carolina Code (2007), the total payment to Spriggs is limited to

\$266,012.71, the amount of the cash bond he paid to the clerk of court. Therefore, Slivka maintains because Spriggs' verdict was \$173,990.53, any award of attorney's fees under the mechanic's lien statute is limited to a maximum of \$92,022.18. We disagree. Section 29-5-110 relates to the amount of the judgment and makes no mention of attorney's fees. Attorney's fees are specifically addressed in section 29-5-10, which provides that the costs and fees incurred in enforcing or defending against the lien may be recoverable by the prevailing party up to the amount of the lien. *See* § 29-5-10(a).

Finally, Slivka argues the attorney's fees awarded by the circuit court are not reasonable and the circuit court order fails to specify which fees were awarded pursuant to which statute. Although the amount of attorney's fees awarded in this case, compared to the jury award, may not shock the conscience of this court, the needle is definitely moving on the seismograph. The circuit court order is unclear as to which fees were awarded under which statutory authority. We note the court's award exceeds the amount permitted under the mechanic's lien statute. Further, although theoretically possible, it is improbable an attorney's fee of almost \$250,000 would be awarded for a net recovery of approximately \$75,000 above the \$100,000 settlement offered by Slivka under section 27-1-15. The circuit court may have combined the two statutes to reach the figure, although the legality of that procedure is not addressed in this decision. Moreover, the trial court surely did not award fees for the two causes of action it dismissed or for the breach of contract claim. Thus, because we find the circuit court's order is unclear, we reverse the court's award of \$235,030.31 in attorney's fees to Spriggs and remand the issue of attorney's fees to the circuit court for reconsideration. We order the circuit court to clearly identify the statutory authority for its award and the fees incurred under each statute.

C. Prejudgment Interest

Slivka argues the circuit court's award of \$37,413.92 in prejudgment interest to Spriggs was not supported by statute. We disagree.

The law permits the award of prejudgment interest when a monetary obligation is a sum certain, or is capable of being reduced to certainty, accruing from the time payment may be demanded either by the agreement of the parties or the operation of law. *Butler Contr., Inc. v. Court St., LLC*, 369 S.C. 121, 133, 631 S.E.2d 252, 258 (2006). Generally, prejudgment interest may not be recovered on an unliquidated claim in the absence of agreement or statute. *Id.* The fact that the amount due is disputed does not render the claim unliquidated for purposes of

awarding prejudgment interest. *Id.* Rather, the proper test is "whether or not the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose." *Id.* "The award of prejudgment interest will not be disturbed on appeal unless the [circuit] 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).

We find the circuit court did not err in awarding Spriggs prejudgment interest. We note the court's award of prejudgment interest was not limited to Spriggs' cause of action for failure to comply with section 27-1-15. The court also awarded interest on Spriggs' breach of contract claim, which was not appealed and is the law of the case. Accordingly, we affirm the circuit court's award of prejudgment interest.

CONCLUSION

We find the construction administration services provided by Spriggs fell within the definition of labor contained in section 29-5-10(a). Additionally, we affirm the circuit court's award of prejudgment interest and denial of Slivka's directed verdict motions as to Spriggs' section 27-1-15 and mechanic's lien claims. We reverse the circuit court's award of attorney's fees and remand for reconsideration.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

SHORT and KONDUROS, JJ., concur.

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.

APPELLANTS' PETITION FOR REHEARING

Robert T. Lyles, Jr.
Lyles & Lyles, LLC
342 East Bay Street
Charleston, South Carolina 29401
(843) 577-7730
Attorneys for Appellants

Other Counsel of Record

A. Bright Ariail, Esquire
James A. Bruorton, IV, Esquire
Rosen, Rosen & Hagood, LLC
151 Meeting Street, Suite 400
Post Office Box 893
Charleston, S.C. 29402
(843) 577-6726
bariail@rrhlawfirm.com
cbruorton@rrhlawfirm.com
Attorneys for Respondent

TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT OF APPEALS:

The Appellant, GENE R. SLIVKA, by and through his undersigned counsel, hereby petition this Honorable Court for a rehearing of the above referenced appeal, pursuant to Rule 221, *SCACR*. Said petition for rehearing is in regard to the Court's February 6, 2013 Opinion which remanded the instant appeal.

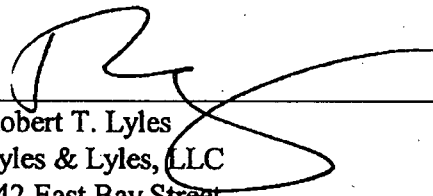
The grounds for Appellants' petition for rehearing are as follows:

- I. THE COURT OF APPEALS ERRED IN HOLDING THAT THE SERVICES PROVIDED BY SPRIGGS IN JANUARY 2009 WAS "LABOR" BECAUSE IT WAS "WORK OF MAKING THE REAL ESTATE SUITABLE AS A SITE FOR THE BUILDING OR STRUCTURE," WHICH IS A PORTION OF THE MECHANIC'S LIEN STATUTE THAT IS NOT APPLICABLE TO THIS CASE.
- II. THE COURT OF APPEALS ERRED IN HOLDING THAT THE CONTRACT ADMINISTRATION SERVICES PROVIDED BY SPRIGGS IN JANUARY 2009 FELL WITHIN THE DEFINITION OF "LABOR" CONTAINED IN SECTION 29-5-10(A) OF THE SOUTH CAROLINA CODE (2007).
 - A. Contract administration services are clearly not within the legislatively provided definition of "labor" and the court of appeals was without authority to expand the legislative definition.
 - B. There is no evidence that the conversations of Spriggs' employees in January 2009 were actually used in the "erection, alteration, or repair" of improvements to Slivka's property.
- III. THE COURT OF APPEALS ERRED IN FINDING THAT THE APPELLANT WAS NOT ENTITLED TO A DIRECTED VERDICT ON RESPONDENT'S CLAIM UNDER SOUTH CAROLINA CODE 27-1-15.
 - A. Whether discovery in pending litigation, at the time the demand is received, satisfies the statutory requirement to investigate is a question for the court, not the jury.

- B. Slivka cited all applicable statutory and case law, fully developed its arguments at the trial court level and on appeal, and did not abandon any defenses or arguments relative to the interpretation or application of § 27-1-15.**
 - C. As a matter of law, there can be no liability under § 27-1-15 when the demand is made at a point where the parties have competing claims and defenses against each other and the issue of which party owes money, and how much, is actually submitted to a jury.**
 - D. As a matter of law, there can be no liability under § 27-1-15 where demand is made after the institution of a mechanic's lien action and money, exceeding the amount of the demand, has been deposited into the court pursuant to the requirements of the Mechanic's Lien Statute.**
- IV. THE COURT OF APPEALS ERRED IN UPHOLDING THE AWARD OF STAFF MEMBER FEES.**
- V. THE COURT OF APPEALS ERRED IN FINDING THAT THE RESPONDENT'S RECOVERY UNDER THE MECHANIC'S LIEN STATUTE WAS NOT LIMITED TO THE AMOUNT OF THE CASH BOND POSTED BY THE APPELLANT IN THIS MATTER.**

In light of the foregoing and the principles of law enumerated in Appellants' Memorandum of Law in Support of Petition for Rehearing, served and filed simultaneously herewith, the Court's February 6, 2013 Order remanding this appeal is in error and therefore, Appellants' petition for rehearing must be granted.

Respectfully submitted,



Robert T. Lyles
Lyles & Lyles, LLC
342 East Bay Street
Charleston, South Carolina 29401
(843) 577-7730
Rtl@lylesfirm.com
Attorneys for Appellant

February 21, 2013

Charleston, South Carolina

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.

APPELLANTS' MEMORANDUM IN SUPPORT
PETITION FOR REHEARING

Robert T. Lyles, Jr.
Lyles & Lyles, LLC
342 East Bay Street
Charleston, South Carolina 29401
(843) 577-7730
Attorneys for Appellants

Other Counsel of Record

A. Bright Ariail, Esquire
James A. Bruorton, IV, Esquire
Rosen, Rosen & Hagood, LLC
151 Meeting Street, Suite 400
Post Office Box 893
Charleston, S.C. 29402
(843) 577-6726
bariail@rrhlawfirm.com
cbruorton@rrhlawfirm.com
Attorneys for Respondent

TABLE OF CONTENTS

Table of Authorities	iii
Grounds for Rehearing	1
I. THE COURT OF APPEALS ERRED IN HOLDING THAT THE SERVICES PROVIDED BY SPRIGGS IN JANUARY 2009 WAS "LABOR" BECAUSE IT WAS "WORK OF MAKING THE REAL ESTATE SUITABLE AS A SITE FOR THE BUILDING OR STRUCTURE," WHICH IS A PORTION OF THE MECHANIC'S LIEN STATUTE THAT IS NOT APPLICABLE TO THIS CASE.	1
II. THE COURT OF APPEALS ERRED IN HOLDING THAT THE CONTRACT ADMINISTRATION SERVICES PROVIDED BY SPRIGGS IN JANUARY 2009 FELL WITHIN THE DEFINITION OF "LABOR" CONTAINED IN SECTION 29-5-10(A) OF THE SOUTH CAROLINA CODE (2007).	2
A. Contract administration services are clearly not within the legislatively provided definition of "labor" and the court of appeals was without authority to expand the legislative definition	2
B. There is no evidence that the conversations of Spriggs' employees in January 2009 were actually used in the "erection, alteration, or repair" of improvements to Slivka's property	3
III. THE COURT OF APPEALS ERRED IN FINDING THAT THE APPELLANT WAS NOT ENTITLED TO A DIRECTED VERDICT ON RESPONDENT'S CLAIM UNDER SOUTH CAROLINA CODE 27-1-15.	4
A. Whether discovery in pending litigation, at the time the demand is received, satisfies the statutory requirement to investigate is a question for the court, not the jury	4
B. Slivka cited all applicable statutory and case law, fully developed its arguments at the trial court level and on appeal, and did not abandon any defenses or arguments relative to the interpretation or application of § 27-1-15	5

C.	As a matter of law, there can be no liability under § 27-1-15 when the demand is made at a point where the parties have competing claims and defenses against each other and the issue of which party owes money, and how much, is actually submitted to a jury	7
D.	As a matter of law, there can be no liability under § 27-1-15 where demand is made after the institution of a mechanic's lien action and money, exceeding the amount of the demand, has been deposited into the court pursuant to the requirements of the Mechanic's Lien Statute	8
IV.	THE COURT OF APPEALS ERRED IN UPHOLDING THE AWARD OF STAFF MEMBER FEES.	8
V.	THE COURT OF APPEALS ERRED IN FINDING THAT THE RESPONDENT'S RECOVERY UNDER THE MECHANIC'S LIEN STATUTE WAS NOT LIMITED TO THE AMOUNT OF THE CASH BOND POSTED BY THE APPELLANT IN THIS MATTER	9
Conclusion		10

TABLE OF AUTHORITIES

CASES

<i>Carolina Steel Corporation v. Palmetto Bridge Constructors</i> , 444 F.Supp.2d 577 (D.S.C. 2006)	7
<i>Charleston Lumber Co. v. Miller Housing Corp.</i> , 318 S.C. 471, 484, 458 S.E.2d 431, 439 (Ct. App. 1995)	8
<i>Clo-Car Trucking Co, Inc., v. Chuffure Estates of S.C.</i> , 282 S.C. 573, 320 S.E.2d 51 (Ct. App. 1984)	2
<i>Grant v. City of Folly Beach</i> , 346 S.C. 74, 551 S.E.2d 229 (S.Ct. 2001)	2
<i>Hodges v. Rainey</i> , 341 S.C. 79, 86, 533 S.E.2d 578, 582 (S.Ct. 2000)	2
<i>Huff v. Jennings</i> , 319 S.C. 142, 459 S.E.2d 886 (S.C.App.,1995)	3
<i>McElveen v. McElveen</i> , 332, S.C. 593, 502, 506 S.E.2d 1, 11 (Ct. App. 1998)	8
<i>Riverwoods, LLC, v. County of Charleston</i> , 349 S.C. 378, 563 S.E.2d 651(S.Ct. 2002)	2

STATUTES

<i>S.C. Code Ann. § 27-1-15</i>	4, 5, 6, 7, 8, 9
<i>S.C. Code Ann. § 29-5-10</i>	1, 2, 3, 4, 6, 8, 9
<i>S.C. Code Ann. § 29-5-110</i>	9
<i>South Carolina Rules of Civil Procedure</i>	4

OTHER AUTHORITIES

<u>Black's Law Dictionary</u> , 284 (Seventh Ed.1999)	6

GROUND'S FOR REHEARING

- I. **THE COURT OF APPEALS ERRED IN HOLDING THAT THE SERVICES PROVIDED BY SPRIGGS IN JANUARY 2009 WAS "LABOR" BECAUSE IT WAS "WORK OF MAKING THE REAL ESTATE SUITABLE AS A SITE FOR THE BUILDING OR STRUCTURE," WHICH IS A PORTION OF THE MECHANIC'S LIEN STATUTE THAT IS NOT APPLICABLE TO THIS CASE**

Improperly disregarding the legislatively supplied definition of "labor," the Court of Appeals held that the discussions between Spriggs' employee, Mr. Bozeman, and an engineer and plumber, which took place in January, 2009, (R. 199) constitute "labor" under the statute because it was "the work of making the real estate suitable as a site for the building or structure" under *S.C. Code Ann. § 29-5-10*. However, the statutory language cited and relied upon by the Court of Appeals is not applicable to this case.

The statute provides:

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. *Id.* (emphasis added).

The portion of the statute relied on by the Court of Appeals, specifically, "**the work of making the real estate suitable as a site for the building or structure,**" refers to site work. (Emphasis added.) The statute goes on to describe "the work" to include obvious site work activities including grading and paving. Neither the engineer or

plumber who spoke with Mr. Bozeman in January, 2009, were involved in site work, and there is no evidence in the record that site work was being performed at the Slivka property at that time. Thus, the portion of the statute relied upon by the Court of Appeals to affirm the result is not even applicable to this case.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT THE CONTRACT ADMINISTRATION SERVICES PROVIDED BY SPRIGGS IN JANUARY 2009 FELL WITHIN THE DEFINITION OF "LABOR" CONTAINED IN SECTION 29-5-10(A) OF THE SOUTH CAROLINA CODE (2007).

A. Contract administration services are clearly not within the legislatively provided definition of "labor" and the court of appeals was without authority to expand the legislative definition.

"The cardinal rule of statutory construction is for the Court to ascertain and effectuate the intent of the legislature." *Riverwoods, LLC, v. County of Charleston*, 349 S.C. 378, 563 S.E.2d 651 (S.Ct. 2002), citing *E.g., Grant v. City of Folly Beach*, 346 S.C. 74, 551 S.E.2d 229 (S.Ct. 2001). "The canon of construction '*expressio unius est exclusio alterius*' or '*inclusio unius est exclusio alterius*' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.' " *Id.* citing *Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (S.Ct. 2000). Had the legislature decided to include contract administration of a design professional in its definition of "labor" it could have done so but did not. The Court of Appeals has improperly expanded the definition of "labor" to include contract administration services, which is clearly prohibited by established South Carolina Law. See, *Clo-Car Trucking Co, Inc., v. Cluffure Estates of S.C.*, 282 S.C. 573, 320 S.E.2d 51 (Ct. App. 1984).

B. There is no evidence that the conversations of Spriggs' employees in January 2009 were actually used in the "erection, alteration, or repair" of improvements to Slivka's property.

The record is devoid of any evidence establishing that the information provided by Mr. Bozeman was actually used in the "erection, alteration, or repair" of the improvements on Slivka property, which is a threshold proof requirement for Spriggs to be entitled to protection of the Mechanic's Lien Statute. Since that cannot be established, the work in January, 2009 is not protected by the Mechanic's Lien Statute.

This highlights why the legislature was specific about what activities of a design professional constituted "labor" under the statute. If an architect's thoughts, telephone conversations, or mere observation of construction, are deemed to be "labor," it is impossible to establish that they were actually used in the erection, alteration or repair of improvements.

For this reason, and for the reasons set forth fully in the Appellant's briefs filed in this matter, Respondent's activities in January, 2009, do not fall within any statutory definition of "labor" within the Mechanic's Lien Statute. Therefore, as no work by the Respondent performed during the ninety days prior to the filing of its mechanic's lien falls within the statute's definition of labor, the Respondent's lien was untimely. Accordingly, Appellant's Petition for Rehearing must be granted at to this issue.

Additionally, because the mechanic's lien was not timely as a matter of law, the Appellant is entitled to a new trial on all issues, including his counterclaims. As set forth in Appellant's Brief, the Respondent's wrongfully filed lien may serve as a basis for an action for slander of title. *Huff v. Jennings*, 319 S.C. 142, 459 S.E.2d 886 (S.C.App.,

1995). Appellant is also entitled to his attorneys fees as the prevailing party under the Mechanic's Lien Statute. As *S.C. Code Ann.* § 29-5-10(b) contemplates one verdict in the action, the entire matter must be reversed and remanded, including the award of \$173,990.53 on the breach of contract claim, since the damages and attorneys fees which should be awarded to Appellant for defending Respondent's faulty lien should be off-set against that award.

III. THE COURT OF APPEALS ERRED IN FINDING THAT THE APPELLANT WAS NOT ENTITLED TO A DIRECTED VERDICT ON RESPONDENT'S CLAIM UNDER SOUTH CAROLINA CODE § 27-1-15.

A. Whether discovery in pending litigation, at the time the demand is received, satisfies the statutory requirement to investigate is a question for the court, not the jury.

Like the trial court, the Court of Appeals erred in holding that the question of Slivka's investigation, after receiving the § 27-1-15 demand, was a question of fact for the jury. This is clearly in error.

Once litigation is filed, as it was by Spriggs eight months prior to the § 27-1-15 demand, the conduct of the parties is governed by the *South Carolina Rules of Civil Procedure*. Adherence to those rules, and the obligations and limitations placed upon the parties by them, is unique to the litigation process. A jury is not qualified, or competent, to assess the fairness or reasonableness of the statutorily required investigation in the context of on-going litigation since a jury is unfamiliar with the processes of litigation, the tools of discovery available to parties, and the obligations and limitation of the parties pursuant to the rules.

Likewise, the jury was unaware that Spriggs moved for summary judgment on its' claims, and made a directed verdict motion, both of which were denied. The significance of these denials, with respect to how it reflects the legal position of the parties, was not known by the jury, and should not have been known by the jury. Therefore, whether a party performed a "reasonable investigation" as required by § 27-1-15, where litigation is pending between the parties, at the time the demand is received, is a question for the Court, not a jury, and to hold otherwise is in error.

B. Slivka cited all applicable statutory and case law, fully developed its arguments at the trial court level and on appeal, and did not abandon any defenses or arguments relative to the interpretation or application of § 27-1-15

Apparently not wanting to address the applicability of § 27-1-15 to the facts of this case, the Court of Appeals surprisingly, and in error, held that Slivka's defenses were abandoned because the arguments were conclusory and without a citation to authority. This finding by the Court of Appeals is remarkably incorrect.

The application of § 27-1-15 to the facts of this case presents three novel issues. First, as previously discussed, does *bona fide*, good faith discovery in active litigation, as a matter of law, satisfy the "reasonable investigation" requirement of § 27-1-15 when the demand is made while the parties are engaged in litigation? Second, when the parties have legally valid, opposing claims and defenses, and the questions of which party is owed money, and how much is owed, are submitted to the jury after the denial of all motions for directed verdict, can one party face liability under the statute for unreasonably failing to pay money it may not have owed? Finally, where a demand under the statute is made after a mechanics lien claim has commenced, and after a party has

complied with the cash bond requirements of the Mechanic's Lien Statute, can the party posting the cash bond face liability under § 27-1-15 for failing to pay money that he has already paid into the court? The fact that there are not cases on point should not prejudice Slivka.

Black's Law Dictionary defines conclusory as "expressing a factual inference without stating the underlying facts on which the inference is based," 284 (*Seventh Ed.1999*). The Court of Appeals' characterization of Slivka's arguments relating to § 27-1-15 is incorrect given Slivka's were neither inferential nor without proof. There has been no assertion made that the record is factually incorrect. Indeed, the demand for payment was made while litigation was pending, which formed the basis of the trial court's denial of Spriggs' motion for directed verdict. This is a matter of record, not inference. Similarly, Slivka's payment of the cash bond to the court has been established in the trial court and is also a matter of record. Making the next logical step to assert that these two factual scenarios show the reasonableness of Slivka's actions goes to the heart of § 27-1-15 and its requirements. Answering whether Slivka's undisputed actions, in the context of the facts of this case, constitute a violation of the statute is a purely legal decision that ultimately should have been made by the trial court judge in favor of Slivka.

Exhaustively, in both the trial court and on appeal, Slivka articulated and argued that the plain language of § 27-1-15 did not support the claims given the facts of the case. The relevant statutes were repeatedly cited as was all relevant case law, and no arguments in this respect were abandoned by Slivka.

- C. **As a matter of law, there can be no liability under § 27-1-15 when the demand is made at a point where the parties have competing claims and defenses against each other and the issue of which party owes money, and how much, is actually submitted to a jury**

To date, no one, not even the Court of Appeals, can say how much, if anything, Slivka owed Spriggs at the time of the demand pursuant to § 27-1-15. This is because the parties had valid claims and defenses against one another up until the time the case was submitted to the jury. Thus, as a matter of law, the plain language of the statute establishes that Slivka can have no liability under § 27-1-15, for unreasonably failing to pay a sum that he may not have owed.

As the trial court ruled in denying directed verdicts as to this cause of action and all causes of action alleged by the Respondent, there is no evidence that any portion of the claims could be deemed "proper" prior to the award of the jury. As the case law is clear, the fact that the Appellant did not prevail does not, in and of itself, entitle the Respondent to recovery under the statute. The case law cited by the Appellant supports his position as well. *Carolina Steel Corp. v. Palmetto Bridge Consts.*, 444 F.Supp. 2d 577 (D.S.C. 2006). Further, as a matter of law, Slivka can not be said to have violated § 27-1-15 for failing to pay what he may not have owed.

The Appellant presented both statutory and case law to support his position, and the Court of Appeals is in error in finding that he abandoned his argument on appeal. Therefore, Appellant's Petition for Rehearing must be granted as to this issue.

- D. As a matter of law, there can be no liability under § 27-1-15 where demand is made after the institution of a mechanic's lien action and money, exceeding the amount of the demand, has been deposited into the court pursuant to the requirements of the Mechanic's Lien Statute.

Additionally, it is undisputed that at the time the § 27-1-15 demand was received, Slivka had already deposited the sum of \$265,012.71 with the court in response to Spriggs' filing of his mechanic's lien. Thus, by requiring that Slivka pay some (unknown) amount in response to the demand would have resulted in his having to pay twice. As a matter of law, under the circumstances, it cannot be said that his failure to pay some (unknown) sum, in response to the § 27-1-15 demand, was unreasonable.

IV. THE COURT OF APPEALS ERRED IN UPHOLDING THE AWARD OF STAFF MEMBER FEES.

In its opinion, the Court of Appeals cites the cases of *McElveen v. McElveen*, 332, S.C. 593, 502, 506 S.E.2d 1, 11 (Ct. App. 1998) and *Charleston Lumber Co. v. Miller Housing Corp.*, 318 S.C. 471, 484, 458 S.E.2d 431, 439 (Ct. App. 1995) in upholding the award of staff member fees as part of its attorney's fees award. First, neither of these cases involves the interpretation of the *South Carolina Mechanic's Lien Statute* or *S.C. Code Ann. § 27-1-15*. Additionally, neither the Court of Appeals, nor the Respondent cites any case law that support the contention that staff fees may be included as "attorney's fees" under either *S.C. Code Ann. § 29-5-10* or *§ 27-1-15*. For this reason and under the legal authority set forth in Appellant's Brief, Appellant's Petition for Rehearing must be granted as to this issue.

V. THE COURT OF APPEALS ERRED IN FINDING THAT THE RESPONDENT'S RECOVERY UNDER THE MECHANIC'S LIEN STATUTE WAS NOT LIMITED TO THE AMOUNT OF THE CASH BOND POSTED BY THE APPELLANT IN THIS MATTER.

The Court of Appeals holds that *S.C. Code Ann.* § 29-5-110 limits only the "judgement" awarded pursuant to the mechanic's lien statute and not the award of attorney's fees which it contends were made pursuant to a separate statute. This contention is in error. The statute makes no distinction between components of a total judgment and the Court of Appeals is not authorized to create fictional components to justify an excessive award under the statute. The trial court ordered that "judgment," in the total amount of \$446,434.76, be entered. (R. 19-23)

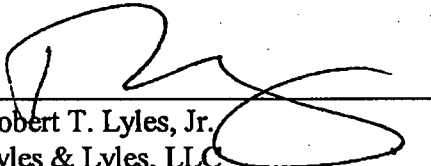
Regarding mechanic's lien actions where a cash bond has been posted, *S.C. Code Ann.* § 29-5-110 specifically provides that "[i]n the event of judgment for the person filing such statement in a suit brought pursuant to the provisions of this chapter, **such judgment shall be paid out of the cash deposited.**" (Emphasis added). This would mean that the total amount including both the attorney's fees and the prejudgment interest upheld by the Court of Appeals must be paid out of the \$266,012.71 cash bond and is therefore limited to that amount.

Therefore, the judgment entered in this matter pursuant to the South Carolina Mechanic's Lien Statute is in violation of *S.C. Code Ann.* § 29-5-110. For the reasons set forth in the Appellant's Brief and the argument herein, Appellant's Petition for Rehearing must be granted.

CONCLUSION

Based on the foregoing, the Court's Opinion filed February 6, 2013, is in error and therefore, Appellant's Petition for Rehearing must be granted.

Respectfully submitted:



Robert T. Lyles, Jr.
Lyles & Lyles, LLC
342 East Bay Street
Charleston, South Carolina 29401
(843) 577-7730
Attorneys for Appellant

February 21, 2013

Charleston, South Carolina

SETTLEMENT AND RELEASE AGREEMENT

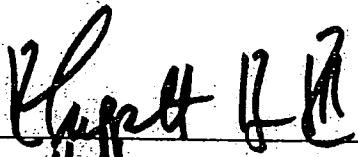
JUDY M. LAUBENSTEIN AND WANDA E. ROWLAND, INDIVIDUALLY AND ON
BEHALF OF ALL OTHER SIMILARLY SITUATED

V.

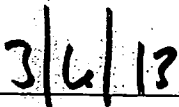
ADIZ, LLC, ATC DEVELOPMENT CORP., AND ATC CONSTRUCTION, LLC
CIVIL ACTION NO. 2010-CP-02-02873

WE AGREE:

Adiz, LLC

By: 

Its: 

Dated: 

SETTLEMENT AND RELEASE AGREEMENT

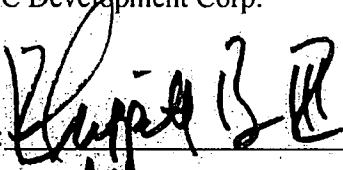
**JUDY M. LAUBENSTEIN AND WANDA E. ROWLAND, INDIVIDUALLY AND ON
BEHALF OF ALL OTHER SIMILARLY SITUATED**

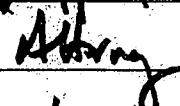
V.

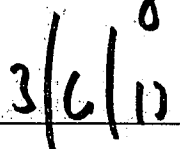
**ADIZ, LLC, ATC DEVELOPMENT CORP., AND ATC CONSTRUCTION, LLC
CIVIL ACTION NO. 2010-CP-02-02873**

WE AGREE:

ATC Development Corp.

By: 

Its: 

Dated: 

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,

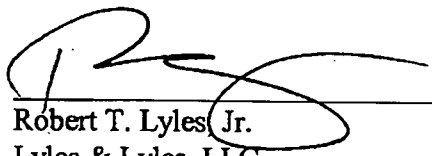
v.

GENE R. SLIVKA, ... Appellant.

PROOF OF SERVICE

I certify that I have served the Appellants' Petition for Rehearing and Appellants' Memorandum in Support of Petition for Rehearing on Respondent by depositing a copy of it in the United States Mail, First Class postage prepaid, on February 21, 2013, addressed to their attorneys of record, A. Bright Ariail and James A. Bruorton, IV, Rosen Rosen & Hagood, 151 Meeting Street, Suite 400, Charleston, South Carolina 29401.

February 21, 2013


Robert T. Lyles Jr.
Lyles & Lyles, LLC
342 East Bay Street
Charleston, South Carolina 29401
(843) 577-7730
Attorneys for Appellants

The South Carolina Court of Appeals

The Spriggs Group, P.C., Respondent,

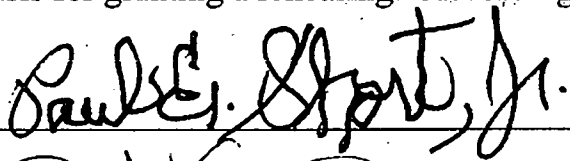
v.

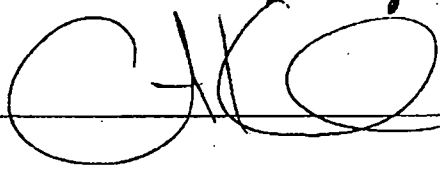
Gene R. Slivka, Appellant.

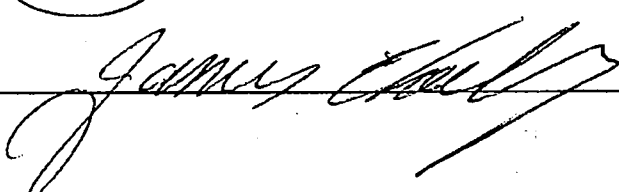
Appellate Case No. 2011-204366

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.


J.


J.

Columbia, South Carolina

cc:

A. Bright Ariail

Robert T. Lyles, Jr.

James Atkinson Bruorton, IV

William H. Seals, Jr.

FILED

March 22, 2013

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.

BRIEF OF APPELLANT

Robert T. Lyles, Jr.
Lyles & Lyles, LLC
342 East Bay Street
Charleston, South Carolina 29401
(843) 577-7730
Attorneys for Appellants

TABLE OF CONTENTS

Table of Authorities	ii
Statement of Issues on Appeal	1
Statement of the Case	1
Argument	8
I. THE TRIAL JUDGE ERRED IN SUBMITTING A QUESTION INVOLVING THE INTERPRETATION OF STATUTES TO THE JURY	8
II. BECAUSE THE RESPONDENT'S LIEN WAS NOT TIMELY THE VERDICT IN FAVOR OF RESPONDENT MUST BE REVERSED AND THE ENTIRE MATTER REMANDED.	10
III. BECAUSE RESPONDENT'S DEMAND UNDER S.C. CODE ANN. § 27-1-15 WAS MADE WHILE THE PARTIES WERE IN LITIGATION, INCLUDING THE PROSECUTION AND DEFENSE OF COLORABLE CLAIMS AGAINST ONE ANOTHER, AND BECAUSE THE APPELLANT HAD DEPOSITED AN AMOUNT THAT EXCEEDED THE ENTIRE AMOUNT OF THE RESPONDENT'S CLAIM, AS A MATTER OF LAW APPELLANT COULD NOT BE FOUND LIABLE UNDER S.C. CODE ANN. § 27-1-15.	18
IV. THE TRIAL COURT ERRED IN AWARDING THE RESPONDENT ATTORNEYS FEES AND COSTS IN THE AMOUNT OF \$235,030.31, AND INTEREST IN THE AMOUNT OF \$37, 413.92.	23
Conclusion	36

TABLE OF AUTHORITIES

CASES

<u>Babb v. Rothrock</u> , 310 S.C. 350, 426 S.E.2d 789 (S.Ct. 1993)	35, 36
<u>Baron Data Systems, Inc. v. Loter</u> , 297 S.C. 382, 377 S.E.2d 296 (S.Ct. 1989)	28
<u>Blumberg v. Nealco, Inc.</u> , 310 S.C. 492, 427 S.E.2d 659 (S.Ct. 1993)	28
<u>Builders Transport, Inc. v. South Carolina Property and Cas. Ins. Guar. Ass'n</u> , 307 S.C. 398, 415 S.E.2d 419 (Ct.App.,1992)	36
<u>Carolina Steel Corporation v. Palmetto Bridge Constructors</u> , 444 F.Supp.2d 577 (D.S.C. 2006)	19
<u>Catawba Indian Tribe of South Carolina v. State</u> , 372 S.C. 519, 524, 642 S.E.2d 751, 753 (S.Ct. 2007), <u>cert denied</u> Oct 1. 2007	9
<u>Charleston County Parks & Recreation Commission v. Somers</u> , 319 S.C. 65, 67, 459 S.E.2d 841, 843 (S.Ct. 1995)	9
<u>Clo-Car Trucking Co., Inc. v. Cliffure Estates of S.C., Inc.</u> , 282 S.C. 573, 320 S.E.2d 51 (Ct.App.1984)	14, 34
<u>D.A. Davis Constr. Co. v. Palmetto Proper., Inc.</u> , 281 S.C. 415, 315 .E.2d 370 (S.Ct. 1984)	23
<u>EFCO Corp. V. Renaissance on Charleston Harbor, LLC</u> , 370 S.C. 612, 635 S.E.2d 922 (Ct. App. 2006)	25
<u>Elam v. S.C. Dep't of Transp.</u> , 361 S.C. 9, 27-28, 602 S.E.2d 772, 782 (S.Ct. 2004)	8
<u>George A.Z. Johnson, JR., Inc. v. Barnhill</u> , 279 S.C. 242, 306 S.E.2d 216 (S.Ct. 1983)	9, 14
<u>Gill Sav. Asso. v. International Supply Co.</u> , 759 S.W.2d 697 (Tex. App. Dallas 1998) .	35
<u>Global Protection Corp. v. Halersberg</u> , 332 S.C. 149, 503 S.E.2d 483 (Ct. App. 1998) .	32
<u>Gooding v. st. Francis Xavier Hosp.</u> , 326.S.C. 248, 252, 487 S.E.2d 596, 598 (S.Ct. 1997)	24

<u>Grant v. City of Folly Beach</u> , 346 S.C. 74, 551 S.E.2d 229 (S.Ct. 2001)	13
<u>Hardaway Concrete Co., Inc. v. Hall Contracting Corp.</u> , 374 S.C. 216, 647 S.E.2d 488 (Ct.App.,2007)	27, 28
<u>Hegler v. Gulf Ins. Co.</u> , 270 S.C. 548, 243 S.E.2d 443 (S.Ct. 1978)	24
<u>Hodges v. Rainey</u> , 341 S.C. 79, 86, 533 S.E.2d 478, 582 (S.Ct. 2000)	13
<u>Huff v. Jennings</u> , 319 S.C. 142, 459 S.E.2d 886 (Ct.App.,1995)	17
<u>Jackson v. Speed</u> , 326 S.C. 289, 308, 486 S.E.2d 750, 760 (S.Ct. 1997)	28
<u>Keeney's Metal Roofing, Inc., v. Palmieri</u> , 345 S.C. 550, 548 S.E.2d 900 (Ct App. 2001)	23
<u>Moore Elec. Supply, Inc., v. Ward</u> , 316 S.C. 367, 374-75, 450 S.E.2d 96, 100 (Ct App. 1994)	20
<u>Preferred Savings and Loan Association, Inc., V. Royal Garden Resort, Inc.</u> , 295 S.C. 268, 272, 368 S.E.2d 78, 81 (Ct. App. 1988)	10, 16
<u>Pope v. Heritage Communities, Inc.</u> , 395 S.C. 404, 434, 717 S.E.2d 765, 781 (Ct.App.,2011)	8
<u>Riverwoods, LLC, v. County of Charleston</u> , 349 S.C. 378, 563 S.E.2d 651 (S.Ct. 2002)	13
<u>Sabb v. S.C. State Univ.</u> , 350 S.C. 416, 427, 567 S.E.2d 231, 236 (S.Ct. 2002)	8
<u>Sea Pines Co. v. Kiawah Island Co., Inc.</u> , 268 S.C. 153, 232 S.E. 2d 501 (S.Ct.. 1977)	10
<u>Southern Welding Works, Inc. v. K & S Construction Co.</u> , 286 S.C. 158, 332 S.E.2d 102 (Ct.App.1985)	35
<u>State v. Dickinson</u> , 339 S.C. 194, 528 S.E.2d 675 (Ct.App. 2000)	20
<u>Steinke v. S.C. Dep't of Labor, Licensing & Regulation</u> , 336 S.C. 373, 386, 520 S.E.2d 142, 148 (S.Ct. 1999)	8
<u>South Carolina Dept. of Social Services v. Tharp</u> , 312 S.C. 243, 439 S.E.2d 854 (S.Ct.1994)	24

<u>Taylor v. Medenica</u> , 331, S.C. 575, 503 S.E.2d 458 (S.Ct. 1998)	28
<u>Utilities Const. Co., Inc., v. Wilson</u> , 321 S.C. 244, 468 S.E.2d 1 (Ct.App. 1996)	25
<u>Wayne Smith Construction Co., Inc. v. Wolman, Duberstein and Thompson</u> , 294 S.C. 140, 363 S.E.2d 115 (Ct.App.1987)	35
<u>Williamson v. Hotel Melrose</u> , 110 S.C. 1, 96 S.E. 407 (S.Ct. 1918)	12, 14, 15

STATUTES

<u>S.C. Code Ann.</u> § 27-1-15	3, 6, 7, 18, 19, 21, 21, 22, 23, 24, 25, 27, 28, 29, 30, 33, 32, 33, 34, 35, 36
<u>S.C. Code Ann.</u> § 29-5-10	3, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 36
<u>S.C. Code Ann.</u> § 29-5-20	30
<u>S.C. Code Ann.</u> § 29-5-90	8, 10, 11, 16, 33
<u>S.C. Code Ann.</u> § 29-5-110	32, 33
<u>S.C. Code Ann.</u> § 29-5-120	33
<u>S.C. Code Ann.</u> § 38-59-40	32
<u>S.C. Code Ann.</u> § 39-5-10	32
<u>S.C. Code Ann.</u> § 42-1-560	32
<u>S.C. Code Ann.</u> § 44-96-40(6)	13
South Carolina Rule of Civil Procedure Rule 59	7

OTHER AUTHORITIES

<u>Black's Law Dictionary</u> 1272 (7th Ed. 1999)	20, 22
47 C.J.S. Interest & Usury § 49 (1982)	35

STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE TRIAL JUDGE ERRED IN SUBMITTING A QUESTION INVOLVING THE INTERPRETATION OF STATUTES TO THE JURY.
- II. WHETHER THE TRIAL COURT ERRED IN FAILING TO DIRECT A VERDICT IN FAVOR OF THE APPELLANT AS TO THE RESPONDENT'S MECHANIC'S LIEN CLAIM BECAUSE THE RESPONDENT'S LIEN WAS NOT TIMELY AS A MATTER OF LAW.
- III. WHETHER THE TRIAL COURT ERRED IN FAILING TO DIRECT A VERDICT IN FAVOR OF THE APPELLANT AS TO THE RESPONDENT'S CLAIM PURSUANT TO *S.C. CODE ANN. § 27-1-15*. BECAUSE THE EVIDENCE WAS UNDISPUTED THAT AN INVESTIGATION HAD TAKEN PLACE INTO THE RESPONDENT'S CLAIM IN THE FORM OF FORMAL DISCOVERY, NO PORTION OF THE CLAIM WAS UNDISPUTED, AND THE APPELLANT HAD ALREADY DEPOSITED AN AMOUNT WHICH EXCEEDED THE ENTIRE CLAIM WITH THE COURT.
- IV. WHETHER THE TRIAL COURT ERRED IN AWARDING THE RESPONDENT ATTORNEYS FEES AND COSTS IN THE AMOUNT OF \$235,030.31, AND INTEREST IN THE AMOUNT OF \$37,413.92 BECAUSE SAID AWARD IS NOT SUPPORTED BY LAW OR FACT.

STATEMENT OF THE CASE

1. History of the Case

This matter stems from a dispute between the Appellant, Mr. Gene R. Slivka, and the Respondent, The Spriggs Group, PC, regarding the provision of architectural services for the Appellant's home and several outbuildings on property located in Colleton County known and often referred to as "New Julianton Plantation." The buildings include the main house, a conservatory with attached potting shed, a grotto, a stable, and two garages, all in historical style. Respondent provided architectural services pursuant to a written agreement included in a letter prepared by the Respondent dated November 17, 2006, hereinafter "Agreement." (R. pp. 346-353) The agreement states that it includes a "fee proposal to complete the

architectural and engineering work with restrictions and limitations noted,” and sets forth a fee of \$161,500 (which the parties do not dispute was later modified to \$151,402). Id. It is uncontested that Appellant paid one half of the fee at the outset of the project. The balance was to be paid at the conclusion of the project.

Dissatisfied with the Respondent’s services, in December 2008 Appellant picked up his remaining drawings and told Respondent that he did not want any more drawings. (R. p. 265, lines 20-25) In February 2009, Appellant was presented with invoices 0609-2, 0609-3, 0609-4, and 0609-5, all dated February 9, 2009, which total \$198,834.53, rather than \$76,201.00, the balance of the agreed upon contract price. (R. pp. 354-363) These charges included charges for tasks and work that had been performed by Respondent, since more than two years before, and never billed. Id. Appellant disputed the additional charges and Respondent filed a mechanic’s lien on April 13, 2009, in the amount of \$198,834.53. (R. pp. 376-386) In the invoices attached to the Affidavit of Account included with the lien there were no charges for time during the ninety day period which preceded the filing of the lien. Id. To release the encumbrance on his property, on May 12, 2009, Appellant posted a bond to release the mechanic’s lien in the amount of \$265,112.71, an amount equal to one and one-third the amount of the recorded lien. (R. pp. 387-391) On May 21, 2009, Respondent issued additional Invoice 0509-6, for services regarding an appraisal. (R. p. 364) On July 8, 2009, Respondent brought suit to foreclose on its mechanic’s lien. (R. pp. 31-54) Respondent answered and initiated counterclaims including slander of title based on the timing of the lien. (R. pp. 55-67) Subsequently, on November 16, 2009, Respondent issued

yet another invoice, Invoice 0609-7, for Construction Phase Services during the time period January 1-13, 2009. (R. p. 365)

On March 15, 2010, over nine months after litigation on the mechanic's lien had been initiated, Respondent sent Appellant and his prior counsel a demand pursuant to S.C. Code Ann. § 27-1-15. (R. pp. 366-375) Appellant, being in the midst of litigation with Respondent over the subject of the demand letter, did not formally respond to the demand letter. On May 5, 2010, Respondent amended its complaint to add a cause of action for Failure to Comply with S.C. Code Ann. § 27-1-15 to its causes of action which included Enforcement of Claim Against Mechanic's Lien Bond, Breach of Contract, Breach of Contract Accompanied by Fraudulent Acts, and Unjust Enrichment/Quantum Meruit. (R. pp. 68-93) Appellant answered again alleging counterclaims. (R. pp. 94-104)

The Respondent filed a Motion for Summary Judgment on January 31, 2011, and a Motion to Strike Appellant's counterclaims. (R. pp. 453-40 and 438-448) Appellant also filed a Motion for Summary Judgment. (R. pp. 449-452) At the hearing, Appellant agreed to withdraw certain counterclaims. Respondent's motion for summary judgment as to its claims against Appellant was denied. (R. pp. 2-3)¹ The parties proceeded to trial on all of Plaintiff's causes of action and on Appellant's counterclaim for slander of title.

On June 30, 2011, Appellant made a formal offer to settle the matter in the amount of \$100,00.00 pursuant to the procedures in the Mechanic's Lien Statute, the initial statutory

¹ Said order indicates, "Motions for Summary Judgment are denied in part and granted in part. Formal Orders are to be submitted." Subsequently the parties withdrew claims on which the motions were granted and therefore no formal orders were submitted.

course selected by the Respondent when it filed its mechanic's lien action. (R. p. 461) Respondent made no response other than to file a Motion to Strike said offer. (R. pp. 462-464)

2. The Evidence Presented at Trial.

The Respondent presented two and a half days of testimony in which it asserted its position that additional charges in its invoices were made due to changes and demands of the owner and were justified by the contract. Mr. Thomas Bozeman testified that items that were not contemplated by the scope of the original agreement were billed pursuant to the contract. (R. p. 201, line 5- p. 202, line 8) The Agreement provides in Paragraph 18, that "[Respondent] will provide any requested construction phase services by the project architect or staff on an hourly basis." (R. p. 350) In Paragraph 19, it further provides that "Once we begin construction documents, any changes in room layouts, sizes, window locations, door locations and exterior elevation design will be performed on an hourly basis." Id. Invoice 0609-2 states that it is for "design and preparation of final drawings" but indicates an amount due of \$163,574.00, an amount in excess of \$85,000.00 over the remaining balance of the agreed upon fee. (R. pp. 354-363) Mr. Ken Spriggs testified Invoice 0609-02 was billed by a "formula" charging for additional work by the sheet, not by the hour as set forth in the Agreement. (R. p. 274, line 12 - p. 277, line 19 and pp. 354-363) Mr. Bozeman admitted that he did not advise the Appellant when he was performing tasks not covered by the original scope of services, or that he was going to bill him extra for it. (R. p. 202, lines 9-23)

The Appellant asserted the position that items that the Respondent claims were additional were or should have been contemplated when the original agreement was made. Appellant also asserted that Respondent had a duty to advise Appellant in advance of performing and charging for work that Respondent considered to be "additional." Respondent admitted that he never informed Appellant that he was incurring additional charges. Mr. Andy Bozeman of The Spriggs Group admitted that what was basic and what was additional (with the exception of preparation of drawings for a retaining wall) was completely subjective. (R. p. 204, lines 3-17) Mr. Gene Slivka testified that with the exception of charges related to a construction meeting and the design of a garden wall, neither Mr. Spriggs nor Mr. Bozeman ever told him that items he requested did not fall within the fee contemplated in the original agreement. (R. p. 298, lines 15-20) He testified that Mr. Spriggs decided what the charges were and did not inform him of them for two years. (R. p. 301, lines 13-25) Mr. Scott Harvey, an expert on architectural standards and practices, testified on behalf of the Respondent. (R. p. 309, line 25 - p. 310, line 22) Mr. Harvey offered the opinion that an architect who fails to inform an owner that he has requested something that falls outside of the original scope of work has violated rules of professional conduct and the applicable standard of care. (R. p. 311, lines 4-23)

Mr. Slivka testified that in response to the mechanic's lien he had to borrow \$265,000.00 to bond off the lien, as it affected the title to his property. (R. p. 125, lines 9-23) He had paid roughly \$50,000.00 in interest over a three year period. Id. This was required as the mechanic's lien filed by the Respondent affected not only his home, but all property that he owned. Id.

3. Trial Motions, Verdict and Post-trial Motions

At the close of the Respondent's case, Appellant and Respondent made cross-motions for directed verdict as to the claim under S.C. Code Ann. § 27-1-15. (R. p. 285 line 7 - p. 290, line3) Appellant also moved for a directed verdict regarding the timeliness of the lien. (R. p. 290, line 4 - p. 294, line 17) Respondent withdrew the quantum meruit action. (R. p. 294, lines 19-15) Appellant also moved for a directed verdict as to Respondent's breach of contract action. (R. p. 295, line 1 - p. 297, line 15). All motions were denied (R. p. 297, lines 16-23)

Following the Appellant's case, Respondent moved for a directed verdict as to the Appellant's slander of title action on the grounds that the lien was timely. (R. p. 314, lines 1-20) This motion was denied. Id. Appellant also renewed his directed verdict motions as to the claim under § 27-1-15 and the Mechanic's Lien Statute. (R. p. 315, line 4- p. 318, line 9) Over Appellant's objections, the trial judge ruled that both causes of action would be submitted to the jury. (R. p. 318, line 12 - p. 319, line 14) Respondent's claims for Breach of Contract Accompanied by a Fraudulent Act was also withdrawn prior to the submission of the case to the jury.

After deliberations, the jury found for the Respondent on the causes of action of foreclosure of mechanic's lien, breach of contract, and claims under S.C. Code Ann. § 27-1-15. (R. p. 333) The Jury found for the Respondent as to the Appellant's slander of title claim. Id. The jury awarded the Appellant \$173,990.53 in actual damages. (R. p. 334) Both parties reserved the right to make post-trial motions within ten days.

Appellant made his post trial motions on August 1, 2011. (R. pp. 522-535) The grounds for said motion included that Appellant was entitled to judgment as a matter of law on the Respondent's mechanic's lien because it was not timely and that Appellant was entitled to judgment, as a matter of law, on the grounds that when Respondent's claim under S.C. Code Ann. § 27-1-15 was made, the lawsuit was pending and discovery was on-going and that the Appellant had paid an amount equal to one and one third of the lien in the form of a bond with the court. Id. Said motion was denied. (R. pp. 4-13) Appellant filed a Rule 59(e), SCRCF motion asking the court to alter, amend or reconsider its order. (R. pp. 567-573) Said motion was denied. (R. pp. 24-25)

Respondent moved the court for attorneys fees, costs, and interest based on both S.C. Code Ann. § 27-1-15 and the Mechanic's Lien Statute. (R. pp. 465-521) Respondent asked for all attorneys fees, costs, and prejudgment interest beginning from the date that invoices were sent to the Appellant in February, 2009. Id. Appellant filed a memorandum in opposition to said motion on the grounds that the fees, costs and interest sought by the Respondent were not legally supportable by statute and were excessive. (R. pp. 536-554) The Court awarded the Respondent attorneys fees and costs in the amount of \$235,030.31 and prejudgment interest in the amount of \$37,413.92, thus ordering that a judgment in the total amount of \$446,434.76 be entered against the Appellant. (R. pp. 14-18) Appellant filed a motion to reconsider said order. (R. pp. 576-586) Said motion was denied. (R. pp. 26-30)

ARGUMENT

I. THE TRIAL JUDGE ERRED IN SUBMITTING A QUESTION INVOLVING THE INTERPRETATION OF STATUTES TO THE JURY.

“When reviewing the denial of a motion for directed verdict or JNOV, the appellate court applies the same standard as the trial court.” Pope v. Heritage Communities, Inc., 395 S.C. 404, 434, 717 S.E.2d 765, 781 (Ct.App. 2011) cited in Elam v. S.C. Dep't of Transp., 361 S.C. 9, 27–28, 602 S.E.2d 772, 782 (S.Ct. 2004). “The court is required to view the evidence and inferences that reasonably can be drawn therefrom in the light most favorable to the non-moving party.” Id. citing Sabb v. S.C. State Univ., 350 S.C. 416, 427, 567 S.E.2d 231, 236 (S.Ct. 2002). “An appellate court will only reverse the trial court's ruling when no evidence supports the ruling or when the ruling is controlled by an error of law. Id. citing Steinke v. S.C. Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (S.Ct. 1999).

S.C. Code Ann. § 29-5-10 (1976, as amended) states as follows:

A person to whom a debt is due for labor performed or furnished or for materials furnished and actually used in the erection, alteration, or repair of a building or structure upon real estate or the boring and equipping of wells, by virtue of an agreement with, or by consent of, the owner of the building or structure, or a person having authority from, or rightfully acting for, the owner in procuring or furnishing the labor or materials shall have a lien upon the building or structure and upon the interest of the owner of the building or structure in the lot of land upon which it is situated to secure the payment of the debt due to him....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**. (Emphasis added.)

Under S.C. Code Ann. § 29-5-90 a mechanic's lien is dissolved unless person filing the lien does so within ninety days after he ceases to labor on, or furnish labor or materials for, such

building or structure. For its lien to be timely, Respondent must have performed labor, within the definition of the statute, during the ninety days preceding April 13, 2009, meaning on or after January 13, 2009.

Prior to, during and after trial, Appellant contended that work performed on January 13, 2009, specifically off-site contract administration, is not within the statutory definition of "labor" and, as a result, Respondent's lien was untimely. Appellant moved for a directed verdict at the close of the Respondent's case on the grounds that the activity alleged to satisfy the requirement of timeliness in the Mechanic's Lien Statute does not fall within the statutory definition of "labor." (R. pp. 290-294) At the close of the Appellant's case, Appellant again argued that whether or not contract administration by an architect falls within the definition of "labor" is a question of law and that, as a matter of law, Respondent's January, 2009 activities were not within the definition of labor. (R. pp. 316-318) Erroneously, the trial court submitted the question of whether the work performed by the Respondent fell within the purview of the statute to the jury, forcing the Appellant to argue statutory interpretation guidelines to the jury. (R. pp. 318-319)

The issue of interpretation of a statute is a question of law for the court. Catawba Indian Tribe of South Carolina v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (S.Ct. 2007), cert denied Oct 1. 2007; Charleston County Parks & Recreation Commission v. Somers, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (S.Ct. 1995) ("The determination of legislative intent is a matter of law".) Consequently, whether services provided by Respondent fall within the definition of "labor" protected by the Mechanic's Lien Statute is one of law and, therefore, was a decision for the court, not the jury. See. George A.Z. Johnson, JR., Inc. v. Barnhill,

279 S.C. 242, 306 S.E.2d 216 (S.Ct. 1983)(Court determined whether the work of a surveyor was entitled to a mechanic's lien for surveying work); Sea Pines Co. v. Kiawah Island Co., Inc., 268 S.C. 153, 232 S.E. 2d 501 (S.Ct. 1977)(Court determined whether services which included the furnishing of plans and the supervision of construction were covered by the mechanic's lien law).

It was incumbent upon the court to rule as to whether or not the work at issue could legally serve as the basis for the filing of a mechanic's lien and submitting the question to a jury was a reversible error.

II. BECAUSE THE RESPONDENT'S LIEN WAS NOT TIMELY THE VERDICT IN FAVOR OF RESPONDENT MUST BE REVERSED AND THE ENTIRE MATTER REMANDED.

When a party files a notice of lien under § 29-5-90 he is asserting that at a time within ninety days before the notice he has performed work for which he is entitled to assert a lien. Preferred Savings and Loan Association, Inc., v. Royal Garden Resort, Inc., 301 S.C. 1, 4, 389 S.E.2d 853, 854 (S.Ct. 1990). In this case the Respondent did not perform work fitting the definition of "labor" under the Mechanic's Lien Statute in the ninety day period before the date the lien was filed and therefore the lien was untimely and dissolved, and the verdict in favor of Respondent must be reversed and the entire matter remanded for a new trial.

A. ACTIVITIES PERFORMED BY THE RESPONDENT IN JANUARY, 2009, DO NOT FALL WITHIN THE DEFINITION OF LABOR ENTITLING ONE TO A LIEN SET FORTH IN THE MECHANIC'S LIEN STATUTE.

For purposes of the timeliness of the lien, Respondent must have provided "labor" actually used in the erection, alteration, or repair of Appellant's buildings on or after January

13, 2009. S.C. Code Ann. § 29-5-90. On November 16, 2009 (seven months after the Respondent's lien was first filed and four months after this action was commenced), Respondent sent Appellant Invoice 0609-7. With that invoice, Appellant was advised, for the first time, that Respondent performed work described as for "Construction Phase Services" between the dates of January 1-13, 2009. (R. p. 365)

The testimony and evidence at trial reflects that Respondent's activities in January, 2009, were limited to work generally described as contract administration which is not included in the Mechanic's Lien Statute's definition of "labor," since none of the work involved "the preparation of plans, specifications and design drawings," which Respondent readily admits.

Mr. Andrew Bozeman, an employee of the Respondent testified that in January, 2009, he performed "construction administration." (R. p. 198, lines 1-20) He answered a call from a plumbing subcontractor. (R. p. 199) He also communicated with a mechanical engineer and answered questions regarding concrete cracks. Id. None of this work was performed on site as Mr. Bozeman never viewed the construction of the main house on site. (R. p. 205, lines 14-19) Mr. Ken Spriggs, principal of The Spriggs Group, described work performed by Mr. Bozeman during this time as "general coordination." (R. p. 264) Mr. Spriggs also testified that his own activities performed in January, 2009, were related to construction administration. Id. He did not prepare any plans, specifications or design drawings during this time. He admitted that in December, 2008, Mr. Slivka had told him that he didn't want any more drawings and that he picked up the last of his drawings. (R. p. 265, lines 20-25) Like Mr. Bozeman, Mr. Spriggs testified that in January, 2009, he participated

in answering the phone calls from the plumbing and framing subcontractor. (R. p. 230-231) The last time that he had been on site was in 2007 or 2008. (R. p. 267) He acknowledged that he was not directing work. Id.

Notwithstanding the fact that the work at issue was not “the preparation of plans, specifications or design drawings,” the trial court denied Appellant’s motions, relying on the case Williamson v. Hotel Melrose, 110 S.C. 1, 96 S.E. 407 (S.Ct. 1918). (R. pp. 4-13) Reliance on this case was in error.

In Williamson the Court specifically sought to determine whether the scope of the Mechanic’s Lien Statute included the services of an architect. The statute in existence at the time afforded a lien to “any person to whom a debt is due for labor performed or furnished.” Id. at 411. The Court found that the architect who had furnished plans and specifications, and who had “superintended” the construction of the project, had performed labor within the meaning of that version of the statute. Id.

However, Williamson was decided under a previous version of the Mechanic’s Lien Statute which did not specifically provide the legislated definition of “labor,” which is included in the current statute. Since the Williamson decision, the South Carolina Legislature has enacted a new mechanic’s lien statute which reads:

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

Clearly, the new version of the statute added specific activities that the legislature deemed to be “labor” covered by the Mechanic’s Lien Statute and included in that definition, “the preparation of plans, specifications and design drawings” which are some of the services typically provided by an architect. While the statute was specifically expanded to include “preparation of plans, specifications, and design drawings,” as well as many other activities, within its definition of “labor,” it did not include “contract administration,” “construction phase services,” or other types of services also provided by design professionals.

"The cardinal rule of statutory construction is for the Court to ascertain and effectuate the intent of the legislature." Riverwoods, LLC, v. County of Charleston, 349 S.C. 378, 563 S.E.2d 651 (S.Ct. 2002), citing E.g., Grant v. City of Folly Beach, 346 S.C. 74, 551 S.E.2d 229 (S.Ct. 2001). "The canon of construction '*expressio unius est exclusio alterius*' or '*inclusio unius est exclusio alterius*' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'" Id. citing Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (S.Ct. 2000). Had the legislature decided to include off-site construction or administration services that a design professional may perform in its definition of “labor” it could have done so but did not. Therefore a correct construction of the statute would lead to the conclusion that the work performed by Respondent was not

within the definition of “labor” as defined by the legislature for the purposes of the Mechanic’s Lien Statute.

The Respondent asked the trial court to do what it could not do, which is to expand the statute beyond its plain language and include, as “labor,” work not described in the statute. Applying the rules of statutory construction the courts of South Carolina have already recognized that such an expansion of the Mechanics Lien Statute is not proper. See, Clo-Car Trucking Co, Inc., v. Cluffure Estates of S.C., 282 S.C. 573, 320 S.E.2d 51 (Ct. App. 1984).

Furthermore, the activities by Respondent that the trial court relied on as work justifying the lien do not even fit within the definition of “labor” set forth in Williamson, 96 S.E. 411. The Court in Williamson found that the architect in that case had, in addition to furnishing plans and specifications, “superintended” the construction. Id. This important aspect of the services provided by the architect in Williamson was cited by the South Carolina Supreme Court in George A.Z. Johnson, Jr., Inc., where the Court explained that Williamson relates to matters which, “deal with labor performed in the actual construction of the buildings **on the property.**” 279 S.C. at 245 (emphasis added).

To the contrary, no one for the Respondent was on-site during the operative time frame and Respondent admitted that, unlike the architect in Williamson, he did not “superintend” or “direct” any work at Appellant’s property, as was the case in Williamson and George A.Z. Johnson. His testimony as to the nature of contract administration services was as follows:

- Q: ...Now, construction observation as a term of art in the architectural profession involves only observing construction. It specifically does not include the architect in any way directing or otherwise controlling the means and methods of construction?
- A: That's correct.
- Q: And the idea is as an architect you're willing to go and look and see conditions, but you're not assuming responsibility for those conditions?
- A: That's correct.
- Q: And you're not directing the work; is that right?
- A: No.
- Q: And you're not ordering the work in any particular sequence or method or means?
- A: That's correct.
- Q: Okay. And you're not as part of the observation services supervising the construction?
- A: That's correct. (R. p. 267, line 14 - p. 268, line 6)

The trial court erred in applying Williamson rather than properly interpreting the existing statute when determining whether Respondent's services constituted "labor" under the Mechanics Lien Statute. Since at most Respondent answered calls and fielded questions via telephone from his office in January, 2009, as a matter of law that does not constitute the "preparation of plans, specifications and design drawings" and therefore is not "labor" under the Mechanic's Lien Statute. Because Respondent did not perform "labor" within ninety (90) days of April 13, 2009, the mechanics lien he filed was untimely and Appellant is entitled to a new trial of the entire matter, including his damages as a result of Respondent's filing of a faulty lien and an award of his attorney fees.

B. WORK PERFORMED IN MAY, 2009, DOES NOT JUSTIFY THE FILING OF A LIEN IN APRIL, 2009, IS NOT "LABOR" AS DEFINED IN THE MECHANICS LIEN STATUTE, AND WAS NOT AUTHORIZED IN ANY WAY BY APPELLANT.

The trial court erroneously found that work performed in May, 2009, a month after the lien was filed, also supported the timeliness of Respondent's lien which was filed on April 13, 2009. (R. pp. 4-13) Mr. Spriggs testified that the work in May, 2009, consisted of an email exchange with an appraiser who contacted him indicating she was preparing an appraisal of the Appellant's property. (R. pp. 272, line 18 - p. 273, line 24) He admitted the work done during this time consisted of supplying the appraiser with information regarding the square footage of the buildings and the rooms within them. Id.

For numerous reasons, the trial court erred in holding that this work supports the timeliness of Respondent's Mechanics Lien claim. First, the work in May, 2009, was performed after the Respondent filed its Mechanic's Lien on April 13, 2009. "When a party files a notice of lien under Section 29-5-90 he is asserting that at a time within ninety days **before** the notice he has performed work for which he is entitled to assert a lien." Preferred Savings and Loan, 301 S.C. at 4 (emphasis added). The Respondent may not go and perform work after the fact to justify a lien it has already filed.

Second, the work allegedly performed does not fit the definition of "labor" protected by the Mechanic's Lien Statute since it was not related to the "preparation of plans, specifications or design drawings" used in the "erection, alteration, or repair of any building or structure," all of which, as noted previously, is required by the Mechanic's Lien Statute.

Third, there was no testimony whatsoever that the Appellant authorized or even knew that the appraiser had contacted the Respondent, which is also required by the statute. S.C. Code Ann. § 29-5-10. Mr. Slivka testified that he did not know that the appraisal company had contacted Spriggs. (R. pp. 126-7) Mr. Slivka also testified that he did not authorize the appraiser to contact Mr. Spriggs. (R. p. 300) Mr. Spriggs testified that this work was done after he was contacted by someone who said “she was preparing an appraisal for Mr. Slivka or of the Slivka property.” (R. p. 273, lines 3-4) He admitted that he never talked with Mr. Slivka about it. (R. p. 273, lines 22-25)

C. BECAUSE THE RESPONDENT’S MECHANIC’S LIEN WAS
UNTIMELY AS A MATTER OF LAW THE APPELLANT IS ENTITLED
TO A NEW TRIAL OF ALL MATTERS.

Because the mechanic’s lien was not timely as a matter of law, the Appellant is entitled to a new trial. The Respondent’s wrongfully filed lien may serve as a basis for an action for slander of title. Huff v. Jennings, 319 S.C. 142, 459 S.E.2d 886 (S.C.App.,1995).

Additionally, Appellant is entitled to his attorneys fees as the prevailing party under the Mechanic’s Lien Statute.

S.C. Code Ann. § 29-5-10(b) contemplates one verdict in the action, including consideration of compulsory counterclaims. Id. The judgment in the amount of \$446,434 which was entered against the Appellant included the jury’s single award of damages under all causes of action, in the amount of \$173,990.53 on all of the Respondent’s causes of action, as well as the jury’s consideration and erroneous rejection of Appellant’s Counterclaims. (R. p. 334-336 and pp. 14-18) It also includes the Court’s erroneous award

of attorneys fees to Respondent under the Mechanic's Lien Statute where the award of fees should have been only to Appellant. (R. pp. 14-18)

Because there can only be one award, the entire matter must be reversed and remanded, including Respondent's judgment, in the amount of \$173,990.53 on its breach of contract claim, since the damages and attorneys fees awardable to Appellant as a result of Respondent's faulty lien should be off-set against that contract award and may exceed it.

III. BECAUSE RESPONDENT'S DEMAND UNDER *S.C. CODE ANN. § 27-1-15* WAS MADE WHILE THE PARTIES WERE IN LITIGATION, INCLUDING THE PROSECUTION AND DEFENSE OF COLORABLE CLAIMS AGAINST ONE ANOTHER, AND BECAUSE THE APPELLANT HAD DEPOSITED AN AMOUNT THAT EXCEEDED THE ENTIRE AMOUNT OF THE RESPONDENT'S CLAIM, AS A MATTER OF LAW APPELLANT COULD NOT BE FOUND LIABLE UNDER *S.C. CODE ANN. § 27-1-15*.

Appellant moved for a directed verdict at the close of the Respondent's case on the basis that, as a matter of law, Appellant would have no liability for attorneys' fees under this statute. Appellant renewed this argument after the close of its case. (R. pp. 285-286) Additionally, Appellant raised this issue in the form of a post trial motion. (R. pp. 522-535).

All motions were denied.

S.C. Code Ann. § 27-1-15 provides:

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

reasonable attorney's fees and interest at the judgment rate from the date of the demand. (Emphasis added.)

Where one has made a fair and reasonable investigation into a claim under the statute, he is not liable for attorneys fees pursuant to S.C. Code Ann. § 27-1-15. The fact that the Appellant did not prevail does not, in and of itself, entitle the Respondent to recovery under the statute. Carolina Steel Corporation v. Palmetto Bridge Constructors, 444 F.Supp.2d 577 (D.S.C. 2006).

Submission of this claim to the jury, and denial of Appellant's post-trial motions, was reversible error for three reasons. First, the Respondent failed to present any evidence that the Appellant did not perform a fair and reasonable investigation because at the time Respondent made its demand under the statute the parties were involved in the discovery process in litigation initiated by the Respondent. Second, because of the claims pending between the parties at the time the demand was made, there is no way to conclude what would have been a "valid" amount to be paid. Third, because the Appellant had paid an amount which exceeded the entire amount of the Respondent's claim into the court, as a matter of law, his failure to make a payment at the time the statutory demand was made cannot be said to be unreasonable.

- A. 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.

The party seeking an award of attorney's fees and interest under this statute has the initial burden of presenting a *prima facie* case that the opposing party did not make a fair and

reasonable investigation before a refusal to pay. Moore Elec. Supply, Inc., v. Ward, 316 S.C. 367, 374-75, 450 S.E.2d 96, 100 (Ct.App. 1994). Where a statute does not define a word, Courts look to sources including Black's Law Dictionary for a definition. E.g. State v. Dickinson, 339 S.C. 194, 528 S.E.2d 675 (Ct.App. 2000). Black's defines "reasonable" as, "Fair, proper, or moderate under the circumstances." Black's Law Dictionary 1272 (7th Ed. 1999).

The Respondent filed a mechanic's lien on April 13, 2009. (R. pp. 376-386) Respondent brought suit to foreclose on that lien on July 8, 2009. (R. pp. 31-54) Appellant replied with counter-claims, including a claim that Respondent's lien was not timely and asserted that he was entitled to damages and attorneys fees. (R. pp. 55-67)

Respondent chose the method for the resolution of his dispute with Appellant with that method being litigation. It is undisputed that the Respondent made the first demand for payment pursuant to this statute on March 15, 2010, after litigation had been pending for over eight months. (R. pp. 366-75) The circumstances at the time the demand was made were that the parties were in the midst of litigation, and that an investigation, in the form of discovery, had occurred both prior to and after the demand was made.

Called to testify during the Respondent's case, the Appellant, Mr. Gene Slivka, testified that at the time he received the May 15, 2010 letter containing the statutory demand he had already hired a lawyer to defend the lien and Respondent's lawsuit and the parties were engaged in discovery. (R. p. 128, lines 11-14) Appellant testified:

- A: Discovery means trying to find out the facts of the case.
- Q: And so that is that an investigation?
- A: Yes, that word. An investigation, yes. (R. p. 128, lines 16-19)

Appellant also testified:

A: ...when you're asking somebody to look at money or talking about money, did you make a review of the invoices? Did you look to see if these were legitimate invoices? Did you consider how they should be paid, or if they should be paid?

In that sense, if that's what you meant by investigation, I'm telling you, yes, I absolutely investigated. Not only did I investigate them but I already had an attorney. There was already a lawsuit filed and we had an attorney representing us. So surely they were investigated. And had already put \$265,000 in the court.

(R. pp. 120a, line 22 - 121, line 8)

This testimony was not disputed by the Respondent.

Discovery is not only one form of investigation, but is the proper form of investigation between two parties involved in pending litigation. That the parties were engaged in discovery at the time the § 27-1-15 demand was sent was undisputed. As a matter of law, Respondent failed to meet its burden of establishing that Appellant had failed to conduct a reasonable investigation into the claim at the time the statutory demand was made and the Appellant was entitled to a directed verdict on this claim.

B. AT THE TIME THE STATUTORY DEMAND WAS MADE THERE WAS NO "VALID" SUM DUE TO RESPONDENT BECAUSE OF THE VIABLE COUNTER-CLAIMS OF APPELLANT AND THE ISSUE OF ATTORNEYS FEES UNDER THE MECHANIC'S LIEN STATUTE.

The statute imposes a duty on the person against who the claim is made to investigate the claim and to pay "whatever portion of it is determined as valid" S.C. Code Ann. § 27-1-

15. At the time of the demand there was no "valid" amount due and owing since the parties had legally valid claims against each other for damages. As outlined by Appellant:

A: I admit that I owe them \$76,210 as the remainder of that contract, but less the \$20,000 that I claim in damages for structural issues, and less

the \$50,000 that I claim for having my \$265,000 tied up for three years. (R. p. 109, lines 11-14)

In addition, because of the nature of the Mechanic's Lien Statute, the amount of attorneys fees was also in dispute when the § 27-1-15 demand was sent. The validity of the dispute about whether Appellant or Respondent would be ultimately liable, and for what, was established when the trial court submitted Appellant's counter-claims to the jury. This question in dispute was not answered until the jury rendered its verdict on July 15, 2011 and the court determined that Respondent was the prevailing party and entitled to fees. Until that time, there was a very real possibility of an award in favor of Appellant and a right to his attorneys' fees. Therefore, at the time the statutory demand was made in 2010, it cannot be said that any portion of the Respondent's claim was "valid," and Appellant was therefore entitled to a directed verdict.

C. AT THE TIME THE STATUTORY DEMAND WAS MADE APPELLANT HAD ALREADY PAID INTO THE COURT A SUM IN EXCESS OF RESPONDENT'S ENTIRE CLAIM.

A person is only liable for attorneys fees and interest if he make a fair investigation or otherwise unreasonably refuses to pay the claim or proper portion. S.C. Code Ann. § 27-1-15. Black's Law Dictionary defines "unreasonable" as "Not guided by reason, irrational or capricious." As a matter of law, Appellant's refusal to pay cannot be said to have been without reason, irrational, or capricious.

To release the mechanic's lien he believes was wrongfully filed by the Respondent, and in compliance with the Mechanic's Lien Statute, on May 12, 2009, Appellant posted a cash bond with the Clerk of Court in the amount of Two Hundred Sixty-Five thousand

Twelve and 71/100 Dollars (\$265,012.71), which was for one and one-third the amount of Respondent's total disputed claim. (R. pp. 387-391) At no time prior to filing the mechanic's lien, or the payment of the cash bond, did Respondent make a demand for payment pursuant to the procedures outlined in S.C. Code Ann. § 27-1-15. The demand under this statute was not made until May 15, 2010, over a year after Appellant's deposit into the court had been made to bond off the lien.

Appellant followed the payment procedures pursuant to the course of recovery which was first elected by the Respondent in filing his mechanic's lien.² Nothing suggests that Appellant was required to pay a sum twice and Respondent never requested the release of any deposited sum in exchange for a reduced lien amount. As a matter of law, Appellant's failure to pay a "valid" amount (if there can be said to have been one) after receipt of the § 27-1-15 demand, cannot be said to have been "unreasonable" in light of the fact that he had already paid 133% of all sums claimed by Respondent pursuant to the mechanism Respondent previously chose as their method of dispute resolution.

IV. THE TRIAL COURT ERRED IN AWARDING THE RESPONDENT ATTORNEYS FEES AND COSTS IN THE AMOUNT OF \$235,030.31, AND INTEREST IN THE AMOUNT OF \$37,413.92.

The determination as to the amount of attorney's fees that should be awarded is addressed to the sound discretion of the trial court. Keeney's Metal Roofing, Inc., v. Palmieri, 345 S.C. 550, 548 S.E.2d 900 (Ct.App. 2001) citing D.A. Davis Constr. Co. v. Palmetto Proper., Inc., 281 S.C. 415, 315 S.E.2d 370 (S.Ct. 1984). An abuse of discretion

²

It should also be noted that after discovery, in conformance with the Mechanic's Lien Statute, on July 1, 2011, Appellant made a formal offer in the amount of \$100,00.00 pursuant to the procedures in the Mechanic's Lien Statute. (R. 461)

occurs when there is an error of law or a factual conclusion which is without evidentiary support. Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252, 487 S.E.2d 596, 598 (S.Ct. 1997). First, for the reasons set forth herein, Respondent is not entitled to an award of attorney's fees under either the South Carolina Mechanic's Lien Statute (S.C. Code Ann. § 29-5-10, *et. seq.*) or under S.C. Code Ann. § 27-1-15. Second, the amount of fees awarded, \$209,109.60, is not legally supportable under either statute, is not customary and is grossly excessive.

A. THE COURT'S AWARD OF ATTORNEYS FEES IS NOT SUPPORTED BY STATUTE.

Respondent was awarded attorneys fees in the amount of \$209,109.60 pursuant to two separate statutes: S.C. Code Ann. § 27-1-15 and § 29-5-10. (R. pp. 14-18). This amount includes the total amount of legal fees, costs and interest incurred in this action through the date that the Respondent's affidavit of fees, specifically, \$207,639.60 plus anticipated future costs. Id.

1. The Order does not establish that the fees that it awards are supported by statute.

Attorney's fees are not recoverable unless authorized by contract or by statute. South Carolina Dept. of Social Services v. Tharp, 312 S.C. 243, 439 S.E.2d 854 (S.Ct., 1994); Hegler v. Gulf Ins. Co., 270 S.C. 548, 243 S.E.2d 443 (S.Ct. 1978). In this matter there is no contractual provision for recovery of attorneys fees by contract. The Court refused the specific request of Appellant that the Court specify which fees were awarded pursuant to each statute, and issued a general award which includes all time expended by Respondent's Counsel. (R. pp. 576-581) The Court's Order Awarding Attorney's Fees fails to make

findings that the fees and costs awarded are supported by either statute. Therefore, its award is not supported by law and must be reversed.

2. Respondent may not recover fees pursuant to the Mechanic's Lien Statute which are not related to the mechanic's lien claim.

Attorneys fees are reasonable by the "prevailing party" under the Mechanic's Lien Statute which provides, "the costs which may arise in **enforcing or defending against the lien** under this chapter, including a reasonable attorney's fee, may be recovered by the prevailing party." S.C. Code Ann. § 29-5-10 (emphasis added). See also, Utilities Const. Co., Inc., v. Wilson, 321 S.C. 244, 468 S.E.2d 1 (Ct.App. 1996). Purportedly, only the fees relating to the prosecution or defense of the Mechanic's Lien Statute are reasonable fees. EFCO Corp. V. Renaissance on Charleston Harbor, LLC, 370 S.C. 612, 635 S.E.2d 922 (Ct.App. 2006).

In Utilities Construction counsel for the prevailing party, the Defendant, submitted an affidavit of the total fee for services rendered through trial. The court found that some "substantial portion" of the attorneys time had been spent on other causes of action. 321 S.C. at 250. The court found that to award the full fees in this case constituted an abuse of discretion and remanded the case back for an entry of an award based upon the time the attorney spent "in defending the mechanic's lien cause of action only." Id.

In this matter the Respondent asserted multiple causes of action: (1) Foreclosure under the Mechanic's Lien Statute; (2) Breach of Contract; (3) Breach of Contract with Fraudulent Intent; (4) *Quantum Meruit*; and (5) Recovery under S.C. Code Ann. § 27-1-15. (R. 68, et seq.).

Likewise in this case counsel for the Respondent asserted, "Plaintiff has incurred legal fees in this action to date in the total amount of \$207,639.60." (R. p. 271) Documentation supporting the amount of these fees was submitted to the Court by Respondent's counsel in the form of billing records. (R. pp. 481-516) These billing records make it clear that substantial portion of the fees are related to causes of action other than the Respondent's mechanic's lien action and to the defense of counterclaims. The entries also establish that the Respondent spent considerable time doing research for those other claims as well as preparing, filing, and arguing motions relative to the non-statutory claims and to the defenses and counterclaims asserted by Appellant. Id. Additionally, the fees requested include time spent contacting other individuals with whom Appellant had payment disputes. Id. These witnesses included Clark Hughes, David Miller, and Ron Horton, all employees of entities with whom Respondent alleged the Appellant was involved in payment disputes. The objective of calling these witnesses was related to the Respondent's claim for punitive damages under breach of contract with fraudulent intent and not to the mechanic's lien action. (R. p. 106) These witnesses were excluded and the Respondent's claim for breach of contract with fraudulent intent was not submitted to the jury. (R. p. 108) The Respondent is not entitled to recover attorneys fees related to pursuing that cause of action under the Mechanic's Lien Statute.

Additionally, in an effort to create a claim for damages in excess of even its invoices, Respondent aggressively pursued presentation of an alternative basis for valuing the services rendered by the Respondent, specifically based on the cost of construction, relevant to the

Respondent's claim for *quantum meruit* (which was eventually withdrawn). (R. p. 294, lines 19-25)

Finally, the majority of the time entries for the Respondent make it impossible to determine whether the time spent involved the mechanic's lien action, the defense of counterclaims, or the pursuit of other causes of action. (R. pp. 481-516) The Respondent should only be allowed to recover fees which can be demonstrated as related to the mechanic's lien action.

3. The 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.

S.C. Code Ann. § 27-1-15 authorizes the recovery of certain fees incurred after a proper demand is made pursuant to the statute. Respondent's demand pursuant to that statute was made on March 15, 2010.

While the language of the statute differs from that of the Mechanic's Lien Statute, there are limitations. Under the plain language of S.C. Code Ann. § 27-1-15, the claimant may only recover fees incurred after the demand. Furthermore, fees awarded under this statute must be "intertwined" with the statutory claim. Hardaway Concrete Co., Inc. v. Hall Contracting Corp., 374 S.C. 216, 647 S.E.2d 488 (Ct.App., 2007) (Fees associated with counterclaims allowed where intertwined with Plaintiff's claim).

The Court committed reversible error in two respects. First, the Court's award includes fees which were undisputedly incurred prior to the Respondent's statutory demand on March 15, 2010. Second, the Court's award also includes defense of counterclaims not related to the claim under S.C. Code Ann. § 27-1-15, but instead were related, among other

things, to the mechanic's lien action; and the other alternative causes of action which sought damages outside of the claim under S.C. Code Ann. § 27-1-15, including *quantum meruit* and breach of contract accompanied by a fraudulent act. Not only were these claims not intertwined with the S.C. Code Ann. § 27-1-15 claim, but they were unsuccessful and withdrawn. Additionally, Respondent was awarded costs for motions which were not successful. *E.g. Order Denying Motion for Summary Judgement* dated April 12, 2011. (R. pp. 2-3). Awarding these costs is in error. See. Hardaway Concrete.

B. THE FEES AWARDED BY THE COURT ARE NOT REASONABLE.

Both the Mechanic's Lien Statute and S.C. Code Ann. § 27-1-15 allow the recovery of some degree of "reasonable" attorneys fees. While the Appellant denies that the Respondent is entitled to any award under either statute, the fees sought by the Respondent are not reasonable under any theory. "[T]he court should consider the following six factors when determining a reasonable attorney's fee: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services." Jackson v. Speed, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (S.Ct. 1997). See also. Blumberg v. Nealco, Inc., 310 S.C. 492, 427 S.E.2d 659 (S.Ct. 1993); Taylor v. Medenica, 331, S.C. 575, 503 S.E.2d 458 (S.Ct. 1998). Consideration should be given to all six factors; none of the factors is controlling. Baron Data Systems, Inc. v. Loter, 297 S.C. 382, 377 S.E.2d 296 (S.Ct. 1989). When considering these factors, the total fees of \$209,109.60 awarded by the trial court is excessive and constitutes an abuse of discretion.

1. The nature and difficulty of the case do not warrant the time devoted to the case and the fees sought.

As an initial matter, and relevant in some degree to all six factors, the fees sought by the Respondent, \$209,109.60, exceed the amount of the Respondent's claim (\$198,834.53 under the Mechanic's Lien Statute and \$199,919.33 under § 27-1-15). The fees sought are also more than 120% of the amount awarded to Respondent by the jury.

With respect to difficulty, this breach of contract case involved only two parties and a total of five witnesses. Plaintiff seeks attorneys fees for the work of two partners (both of which participated in the trial of the case), two associates, as well as law clerks and staff, which is excessive given the nature of the case or its difficulty. (R. pp. 481-516) To the extent the case was complex or difficult, it was made so by Respondent's pursuit of difficult and unsupportable causes of action in an attempt to recover sums over and above the invoices it had submitted to the Respondent. These causes of action included *quantum meruit*, in which Respondent spent time and effort to develop damages based upon alternative values for its services, and breach of contract accompanied by a fraudulent act so that Respondent could recover punitive damages. The Respondent was not successful on either of those claims and ultimately withdrew them, but those claims themselves, and the witnesses Respondent sought to bring to trial, did complicate the case substantially. There is no legal basis on which Respondent can claim fees associated with these efforts and any recovery should be limited to time entries that do not relate to those claims.

2. The result obtained by Respondent's counsel does not justify the amount awarded by the trial court.

When the Respondent made its § 27-1-15 demand on March 15, 2010, its fees for entries prior to that date totaled \$24,785.25. (R. pp. 481-516) On July 11, 2011 (one week prior to trial), Respondent represented that it had incurred fees from March 15, 2010 to July 11, 2011, totaling \$81,372.74. (R. pp. 548-549) Thus, between the Notice of Lien, on April 15, 2009, and one week before trial, Respondent had incurred only \$106,157.99 in fees.

On June 30, 2011, Appellant made an offer of \$100,000.00 pursuant to S.C. Code Ann. § 29-5-20 in an effort to settle the case. Respondent refused to counter under the statute and instead elected to incur additional costs by filing a motion to strike defendant's offer (which was denied by the Court). (R. pp. 462-464) Respondent then proceeded to trial presumably in an effort to recover punitive damages and damages over and above the claimed amount (which efforts proved to be fruitless). In doing so, Respondent recovered an additional \$73,990.53 (over Appellant's offer) but incurred an additional \$101,481.61 in fees. This result certainly does not warrant recovery of the full cost of trial.

Respondent's counsel asserted in her affidavit that the Appellant created unnecessary delays, filed meritless motions and forced the Respondent to incur fees over what would generally be incurred on a similar case. (R. pp. 468-470) Even if true, then costs were included in the \$106,157.99 in fees that had been incurred prior to July 11, 2011. (It should also be stated that Respondent filed motions to strike affirmative defenses and counterclaims which were denied by the trial court and filed and argued a substantial Motion for Summary Judgment which was denied by Judge Kinard on April 12, 2011 (R. pp. 2-3).

As set forth above, the majority of the fees were incurred for a trial in which Respondent was clearly seeking to conduct a meritless campaign against the Appellant for

punitive damages and to try and seek recovery of amounts over and above that included in what was invoiced. These claims were eventually excluded by the Court or withdrawn. Respondent did not even recover the total sums sought in this action. Thus, attorneys' fees in excess of the claim and the award is certainly not justified by the result.

3. Respondent presented no evidence as to the contingency of the fee.

In her affidavit in support of its claim for attorney's fees, Respondent's counsel asserts that the Respondent entered into a fee agreement under which it was charged an hourly rate of \$250.00 per hour for her services. (R. pp. 468-473) While she references a fee agreement, no fee agreement was ever produced outlining any terms or conditions that may relate to the services. No invoices or evidence of payment of any fees by the Respondent were presented. The affidavit only asserts that the Respondent has been billed for costs incurred by the firm through trial. Thus the rates of the fee agreement itself, and whether Respondent has paid or even been billed for fees was unknown, and Respondent failed to provide requisite evidence related to this element of an award of fees.

4. The fee of \$209,109.60 is not customary for similar services.

The Respondent offers no evidence that a fee, which is over 105 % of the amount claimed in a lien (and over 120 % of actual recovery) is customary for similar services. Respondent offered the affidavit of N. Keith Emge, Jr., dated July 25, 2011, (hereinafter "Emge Affidavit") in support of its contention that the requested fees are customary. (R. pp. 474-475). In his affidavit Mr. Emge asserts that the hourly rates charged by the firm of Rosen Rosen & Hagood, LLC, are reasonable and comparable to similar rates charged for legal representation of architects and construction clients within the Charleston County Bar.

Neither Mr. Emge nor Respondent's counsel address the reasonableness of the total amount of the fees sought by the Respondent or on points specifically including, whether it is customary to have two partners of a firm participate at trial of a claim of this nature, whether it is customary to have two associates participate in the preparation of the case, whether the total number of hours spent on the case is customary or reasonable.

Courts have recognized that a fee equal to one-third ($33\frac{1}{3}\%$) of the Respondent's total award is customary. Global Protection Corp. v. Halbersberg, 332 S.C. 149, 503 S.E.2d 483 (Ct. App. 1998)(In awarding attorneys fees under the South Carolina Unfair Trade Practices Act, the Court awarded one-third of the total damages although attorney's fee contract provided for a fee 40% of any recovery.) The Mechanic's Lien Statutes of South Carolina recognize this as a reasonable ceiling for recovery of attorneys fees in that a mechanic's lien may be discharged by filing a cash bond in an amount equal to one and one-third times the amount claimed in a lien. S.C. Code Ann. § 29-5-110.

Other statutes recognize similar limits. South Carolina law provides for attorneys fees where an insurer had refused to pay a claim in bad faith, but it specifically limits that said fees may not exceed one-third of the amount of the judgment. S.C. Code Ann. § 38-59-40. The Worker's Compensation Statutes of South Carolina provide for recovery of attorneys fees in certain circumstances, but said fees may not exceed one third of the total claim amount paid by the carrier to the injured employee. S.C. Code Ann. § 42-1-560.

Per custom, the Respondent's fees should be capped at the customary one-third of the amount of the judgment and per the language of the statutes, Respondent should only be able

to recover a reasonable amount, within that limit, that can be demonstrated attributable to the mechanic's lien action or Plaintiff's claim under S.C. Code Ann. § 27-1-15.

- C. UNDER THE SOUTH CAROLINA MECHANIC'S LIEN STATUTE, TOTAL RECOVERY IS LIMITED TO THE AMOUNT OF THE CASH BOND POSTED BY THE RESPONDENT WITH THE CLERK OF COURT.

Under the Mechanic's Lien Statute the Respondent is only entitled to payment from the cash posted by the Appellant with the court pursuant to S.C. Code Ann. § 29-5-110.

This statute states:

At any time after service and filing of the statement required under § 29-5-90 the owner or any other person having an interest in or lien upon the property involved may secure the discharge of such property from such lien by filing in the office of clerk of court or register of deeds where such lien is filed his written undertaking, in an amount equal to one and one-third times the amount claimed in such statement, secured by the pledge of United States or State of South Carolina securities, by cash or by a surety bond executed by a surety company licensed to do business in this State, and upon the filing of such undertaking so secured **the lien shall be discharged and the cash, securities or surety bond deposited shall take the place of the property upon which the lien existed** and shall be subject to the lien. In the event of judgment for the person filing such statement in a suit brought pursuant to the provisions of this chapter, **such judgment shall be paid out of the cash deposited** or, in event of pledge of securities, it shall be paid from the proceeds of a sale of so much of the pledged securities as shall be necessary to satisfy such judgment or, in event of the filing of a surety bond, the surety company issuing such bond shall pay such amount found due, not to exceed the amount of the bond. Unless suit for enforcement of the lien is commenced as required by § 29-5-120, the undertaking herein required shall be null and void and the principal therein shall have the right to have it canceled and such cash or securities deposited or pledged or surety bond filed shall be released from the lien herein provided. (emphasis added)

Pursuant to this statute, the Appellant deposited \$266,012.71 in cash with the clerk of court on May 12, 2009 and the Respondent's mechanic's lien was released. (R. pp. 387-391).

Upon making this deposit the Respondent's mechanic's lien was discharged and thus, the

cash deposited took the place of the Appellant's property. Per the statute, the total payment to the Respondent under the Mechanic's Lien Statute is limited to the \$266,012.71 deposited by the Defendant with the Clerk of Court. The Respondent's verdict was \$173,990.53. Therefore, any award of attorneys fees under the Mechanic's Lien Statute is limited to a maximum of \$92,022.18³.

D. THE RESPONDENT MAY NOT RECOVER ATTORNEYS FEES FOR STAFF MEMBERS.

Respondent includes \$28,619.25 in fees for time spent by staff members. (R. pp. 481-516) Both the statutory claims of the Respondent provide for recovery of "attorneys fees." S.C. Code Ann § 29-5-10 and § 27-1-15. Whether these statutes allow for the recovery of fees related to service by staff members has not been specifically addressed in South Carolina. "We are not at liberty to depart from the plain meaning of the mechanic lien's statutory language." Clo-Car Trucking Co., Inc. v. Cliffure Estates of South Carolina, Inc., 282 S.C. 573, 320 S.E.2d 51 (Ct.App.1984). Therefore, the Respondent may not include fees related to staff members in its claims for attorneys fees under the statute.

Even in jurisdictions where recovery of fees related to staff members has been allowed under the mechanic's lien laws, the claimant is required to show: (1) that the legal assistant was qualified through education, training or work experience to perform substantive legal work (2) the substantive legal work was performed under the direction and supervision of an attorney; (3) the nature of the legal work which was performed; (4) the hourly rate

3

For the reasons set forth herein, Respondent asserts that even an award of \$92,022.18 is excessive but it represents the Respondent's maximum recovery of attorney's fees under the South Carolina Mechanic's Lien Statute.

being charged for the legal assistant; and (5) the number of hours expended in the performance of the services by the legal assistant. Gill Sav. Asso. v. International Supply Co., 759 S.W.2d 697 (Tex. App. Dallas 1998). The timesheets submitted by the Respondent include fees routine tasks such as filing by staff members. (R. pp. 481-516) Respondent cannot recover for this none-substantive work. Therefore, the Respondent is not entitled to recover these fees.

E. THE INTEREST AWARDED BY THE COURT IS NOT SUPPORTABLE BY STATUTE.

The Court's award includes \$37, 413.92 in Prejudgment Interest beginning from the date of February 9, 2009, to the date of the petition for attorneys fees. (R. pp. 19-23) This award is not supportable by South Carolina law. First, under S.C. Code Ann. § 27-1-15 one may only recover pre-judgment interest from the date of the demand. Respondent did not make its demand until March 10, 2010. (R. p. 366). Thus, the award clearly includes interest which may not be awarded under this statute.

In Babb v. Rothrock, 310 S.C. 350, 426 S.E.2d 789 (S.Ct. 1993), the Court set out the law regarding prejudgment interest.

The law allows prejudgment interest on obligations to pay money from the time when, either by agreement of the parties or operation of law, the payment is demandable, if the sum is certain or capable of being reduced to certainty. Southern Welding Works, Inc. v. K & S Construction Co., 286 S.C. 158, 332 S.E.2d 102 (Ct.App.1985). The fact that the sum due is disputed does not render the claim unliquidated for the purposes of an award of prejudgment interest. Wayne Smith Construction Co., Inc. v. Wolman, Duberstein and Thompson, 294 S.C. 140, 363 S.E.2d 115 (Ct.App.1987). The proper test for determining whether prejudgment interest may be awarded is whether or not the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose. 47 C.J.S. Interest & Usury § 49 at 124-25 (1982).

The Agreement does not provide for prejudgment interest. (R. pp. 346-353) Therefore prejudgment interest beginning at February 9, 2009, may only be awarded if Plaintiff's damages are liquidated. Applying the test set forth in Babb, the prejudgment interest can only be awarded if the amount of the claim can be reduced to certainty. Id. The question is whether the claim is capable of being reduced to certainty by simple mathematical calculation. Builders Transport, Inc. v. South Carolina Property and Cas. Ins. Guar. Ass'n, 307 S.C. 398, 415 S.E.2d 419 (Ct.App.,1992). The claim in this case is not.

While the contract provided for a flat fee, the claim of the Respondent was primary an effort to recover fees outside of the work outlined in the contract. (R. pp. 346-353) The Agreement provided for certain services pursuant to a flat fee and certain services to be billed by the hour. However, the Respondent also bills for some additional work pursuant to a formula he contended was outlined in the Agreement. Mr. Bozeman admitted that the line between what was and what wasn't additional was "subjective." (R. p. 204 217) As it was admitted that was and wasn't contained in the flat fee, there is no way that this claim can be reduced to a certain sum pursuant to a mathematical formula and the matter is therefore unliquidated. The Court's award of pre-judgment interest must therefore be reversed.

CONCLUSION

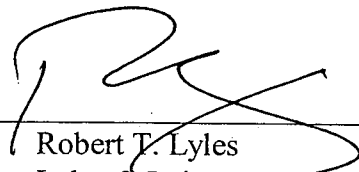
For the foregoing reasons, Appellant was entitled to a directed verdict as to the Respondent's claims pursuant to the South Carolina Mechanic's Lien Statute and as to Respondent's claim under S.C. Code Ann. § 27-1-15. The Appellant is entitled to recover his attorneys fees and costs as the prevailing party under the Mechanic's Lien Statute. Additionally, the single verdict rendered by the jury must be reversed and the matter

remanded to the trial court to be reheard based on the invalidity of the Respondent's mechanic's lien.

If this court finds either of these claims valid, the Trial Court's award of attorneys fees must still be reversed and reduced to an amount that is reasonable and supported by law or fact.

Respectfully submitted,

July 19, 2012



Robert T. Lyles
Lyles & Lyles, LLC
342 East Bay Street
Charleston, South Carolina 29401
(843) 577-7730
Rtl@lylesfirm.com
Attorneys for Appellant

Other Counsel of Record

A. Bright Ariail, Esquire
Rosen, Rosen & Hagood, LLC
134 Meeting Street, Suite 200
Post Office Box 893
Charleston, S.C. 29402
(843) 577-6726
bariail@rrhlawfirm.com
Attorney for Respondent

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,

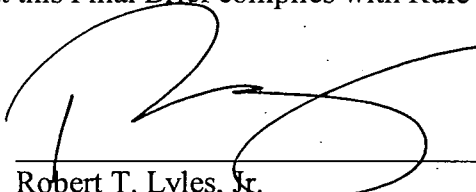
v.

GENE R. SLIVKA, ... Appellant.

CERTIFICATE OF COUNSEL

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

July 19, 2012



Robert T. Lyles, Jr.
Lyles & Lyles, LLC
342 East Bay Street
Charleston, SC 29401
(843) 577-7730
Attorney for Appellant

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	ii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	6
ARGUMENT	14
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	14
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	24
III. APPELLANT HAS NOT PRESERVED ANY ISSUES FOR APPEAL ON THE VERDICT RENDERED AS TO RESPONDENT'S BREACH OF CONTRACT CLAIM	27
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	29
V. THE TRIAL COURT PROPERLY AWARDED PREJUDGMENT INTEREST TO THE RESPONDENT PURSUANT TO S.C. CODE ANN § 34-31-20(A)	44
CONCLUSION	47

TABLE OF AUTHORITIES

Cases

<u>Atlantic Pipe Corp. v. Quadrangle Limited Partnership</u> , 1993 WL 454203, *2 (Conn. Super. Ct. 1993)	34
<u>Austin v. Specialty Transp. Services, Inc.</u> 358 S.C. 298, 594 S.E.2d 867 (CT.App. 2004)	28
<u>Baron Data Systems, Inc. v. Loter</u> , 297 S.C. 382, 377 S.E.2d 296 (1989)	39, 40
<u>Bloom v. Ravoira</u> , 339 S.C. 417, 529 S.E.2d 710 (2000)	14
<u>Blumberg v. Nealco, Inc.</u> , 310 S.C. 492, 427 S.E.2d 659 (1993).....	39
<u>Boddie-Noell Properties, Inc. v. 42 Magnolia Partnership</u> , 344 S.C. 474, 482, 544 S.E.2d 279, 283 (Ct.App.2000)	15
<u>Butler Contracting, Inc. v. Court Street, LLC</u> , 369 S.C. 121, 131, 631 S.E.2d 252, 257 (2006)	22
<u>Carolina Steel Corp. v. Palmetto Bridge Construction</u> , 444 F.Supp.2d 577 (D.S.C. 2006)	25, 26
<u>Cedar Creek Properties v. Cantelou Assoc., Inc.</u> , 320 S.C. 483, 465 S.E.2d 774 (S.C. App. 1995)	33
<u>Charleston Lumber Co. v. Miller Housing Corp.</u> , 458 S.E.2d 431, 438 Ct.App. 1996).....	43
<u>Clo-Car Trucking Co., Inc. v. Cliffure Estates of S.C.</u> , 282 S.C. 573, 320 S.E.2d 51 (Ct.App. 1984)	18
<u>Collins v. Collins</u> , 239 S.C. 170, 122 S.E.2d 1 (1961)	39, 41
<u>D.A. Davis Construction Co., Inc. v. Palmetto Properties, Inc.</u> , 281 S.C. 415, 315 S.E.2d 370 (1984)	31
<u>Darden v. Witham</u> , 263 S.C. 183, 209 S.E.2d 42 (1974)	39
<u>Dedes v. Stickland</u> , 307 S.C. 155, 414 S.E.2d 134 (1992)	39
<u>Ellie, Inc. v. Miccichi</u> , 358 S.C. 78, 594 S.E.2d 485 (Ct.App. 2004)	28
<u>Felder v. K-Mart Corp.</u> , 297 S.C. 446, 448, 377 S.E.2d 332, 333 (1989)	15

<u>Gamble v. International Paper Realty Corp. of S.C.</u> , 323 S.C. 367, 474 S.E.2d 438 (1996)	15
<u>Gill Sav. Assoc. v. International Supply Co.</u> , 759 S.W.2d 697 (Tex. App. Dallas 1988).....	44
<u>GTR Rental, LLC v. DalCanton</u> , 547 F.Supp. 2d 510 (D.S.C. 2008)	45
<u>Hardaway Concrete Co., Inc. v. Hall Contracting Corp.</u> , 374 S.C. 216, 647 S.E. 2d 488 (Ct.App. 2007)	25, 36, 37, 38
<u>Hawkins v. Mullins</u> , 359 S.C. 497, 597 S.E.2d 897 (Ct.App. 2004)	28
<u>Hegler v. Gulf Ins. Co.</u> , 270 S.C. 548, 243 S.E.2d 443 (1978).....	29
<u>Historic Charleston Holdings, LLC v. Mallon</u> , 381 S.C. 417, 435, 673 S.E.2d 448, 457-58 (2009)	44
<u>Jacobs v. Am. Mut. Fire Ins. Co.</u> , 287 S.C. 541, 544, 340 S.E.2d 142, 143 (1986)	45
<u>Judy v. Judy</u> , 384 S.C. 634 646, 682 S.E.2d 836, 842 (Ct.App. 2009)	20
<u>P'on, LLC v. Town of Mt. Pleasant</u> , 338 S.C. 406, 526 S.E.2d 716 (2000)	28
<u>Lee v. Du-Rite Products, Co., Inc.</u> , 366 Pa. 548, 79 A.2d 218 (1951)	19
<u>Lucas v. Rawl Family Ltd. P'ship</u> , 359 S.C. 505, 598 S.E.2d 712 (2004)	16, 28
<u>McElveen v. McElveen</u> , 332 S.C. 583, 506 S.E. 2d1 (Ct. App. 1998).....	43
<u>Moore Elec. Supply, Inc. v. Ward</u> , 316 S.C. 367, 450 S.E. 2d 96 (Ct.App. 1994).....	25, 37
<u>Seckinger v. Vessel Excalibur</u> , 326 S.C. 382, 483 S.E.2d 775 (S.C. App. 1997)	29
<u>Sims v. Giles</u> , 343 S.C. 708, 714, 541 S.E.2d 857, 861 Ct.App. 2001)	14
<u>South Carolina Dept. of Social Services v. Tharp</u> , 312 S.C. 243, 439, S.E.2d 854 (1994)	29
<u>State v. Byers</u> , 392 S.C. 438, 447-48, 710 S.E.2d 55, 60 (2011)	20
<u>State v. Reeves</u> , 301 S.C. 191, 193-94, 391 S.E.2d 241, 243 (1990)	20
<u>Steinke v. S.C. Dep't of Labor</u> , 336 S.C. 373, 520 S.E. 2 nd 142 (1999).....	14, 15

<u>Swinton Creek Nursery v. Edisto Farm Credit, ACA</u> , 334 S.C. 469, 514 S.E.2d 126 (1999)	14
<u>Taylor v. Medencia</u> , 331 S.C. 575, 503 S.E.2d 458 (1998)	40
<u>T.W. Morton Builders, Inc. v. von Buedingen, et al.</u> , 316 S.C. 388, 450 S.E.2d 87 (Ct.App. 1994)	31
<u>United Student Aid Funds, Inc. v. S.C. Dep't of Health & Environ. Control</u> , 356 S.C. 266, 588 S.E.2d 599 (2003)	28
<u>Utilities Construction Co., Inc. of S.C. v. Wilson</u> , 321 S.C. 244, 468 S.E.2d 1 (Ct.App. 1996)	32, 33
<u>Weir v. Citicorp. Nat'l Servs., Inc.</u> , 312 S.C. 511, 435 S.E.2d 864 (1993)	15
<u>Williamson v. Hotel Melrose</u> , 110 S.C. 1, 96 S.E.2d 407 (1918)	17
<u>Wintersteen v. Food Lion, Inc.</u> , 344 S.C. 32, 35, 542 S.E.2d 728, 729 (2001)	14
<u>Wood v. Hardy</u> , 235 S.C. 131, 110 S.E.2d 157 (1959)	23
<u>Yadkin Brick Co. v. Materials Recovery Co.</u> , 339 S.C. 640, 529 S.E.2d 764 (Ct.App. 2000)	15

Statutes

S.C. Code Ann. §15-36-10	2
S.C. Code Ann. §27-1-15	1, 2, 4, 5, 6, 13, 14, 24, 25, 26, 27, 28, 29, 30, 31, 34, 35, 36, 37, 38, 43, 44, 46, 47
S.C. Code Ann. §29-5-10	17, 22, 24, 29, 30, 31, 42, 43
S.C. Code Ann. §29-5-20	30, 41
S.C. Code Ann. §29-5-90	19
S.C. Code Ann. §29-5-100	23
S.C. Code Ann. §29-5-110	42, 43
S.C. Code Ann. §34-31-20	5, 45, 47

Rules

Rule 59(e), SCRCF	5, 6, 28
Rule 220(c), SCACR	47

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 tortious interference with contractual relations with third parties dependent upon performance by Plaintiff, and tortious interference with contractual relations resulting from defective notice of mechanic's lien. 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), SCRCF 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), SCRC 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), SCRC 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 parties¹. (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. Ravoir, 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 2009². (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. Cliffure 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 properly 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 Env't'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 that 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 Tortious 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 statute, 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, Inc. 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.E.2d 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 circumstances³. 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)

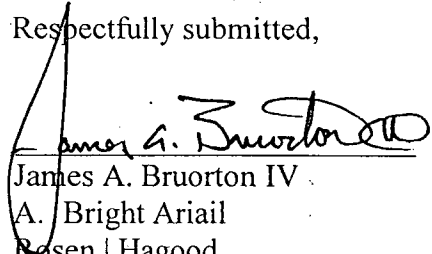
Appellant argues that the Court awarded pre-judgment interest in an amount pursuant to S.C. Code Ann. § 27-1-15 and is limited to prejudgment interest from the date of the demand under that statute. (Appellant's Brief). It is not disputed that Respondent made its demand pursuant to S.C. Code Ann. § 27-1-15 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

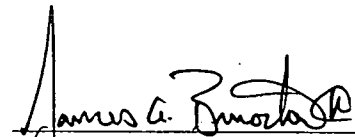
THE SPRIGGS GROUP, P.C., ... Respondent,

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

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.

REPLY BRIEF OF APPELLANT

Robert T. Lyles
Lyles & Lyles, LLC
342 East Bay Street
Charleston, South Carolina 29401
(843) 577-7730
Attorneys for Appellants

TABLE OF CONTENTS

Table of Authorities	ii
Argument	1
I. BECAUSE THE WORK PERFORMED BY RESPONDENT IN JANUARY, 2009 AND IN MAY, 2009 WAS NOT LABOR, AS DEFINED BY THE MECHANIC'S LIEN STATUTE, RESPONDENT'S LIEN WAS UNTIMELY, AS A MATTER OF LAW, AND THE JUDGMENT OF THE LOWER COURT SHOULD BE REVERSED AND A NEW TRIAL ON ALL REMAINING ISSUES SHOULD BE ORDERED.	1
II. RESPONDENT DOES NOT ESTABLISH AN UNREASONABLE FAILURE TO PAY AND THEREFORE JUDGMENT UNDER <u>S.C. CODE ANN. § 27-1-15</u> SHOULD BE REVERSED.....	5
III. THE ISSUE OF WHETHER APPELLANT IS ENTITLED TO A NEW TRIAL WAS RAISED AND RULED UPON BY THE TRIAL COURT.	6
IV. RESPONDENT DOES NOT ESTABLISH THAT ALL OF THE ATTORNEYS FEES AWARDED ARE SUPPORTED BY LAW, SPECIFICALLY EITHER <u>S.C. CODE ANN. § 27-1-15</u> OR <u>§ 29-5-10</u>	7
V. RESPONDENT DOES NOT ESTABLISH THAT THE FEES WHICH VASTLY EXCEED THE VERDICT IN THIS CASE ARE REASONABLE.	9
Conclusion	10

TABLE OF AUTHORITIES

CASES

<u>Carolina Steel Corp. v. Palmetto Bridge Constructors,</u> 44 F.Supp.2d 577 (D.S.C. 2006)	10
<u>Dowaliby v. Chambliss,</u> 344 S.C. 558, 562, 544 S.E.2d 646, 648 (Ct. App. 2001)	8
<u>George A.Z. Johnson, JR., Inc. v. Barnhill,</u> 279 S.C. 242, 306 S.E.2d 216 (S.Ct. 1983)	2
<u>Hardaway Concrete Co., Inc. v. Hall Contracting Corp.,</u> 374 S.C. 216, 647 S.E.2d 488 (Ct.App., 2007)	8
<u>Harris-Jankins, et al. v. Nissan Car Mart, Inc.,</u> 348 S.C. 171, 557 S.E.2d 708 (Ct. App. 2001)	8
<u>Herron v. Century BMW,</u> 395 S.C. 461, 719 S.E.2d 640 (S.Ct. 2011)	6
<u>Lee v. Du-Rite Products, Co., Inc.,</u> 366 Pa. 548, 29 A.2d 218 (Pa. S.Ct. 1951)	2, 3
<u>Preferred Savings and Loan Association, Inc., v. Royal Garden Resort, Inc.,</u> 301 S.C. 1, 4, 389 S.E.2d 853, 854 (S.Ct. 1990)	4
<u>Queens Grant II HPR v. Greenwood Development Corp.,</u> 368 S.C. 342, 628 S.E.2d 902 (Ct. App. 2006)	7
<u>State v. Russell,</u> 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001)	7
<u>Sea Pines Co. v. Kiawah Island Co., Inc.,</u> 268 S.C. 153, 232 S.E.2d 501, (S.Ct. 1977)	2
<u>Smith v. Strickland,</u> 314 S.C. 192, 442 S.E.2d 207 (Ct.App. 1994)	8
<u>Taylor v. Medenica,</u> 331 S.C. 575, 503 S.E.2d 458 (S.Ct. 1998)	9
<u>Williamson v. Hotel Melrose,</u> 110 S.C. 1, 96 S.E. 407, 408 (S.Ct. 1918)	2

STATUTES

<u>S.C. Code Ann.</u> § 27-1-15.	5, 6, 7, 8, 9, 10, 11
<u>S.C. Code Ann.</u> § 29-5-10.	1, 2, 3, 4, 7, 8, 10, 11
<u>S.C. Code Ann.</u> § 39-5-140.	9

RULES

<u>SCRCP</u> 59(e)	7

ARGUMENT

- I. BECAUSE THE WORK PERFORMED BY RESPONDENT IN JANUARY, 2009 AND IN MAY, 2009 WAS NOT LABOR, AS DEFINED BY THE MECHANIC'S LIEN STATUTE, RESPONDENT'S LIEN WAS UNTIMELY, AS A MATTER OF LAW, AND THE JUDGMENT OF THE LOWER COURT SHOULD BE REVERSED AND A NEW TRIAL ON ALL REMAINING ISSUES SHOULD BE ORDERED.

Respondent contends that its efforts in both January, 2009 and May, 2009 support the timeliness of its lien. As noted previously, the work performed in these months does not fit with the legislated definition of "labor" in the Mechanic's Lien Statute. To hold that it does requires an improper expansion of the Mechanic's Lien Statute which, Appellant previously noted, is not permitted. Additionally, the work ostensibly done in May, 2009, occurred after the filing of the lien, is therefore immaterial and cannot, as a matter of law, support the timeliness of the lien.

- A. Neither the work ostensibly performed in January, 2009 or May, 2009 was within the definition of "labor" and therefore cannot, as a matter of law, support the timeliness of Respondent's mechanics lien.

It is undisputed that the work done by Respondent in January, 2009 and May, 2009 was not "preparation of plans, specifications and design drawings." Respondent concedes this work was "construction administration services" done from the offices of Respondent, not at the jobsite. Respondent essentially argues that the definition of "labor" should be expanded to include "construction administration services." Such an expansion of the Mechanic's Lien Statute is improper, as previously pointed out in Appellant's Brief.

Respondent first points to case law and argues that design professionals have previously been recognized to have certain lien rights. However, the cited cases are factually

different then the one at hand. South Carolina cases finding that design professionals have performed “labor” in the “erection of a building,” under S.C Code Ann. § 29-5-10, have been specifically limited to cases where the architect performed on-site services in supervising construction. In Williamson v. Hotel Melrose, 110 S.C. 1, 96 S.E. 407, 408 (S.Ct. 1918), a case relied upon by Respondent, the court found that the architect had lien rights where he had “superintended” construction. The Respondent admitted at trial that he did not do that here.

Though not mentioned by Respondent, in Sea Pines Co. v. Kiawah Island Co., Inc., 268 S.C. 153, 232 S.E.2d 501, (S.Ct. 1977), the Court did hold that the mechanics lien statute covered the **supervision** of the planning and development of the project by a design professional. (emphasis added). In that case, the design professional provided a staff to supervise construction at the project.

The important distinction between “construction administration” generally and on-site supervision was articulated in George A.Z. Johnson, JR., Inc. v. Barnhill, 279 S.C. 242, 306 S.E.2d 216 (S.Ct. 1983), where a surveyor’s claim under the Mechanic’s Lien Statute was rejected. In distinguishing the surveyor’s claim from those where lien rights had been granted for design professionals, the court stated that the cases in which architects had been entitled to assert lien rights “deal with labor performed in the actual construction of the buildings **on the property**.” Id. at 245. (emphasis added) Respondent did not go on-site and did not “supervise” anything with regard to construction in January, 2009, or at any time, as set forth previously in Appellant’s brief. Respondent does not refute this.

Respondent also cites a 1951 Pennsylvania case, Lee v. Du-Rite Products, Co., Inc.,

366 Pa. 548, 29 A.218 (Pa. S.Ct. 1951), which actually supports Appellant's argument. In Lee, the Pennsylvania Court refused to expand its Mechanic's Lien Statute and reversed a verdict on a mechanic's lien action which had been entered in favor of the Plaintiff, an architect. Pennsylvania law does allow an architect to assert a lien if he is employed to be **on site directing construction**, but not to draw plans alone. Id. at 219. (emphasis added) The court in Lee found that the architect had no lien claim, even though he made site visits, because during those visits he did not superintend or supervise construction.

Notably, in its brief the Respondent actually asks the Court how security guards can have lien rights for their services during construction, but an architect not have lien rights for construction administrative services. The question goes to the very heart of the issue before the Court and the answer is not only simple but dispositive of Respondent's argument: the legislature explicitly granted security guards lien rights in the Mechanic's Lien Statute. The legislature explicitly did not grant lien rights to architects for services other than "the preparation of plans, specifications or design drawings." If the legislature intended to give architects lien rights for construction administration, it could have defined "labor" in the statute "contract administration" by an architect or "all services performed by an architect." It did neither. Instead, it granted lien rights to architects only for the "preparation of plans, specifications, and design drawings." S.C. Code Ann. § 29-5-10.

Respondent also asserts that "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." (Respondent's Brief p. 16.) This too illustrates a fundamental error in Respondent's argument. The issue before the Court is not what is more

or less supportive to the erection of a building. It is what is defined as "labor" in the current statute. The Mechanics Lien Statute is what the legislature created it to be. It cannot be altered, revised or changed by parties to suit their purposes. It is to be strictly construed and strict compliance with its terms is required.

Since the January 2009 work undisputedly did not include the preparation of any plans, specifications, or design drawings, the Respondent's judgment under the Mechanic's Lien Statute must be reversed.

- B. The work in May, 2009, cannot support the mechanic's lien because it post-dated the lien and there was no evidence at trial that Appellant knew of or authorized the work.

As a preliminary matter, all issues relative to the May, 2009 work of Respondent were argued and ruled upon by the trial judge and are therefore preserved for appeal. (R. pp. 522-535; 4-14; and 567-573)

Respondent does not refute that the May, 2009, services were performed after the filing of the mechanic's lien. The Mechanic's Lien Statute requires that qualifying work be performed no more than ninety days **before** a lien is filed. See. Preferred Savings and Loan Association, Inc., v. Royal Garden Resort, Inc., 301 S.C. 1, 4, 389 S.E.2d 853, 854 (S.Ct. 1990). (Emphasis added.) "Because the party asserts in his notice the work has already been performed, the date of cessation of the labor for which the lienor seeks payment must be a date before the notice of lien is filed and not after." Id. at 272-3.

Finally, as previously stated, to support a mechanic's lien action the work must have been authorized by the owner. §29-5-10. There is no evidence in the record that Mr. Slivka authorized the work done for the appraiser in May, 2009 or that he ever knew about it

until he was invoiced for that work in May, 2009. (R. pp. 364 and 300, lines 1-17)

For these additional reasons, the trial court's reliance on the May, 2009 work to support the lien of Response was reversible error.

II. RESPONDENT DOES NOT ESTABLISH AN UNREASONABLE FAILURE TO PAY AND THEREFORE JUDGMENT UNDER S.C. CODE ANN. § 27-1-15 SHOULD BE REVERSED.

With regard to the § 27-1-15 claim, the parties largely agree on some facts. There is agreement by all that prior to the filing of this action, on July 8, 2009, Appellant owed Respondent some sum of money for services rendered by Respondent, though the amount owed was in dispute. Respondent relies upon this fact in his brief but ignores a critical fact relative to his § 27-1-15 claim.

When Respondent's invalid lien foreclosure was filed, on July 8, 2009, Appellant began to incur attorneys fees and damages, which continued to accrue and are still accruing. Appellant asserted cross-claims that survived all efforts by Respondent to have them dismissed. Thus, at the time this matter was submitted to the jury, a question existed about whether Appellant owed Respondent anything and if so, how much. The Court or the jury could have ultimately concluded that Respondent's lien was untimely and that, in fact, Respondent owed Appellant for Appellant's damages. That these matters were in dispute, as a matter of law, is established by the fact that the trial court denied Respondent's motions for directed verdict (R. pp. 286-297 and 314)

Under these circumstances, as a matter of law, it cannot be said that Appellant's decision not to pay Respondent, after demand was made in March, 2010, eight months after suit was filed, was "unreasonable." The trial judge should have directed a verdict in favor

of Appellant with respect to this claim and his failure to do so was reversible error.

Second, as a matter of law, because of the *bona fide* dispute between the parties, it cannot be said that there was a certain or valid sum and to Respondent in March, 2010. Respondent refers to testimony that Appellant requested services he did not pay for and even agreed to pay a certain sum in 2009. This was all prior to the filing of the action to foreclose the untimely lien.

Respondent moved for directed verdict, and an award of damages, on the very same basis at the close of his case. (R. pp. 287, lines 1- 278 line 22) The trial court correctly denied Respondent's motion. (R. p. 297) That denial establishes, as a matter of law, that there was not an undisputed or "valid" sum payable to Respondent at the time the case was submitted to the jury. Thus, as a matter of law, the trial judge should have directed a verdict on the §27-1-15 cause of action and his failure to do so was reversible error.

Finally, it is undisputed that when the §27-1-15 demand was sent, the case had been pending for ten months and the parties were engaged in active, ongoing discovery related to valid, colorable claims each had against the other. Under these circumstances, as a matter of law, it cannot be said that Appellant failed to investigate Respondent's claim in March, 2010. The trial judge should have directed a verdict in favor of Appellant on that basis as well and his failure to do so is reversible error.

III. THE ISSUE OF WHETHER APPELLANT IS ENTITLED TO A NEW TRIAL WAS RAISED AND RULED UPON BY THE TRIAL COURT.

"Issue preservation is to give the trial court a fair opportunity to rule on the issues and to provide [the appellate court] with a platform for meaningful appellate review." Herron v.

Century BMW, 395 SC 461, 719 S.E.2d 640 (S.Ct. 2011) citing Queens Grant II HPR v. Greenwood Development Corp., 368 S.C. 342, 628 S.E.2d 902 (Ct.App. 2006) “A party is not required to use the exact name of a legal doctrine in order to preserve the issue.” Id. citing State v. Russell, 546 S.E.2d 202, 345 S.C. 128, 546 S.E.2d 202 (Ct.App. 2001). Pursuant to SCRCP 59(e) Appellant filed a *Notice of Motion and Motion for Judgment Notwithstanding the Verdict and/or for a New Trial* following the trial of his matter which was denied. (R. pp. 522-535) This motion was denied. (R. p. 4-13) In its motion, Appellant challenged the single verdict issued in this matter for the reasons set forth in this appeal. The trial court had the opportunity to rule on whether to uphold the verdict. Therefore, the issue of the Appellant’s entitlement to a new trial has been raised and ruled on by the trial court and is preserved for review.

To clarify, Appellant has no basis to challenge the jury verdict on the contract cause of action in and of itself. A new trial is required because of the reversible error with respect to the Mechanic’s Lien Statute. If the lien was untimely, as a matter of law, Appellant is entitled to attorneys fees, and possibly an award of damages on his slander of title claim, which will offset any actual damages awarded to Respondent on his contract claim, and may well exceed them. Thus, the entire matter must be remanded for a new trial.

IV. RESPONDENT DOES NOT ESTABLISH THAT ALL OF THE ATTORNEYS FEES AWARDED ARE SUPPORTED BY LAW, SPECIFICALLY EITHER S.C. CODE ANN. § 27-1-15 OR § 29-5-10.

Since there is no contractual basis for the recovery of fees in this matter, the Court’s award of fees, totaling \$235,030.31, must be based upon Plaintiff’s claims under the Mechanic’s Lien Statute and S.C. Code Ann. § 27-1-15.

Courts must interpret statutes that grant the power to award attorney's fees narrowly because these laws have been enacted in derogation of the common law. Harris-Jankins, et al. v. Nissan Car Mart, Inc., 348 S.C. 171, 557 S.E.2d 708 (Ct.App. 2001), citing Dowaliby v. Chambliss, 344 S.C. 558, 562, 544 S.E.2d 646, 648 (Ct.App. 2001). Therefore, the Court must establish what fees being sought are recoverable under each of the referenced statutes.

As previously stated, Appellant requested that the trial judge specify which fees were being awarded under which statute, so that the reasonableness of the fees awarded, under each statute, could be assessed and reviewed. The trial court refused to do that which, in and of itself, is an abuse of discretion and requires remand of this matter. See, Smith v. Strickland, 314 S.C. 192, 442 S.E.2d 207 (Ct.App. 1994).

Each of the referenced statutes sets limits on the amount or type of fees that are reasonable. The Mechanic's Lien Statute limits the recovery of attorney's fees to the amount of the lien. S.C. Code Ann. § 29-5-10(a). In this case, the amount of the lien was established by the jury to be \$173,990.53. The Mechanic's Lien Statute further limits the recovery of attorneys fees to "the costs 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). Under S.C. Code Ann. § 27-1-15 the court may only award fees incurred from the date the demand pursuant to the statute was made and any fees awarded under S.C. Code Ann. § 27-1-15 must be "intertwined" with the statutory claim. Hardaway Concrete Co., Inc. v. Hall Contracting Corp., 374 S.C. 216, 647 S.E.2d 488 (Ct.App., 2007).

Here the Court awarded Respondent all fees incurred by Respondent from the inception of this matter through trial. That award exceeds the amount of the mechanic's lien

by more than \$63,000.00, and it includes fees incurred by Respondent to prosecute and prepare for the trial of its causes of action for breach of contract accompanied by a fraudulent act (where it was seeking punitive damages) and *quantum meruit*, and includes fees incurred before the issuance of the § 27-1-15 demand, none of which is recoverable. Therefore, the award of attorney's fees unquestionably includes fees not supported by either statute and, therefore, must be reversed.

V. RESPONDENT DOES NOT ESTABLISH THAT THE FEES WHICH VASTLY EXCEED THE VERDICT IN THIS CASE ARE REASONABLE.

Respondent argues that Taylor v. Medenica, 331 S.C. 575, 503 S.E.2d 458 (S.Ct. 1998) supports the reasonableness of the award of fees totaling \$235,030.31 which are 135% of the verdict it obtained. However, the award made in Taylor v. Medenica was made pursuant to the South Carolina Unfair Trade Practices Act and not pursuant to either of the statutes at issue in this case. The object of the Unfair Trade Practices Act is to discourage parties who are repeatedly using deceptive acts and practices in the conduct of trade or commerce. Id. Under the Unfair Trade Practices Act, the attorneys fees provision is a tool to effect the object of the statute and encourage Plaintiffs to fight the use of unfair trade practices even in cases where their damages may be minimal. Id. The Unfair Trade Practices Act is clearly a punitive statute which also awards treble damages. S.C. Code Ann. § 39-5-140. The recovery of treble damages and attorneys fees encourages claimants to pursue claims against those practicing unfair or deceptive trade practices where the actual damages which might be recovered may be minimal.

The objective of the provisions awarding attorneys fees in the statutes at issue in this

case is to facilitate resolution of disputes rather than to punish or deter particular conduct. The legislature placed very specific limitations on the attorneys fees which can be awarded under the Mechanic's Lien Statute, specifically limiting any such award to the amount of the lien. S.C. Code Ann. § 29-5-10. Additionally, under the Mechanic's Lien Statute, either party to the dispute may be forced to pay attorneys fees, depending on who prevails. S.C. Code Ann. § 29-5-10.

Likewise, S.C. Code Ann. § 27-1-15 also contains specific limitations as the award of attorneys fees is limited to those incurred after the date of the statutory demand. The obvious purpose of the statute is to avoid litigation by promoting pre-suit investigation with the threat of recovery of attorneys fees before the use of the courts is required (although the Respondent in this matter waited until he had initiated a lien on the Appellant's property, the Appellant had already posted a sizeable cash bond, and Respondent had already initiated litigation). The purpose of this statute is to promote investigation of claims and resolution of portions of the claims which are not disputed. Id. A finding against the Appellant with respect to the claim does not even mandate an award of attorneys fees under this statute. Carolina Steel Corp. v. Palmetto Bridge Constructors, 44 F.Supp.2d 577 (D.S.C. 2006).

Thus, while it is impossible to assess the reasonableness of the attorneys' fees under each statute, given the trial judge's refusal to specify what fees are awarded pursuant to which statute, the totality of the fees, 135% of the amount of damages Respondent recovered, is clearly unreasonable and is, therefore, reversible.

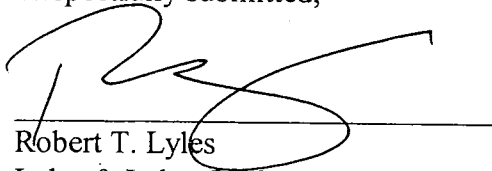
CONCLUSION

For the foregoing reasons and for those set forth in the Brief of the Appellant,

Appellant was entitled to a directed verdict as to the Respondent's claims pursuant to the South Carolina Mechanic's Lien Statute and as to Respondent's claim under S.C. Code Ann. § 27-1-15. The Appellant is entitled to recover his attorneys fees and costs as the prevailing party under the Mechanic's Lien Statute. Additionally, the single verdict rendered by the jury must be reversed and the matter remanded to the trial court to be reheard based on the invalidity of the Respondent's mechanic's lien.

July 19, 2012

Respectfully submitted,



Robert T. Lyles
Lyles & Lyles, LLC
342 East Bay Street
Charleston, South Carolina 29401
(843) 577-7730
Rtl@lylesfirm.com
Attorneys for Appellant

Other Counsel of Record

A. Bright Ariail, Esquire
Rosen, Rosen & Hagood, LLC
134 Meeting Street, Suite 200
Post Office Box 893
Charleston, S.C. 29402
(843) 577-6726
bariail@rrhlawfirm.com
Attorney for Respondent

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,

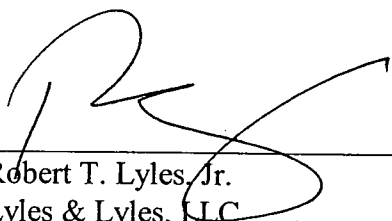
v.

GENE R. SLIVKA, ... Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

July 19, 2012



Robert T. Lyles, Jr.
Lyles & Lyles, LLC
342 East Bay Street
Charleston, SC 29401
(843) 577-7730
Attorney for Appellant

G

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.

RECORD ON APPEAL, VOLUME 1

Robert T. Lyles, Esquire
Lyles & Lyles, LLC
342 East Bay Street
Charleston, South Carolina 29401
(843) 577-7730
Rtl@lylesfirm.com
Attorneys for Appellants

James A. Bruorton, IV, Esquire
A. Bright Ariail, Esquire
Rosen, Rosen & Hagood, LLC
Post Office Box 893
Charleston, S.C. 29402
(843) 577-6726
cbruorton@rrhlawfirm.com
bariail@rrhlawfirm.com
Attorney for Respondent

INDEX

Order Denying Defendant's Motion to Dismiss filed March 2, 2010	1
Order denying Motion for Summary Judgment dated April 12, 2011	2
Order Denying Defendant's Motion for JNOV and/or For New Trial, filed on September 7, 2011.	4
Order for Award of Interest, Fees, and Costs initially filed on September 7, 2011	14
Order for Award of Interest, Fees, and Costs v and filed on October 3, 2011.	19
Order denying Defendant's Motion to Alter/Amend	24
Court's Order Denying Defendant's Motion for JNOV and/or for New Trial on November 22, 2011.	
Order Denying Defendant's Rule 59 Motion Regarding	26
Award of Interest, Fees and Costs to Plaintiff filed on November 22, 2011.	
Complaint filed July 8, 2009.	31
Answer and Counterclaim filed September 10, 2009.	55
Amended Complaint filed May 5, 2010.	68
Answer and Counterclaim filed May 18, 2010.	94
Transcript of Proceedings	
Volume 1	105
Pre-Trial Motions	106
Gene Raymond Slivka	
Direct by Ms. Ariail	109
Cross by Mr. Lyles	125
Redirect by Ms. Ariail	129

Thomas Anderson Bozeman

Direct by Ms. Ariail 138

Cross by Mr. Lyles 201

Redirect by Ms. Ariail 205

Charles Kenneth Spriggs

Direct by Ms. Ariail 206

Cross by Mr. Lyles 267

Volume 2 271

Charles Kenneth Spriggs

Cross by Mr. Lyles (Continued) 272

Redirect by Ms. Ariail 278

Myles Ivan Glick

Direct by Mr. Bruorton 279

Motions 285

Gene Raymond Slivka

Direct by Mr. Lyles 298

Cross by Ms. Ariail 301

Harvey Anthony Scott

Direct by Mr. Lyles 309

Cross by Ms. Ariail 312

Post-Trial Motions 314

Closing Arguments by Plaintiff 320

Judge's Charge to the Jury	321
Theume Transcript of Proceedings	332
Verdict.	337
Plaintiff Exhibits	
2 (Oversized, Main House Site Plan, Sheet A01)	339
3 (Oversized, Main House Site Plan, Sheet A02)	340
6 (Slivka Hand Drawn Sketches)	341
7 (Proposal dated November 27, 2006)	346
8 (Letter dated February 9, 2009 with invoices)	354
8a (Invoice 0609-6 dated May 21, 2009)	364
8b (Invoice 0609-7 dated November 16, 2009)	365
9 (S.C. Code Ann. § 27-1-15 Letter)	366
10 (Mechanic's Lien)	376
11 (Bond to discharge Mechanic's Lien)	387
13 (Oversized, Main House, Basement Plan)	392
14 (Oversized, Main House Plans)	393
15 (Oversized, Permit Plan Set)	394
16 (Oversized, Garage Building Plans)	395
17 (Oversized, Potting Shed Plans)	396
18 (Oversized, Garden Wall and Stair Plans)	397
19 (Email to Kayton Smith)	398
20 (Letter dated October 5, 2006)	400

21 (Timesheets)	403
Defendant's Exhibit	
3 (Handwritten Letter dated June 4, 2009)	437
Plaintiff's Motion to Strike Affirmative Defenses and Counterclaim dated June 23, 2010.	438
Defendant's Motion for Summary Judgment dated January 27, 2011.	449
Plaintiff's Motion for Summary Judgment dated January 31, 2011.	453
Defendant's Offer of Settlement dated July 1, 2011.	461
Plaintiff's Motion to Strike Offer dated July 11, 2011.	462
Plaintiff's Motion for Interest, Fees and Costs dated July 27, 2011 with affidavits and exhibits.	465
Defendant's Motion Notwithstanding the Verdict and/or for a New Trial Absolute or Nisi Remittitur dated August 1, 2011.	522
Defendant's Memorandum in Opposition to Plaintiff's Motion for Attorneys' Fees and Costs dated August 11, 2011 with exhibits.	536
Plaintiff's Memorandum in Opposition to Defendant's Motion for Judgment Notwithstanding the Verdict and/or for a New Trial filed August 12, 2011.	555
Defendant's Rule 59(e) Motion dated September 16, 2011.	567
Plaintiff's Letter to Court Enclosing Letter to Judge Seals dated September 22, 2011.	574
Defendant's Rule 59(e) Motion dated October 7, 2011.	576

Plaintiff's Memorandum in Opposition to	586
Defendant's Motion for Judgment Notwithstanding the Verdict and/or for New Trial with affidavit and exhibits dated October 20, 2011	
Defendant's Notice of Appeal	598

STATE OF SOUTH CAROLINA
COUNTY OF COLLETON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NO: 2009CP1500595

2010 MAR -2 PM 2:10

CLERK OF COURT
COMMON PLEAS

Spriggs Group Pc vs. Gene R Slivka

CHECK ONE:

☐ JURY VERDICT.

This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ DECISION BY THE COURT.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ ACTION DISMISSED (CHECK REASON):

SCRPC (Vol. Nonsuit);

☐ Rule 43(k), SCRPC (Settled);

☐ Rule 12(b), SCRPC;

☐ Rule 41(a),

☐ Other:

☐ ACTION STRICKEN (CHECK REASON):

☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;

☐ Rule 40(j) SCRPC;

☐ Bankruptcy;

☐ Other:

IT IS ORDERED AND ADJUDGED:

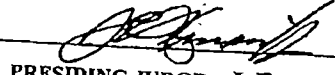
☐ See attached order;

☐ Statement of Judgment by the Court;

The Motion to Strike filed 1/12/10 is withdrawn per J. Reaves McLeod. The Motion to Dismiss filed 12/16/09 is respectfully denied.

Dated at Walterboro, South Carolina, this 2 day of March 2010.

Court Reporter:


PRESIDING JUDGE - J. Ernest Kinard Jr.

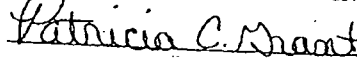
This judgment was entered on the 2d day of March 2010, and a copy mailed first class this 2d day of March 2010, to attorneys of record or to parties (when appearing pro se) as follows:

Anne Bright Ariall Rosen Rosen & Hagood,
LLC P.O. Box 893 Charleston, SC 29402

ATTORNEY(S) FOR THE PLAINTIFF(S)

J. Reaves McLeod McLeod Fraser & Conc
P.O.Box 230 Walterboro, SC 29488

ATTORNEY(S) FOR THE DEFENDANT(S)



Patricia C Grant - Clerk of Court

SCRPC APP-24/FORM 4

CPFORM4M

RECEIVED

MAR 03 2010

STATE OF SOUTH CAROLINA
COUNTY OF COLLETON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NO: 2009CP1500595

Spriggs Group Pc vs. Gene R Slivka

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried, heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court:

The Motions for Summary Judgment are denied in part and granted in part. Formal Orders are to be submitted.

Dated at Walterboro, South Carolina, this 13 day of April 2011.

Court Reporter: *Missy Brown*


PRESIDING JUDGE - J. Ernest Kinard

This judgment was entered on the 12th day of April 2011, and a copy mailed first class this 15th day of April 2011, to attorneys of record or to parties (when appearing pro se) as follows:

Anne Bright Ariail Rosen Rosen & Hagood, LLC
P.O. Box 893 Charleston, SC 29402

J. Reaves McLeod McLeod Fraser & Cone P.O.Box
230 Walterboro, SC 29488
Robert T. Lyles Jr. Lyles & Lyles, LLC P.O. Box
773 Charleston, SC 29402

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Patricia C. Grant
Patricia C Grant - Clerk of Court

to whether a reasonable and fair investigation of Plaintiff's claim had been made is one for the jury to decide. Likewise, the issue of whether a valid portion of Plaintiff's claim, to the extent one exists, was paid in a timely manner in compliance with the statute is an issue for the jury to decide. After a full week of listening to the evidence in this case, the jury unanimously determined that the Defendant had not made a reasonable and fair investigation of Plaintiff's claim and failed to properly pay the proper portion of Plaintiff's claim deemed valid.

Defendant argues that discovery in the lawsuit amounts to a fair and reasonable investigation into Plaintiff's claims under the statute. Defendant 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 attorney's 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 court finds Carolina Steel distinguishable from this case in that the Defendant never paid Plaintiff either prior to Plaintiff's demand or after Plaintiff's demand despite admitting he owes Plaintiff at a minimum one half of \$151,000.00. This Court finds that recovery under S.C. Code Ann. § 27-1-15 is not barred when a demand under the statute is made after litigation has commenced. Further, this Court finds that payment to the Court to bond off a mechanic's lien claim does not constitute compliance with S.C. Code Ann. § 27-1-15.

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. Defendant admitted owing Plaintiff a minimum of one half of \$151,000 and admitted he made no further payments to Plaintiff after the initial contract payment in February 2007. 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. Defendant never made payment to the Plaintiff of the undisputed amount he admits he owes to the Plaintiff; therefore, the verdict rendered as to Plaintiff's claim for failure to comply with S.C. Code Ann. § 27-1-15 is supported by the evidence presented.

2. Defendant is not entitled to judgment notwithstanding the verdict on Plaintiff's claim under the mechanic's lien statute as the evidence supports the jury's verdict.

Defendant argues there was no evidence that Plaintiff performed work which entitled it to a lien within ninety days of filing the mechanic's lien that is the subject of this action. Plaintiff presented evidence by way of invoices, timesheets, emails and testimony that Plaintiff performed work on this project up to January 14, 2009 and then again in May 2009 for 3.5 hours. See Plaintiff's Exhibits 8(a), 19, and 21. The Defendant testified that the Plaintiff was authorized to respond to questions from the field from various contractors and admitted that he never told Plaintiff to stop responding to these questions prior to the services performed in January 2009. Plaintiff's mechanic's lien was filed on April 13, 2009, which is within ninety (90) days of January 14, 2009 and prior to the work performed in May 2009. See Plaintiff's Exhibit 10.

Plaintiff's claim against a mechanic's lien in this matter arises out of statutory law. It is undisputed that the Plaintiff provided labor and services connected with Defendant's construction project. In accordance with § 29-5-10, Plaintiff properly filed a mechanic's lien for services furnished in the erection, alteration, and repair of Defendant's building within ninety days of the last work performed based upon the evidence presented. 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).

Defendant argues that the services performed by Plaintiff in January 2009 are not part of the invoices specified in the Plaintiff'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 wilfully and knowingly claimed more than is his due.” Plaintiff's error in the amount stated for labor due does not invalidate its lien. The only requirement of the law is that the account be filed within ninety (90) days after person seeking 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 Plaintiff presented evidence by way of timesheets, emails and testimony of Andy Bozeman and Ken Spriggs showing that the Plaintiff labored on the project within ninety (90) days of the date in which the mechanic's lien was filed on Defendant's property. Because Plaintiff 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, the evidence supports the verdict rendered on Plaintiff's cause of action under S.C. Code of Laws § 29-5-10, *et al.*

Defendant further argues that the services performed by Plaintiff in January 2009 are not the type of services for which a lien is allowed. However, the Defendant did not argue that the services performed in May 2009 by Plaintiff were not the type of services for which a lien is

allowed¹. Defendant's argument as to the January 2009 services is that the S.C. Mechanic's lien statute does not provide for lien rights associated with the performance of construction administration services. Defendant argues that because the statute defines labor to include the preparation of plans, specifications, and design drawings that it 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).

This Court finds 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." Clearly, construction administration work is instrumental in delivering an appropriate residence or structure. 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.

¹ Plaintiff provided design sketches for an appraisal of Defendant's property. Andy Bozeman testified he was contacted by an appraiser for the Defendant and asked to provide floor plan sketches and room name information for preparation of the appraisal of Defendant's home.

This Court finds that construction administration services are the type of labor for which a lien can be filed under South Carolina's mechanic's lien statute as those services actually support the erection, alteration or repair of a building more so than the preparation of plans, specifications and design drawings related to the project.

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). To infer that South Carolina's legislature allows a lien for preparation of plans, specifications and design drawings but excludes the services that further and support the design and actually result in improvements to the building or structure is contrary to legislative intent and without merit. Thus, the evidence presented supports the jury's verdict on Plaintiff's mechanic's lien cause of action.

3. Defendant is not entitled to a judgment notwithstanding the verdict or a new trial as the jury was presented with factual issue of whether Plaintiff's lien is valid and timely.

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 § 29-5-90. At the conclusion of the trial, the jury was charged as to what the law in South Carolina is as it relates to filing and enforcing a mechanic's lien. At that time, both the Plaintiff and the Defendant indicated they were in agreement as to the charge given to the jury on the mechanic's lien law. The jury was asked to determine whether Plaintiff's lien was valid and timely. The jury unanimously determined that based upon the evidence presented, Plaintiff's lien was valid.

4. Defendant is not entitled to a new trial based upon the Court omission of Defendant's Charge Number 6 as the Court properly charged the Jury as to the law.

Defendant argues that the Court omitted Defendant's Charge Number 6 related to Plaintiff's claim for failure to comply with S.C. Code Ann. § 27-1-15. Defendant argues that the Court should have included language from Carolina Steel Corporation v. Palmetto Bridge Constructors, 444 F.Supp.2d 577 (D.S.C. 2006) related to a fair and reasonable investigation. As discussed previously, the Defendant in Carolina Steel made payment to the Plaintiff for the undisputed amount. The Court held the Defendant was not subject to attorneys fees because an investigation had occurred, undisputed fees had been paid, and a dispute existed concerning the remaining fees. Id. The Defendant's requested charge would have been misleading to the jury given the distinguishing characteristics of this case from Carolina Steel.

A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law. Yolanda Burroughs v. John W. Worsham, 352 S.C. 382, 574 S.E.2d 215 (Ct. App. 2002)(citing Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 514 S.E.2d 570 (1999)). "The substance of the law is what must be instructed to the jury, not any particular verbiage." Id. at 392. "A jury charge which is substantially correct and covers the law does not require reversal." Id. The charge given by the Court as to S.C. Code Ann. § 27-1-15 was substantially correct and covered the law of the statute. To warrant reversal for refusal to give a requested charge, a party must show both error and prejudice. Cohens v. Atkins, 333 S.C. 345, 509 S.E.2d 286 (Ct. App. 1998). Defendant has not presented this Court with any evidence of prejudice based upon the alleged incorrect charge. Plaintiff's recovery of interest and attorney's fees are provided for by the jury's verdict on Plaintiff's cause of action for foreclosure of mechanic's lien and breach of contract and not solely dependent upon the cause of action for failure to comply with S.C. Code Ann. § 27-1-15.

5. Defendant is not entitled to a new trial based upon the Thirteenth Juror Doctrine as the evidence supports the verdict rendered.

Defendant argues that the jury's verdict is contrary to the preponderance of the evidence because (a) the Plaintiff did not comply with the duty of good faith and fair dealing implied in its contract, (b) the Defendant made a fair and reasonable investigation of Plaintiff's claims under S.C. Code Ann. § 27-1-15, (c) the work performed subject to the mechanic's lien is not work for which Plaintiff is entitled to assert a lien, and (d) Plaintiff's mechanic's lien was untimely as a matter of law.

Specifically, Defendant argues that "it is undisputed that Plaintiff did not comply with the covenant of good faith and fair dealing in its billing practices with the Defendant." Whether the Plaintiff complied with the covenant of good faith and fair dealing in its billing practices with the Defendant is an issue of fact to be determined by the jury. Based upon the evidence presented at trial, a legitimate dispute as to the terms of the contract existed and eleven respectable jurors made a competent decision after a week of testimony that the Plaintiff was entitled to a verdict in the amount of \$173,990.53. Defendant's arguments as to S.C. Code Ann. § 27-1-15 and the entitlement to a mechanic's lien have previously been addressed by this Court within this Order.

The arguments presented by the Defendant that the verdict is contrary to the preponderance of the evidence all present issues of fact to be determined by the jury. Plaintiff in this action bears the burden to prove its claims by the greater weight or preponderance of the evidence. See Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992)(findings of fact based upon a preponderance of the evidence are those supported by the greatest weight, amount, credibility of truth, as reflected by the whole of the evidence before the court, or evidence which convinces as to its truth). After a full week trial on the merits, a competent jury of eleven unanimously found that the evidence presented by both the

Plaintiff and the Defendant when weighed together tipped the scale in favor of the Plaintiff. Plaintiff met its burden of proof as to all causes of action submitted to the jury and the verdict rendered is supported by the evidence.

6: The Jury's verdict rendered is not excessive.

Defendant argues it is entitled to a new trial because the amount of the jury's verdict is grossly inadequate or excessive. In the alternative, Defendant asks the court to reduce the jury's verdict because it is excessive in light of the evidence presented. "The consideration for a motion for a new trial *nisi remittitur* requires the trial judge to consider the adequacy of the verdict in light of the evidence presented." Proctor v. Dept. of Health and Env. Control, 368 S.C. 297, 628 S.E.2d 496 (Ct. App. 2006). An excessive verdict is one that results from the jury's passion or prejudice and thereby shocks the court's conscience. See Black's Law Dictionary, 7th Edition (1999).

Under the evidence presented at trial, the jury's verdict is clearly not excessive and does not shock the court's conscience as it is less than the amount of actual damages claimed by the Plaintiff. Plaintiffs claimed actual damages for design services due in the total dollar amount of \$201,773.03. See Plaintiff's Exhibit 23. Plaintiff provided evidence through testimony, drawings, time sheets and invoices to substantiate the dollars claimed. See Plaintiff's Exhibits 8, 8(a), 8(b), 13-18, 21 & 23. After listening to the testimony and reviewing the evidence presented, the jury determined that Plaintiff is entitled to a verdict in the amount of \$173,990.53. While the jury's verdict is not equal to the actual damages claimed by the Plaintiff, the verdict rendered is supported by the evidence presented at trial.

THEREFORE, for the reasons set forth herein, Defendant's Motion for Judgment Notwithstanding the Verdict and/or For a New Trial is denied.

IT IS SO ORDERED this 30th day of August, 2011.

W. H. Seals, Jr.

The Honorable William H. Seals, Jr.
Presiding Judge

reached is considered the prevailing party in the action. Id. In this case, Plaintiff's offer of \$198,834.53 is closer to the verdict reached than Defendant's offer of \$100,000.00, which was filed with the Court in accordance with the S.C. Mechanic's Lien Statute prior to the commencement of trial. Thus, the Plaintiff is the prevailing party in the action and can be awarded attorney's fees and costs pursuant to the statute. The determination as to the amount of attorney fees which should be awarded under the mechanic's lien statute 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).

In addition to the attorney's fees and costs allowable under the verdict rendered on Plaintiff's foreclosure of mechanic's lien claim, S.C. Code Ann. § 27-1-15 also provides for a recovery of attorney's fees and interest at the judgment rate on the money claimed due. See S.C. Code Ann. § 27-1-15. The express provisions of S.C. Code Ann. § 27-1-15 do not limit the recovery of attorney's fees to the amount of the lien as expressed in the S.C. Mechanic's Lien Statute. Id. Thus, the allowable attorney's fees and costs are not required to be capped by the amount of the mechanic's lien.

Also, Plaintiff sought pre-judgment interest in its complaint as to all causes of action against Defendant and has moved the Court for an award of the same. See Atrial Affidavit ¶ 13. South Carolina law allows prejudgment interest on obligations to pay money from time when payment is demandable, if sum due is capable of being reduced to certainty. See GTR Rental, LLC v. DalCanton, 547 F.Supp.2d 510 (2008). S.C. Code Ann. § 27-1-15 provides for interest to be awarded from the date of the demand being sent pursuant to the statute. In this case, the evidence in the record indicates that the sum due Plaintiff was demandable as of February 9, 2009. In addition, Plaintiff sent a demand to Defendant pursuant to S.C. Code Ann. § 27-1-15 on

#2
2/15

March 15, 2010. Under South Carolina law, the fact that a sum due is disputed does not render the claim unliquidated for purposes of an award of prejudgment interest. Id.

In determining an 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.E.2d 659 (1993); Dedes v. Stickland, 307 S.C. 155, 414 S.E.2d 134 (1992). Consideration should be given to all six criteria in establishing reasonable attorney's fees; none of these factors is considered controlling. Baron Data Systems, Inc. v. Loter, 297 S.C. 382, 377 S.E.2d 296 (1989)(citing Darden v. Witham, 263 S.C. 183, 209 S.E.2d 42 (1974).

To support its Motion for Interest, Attorney's Fees and Costs, Plaintiff submitted the Affidavits of A. Bright Ariail and N. Keith Emge, Jr. Included in the Affidavit of A. Bright Ariail are detailed bills for legal services rendered setting forth each task performed, who performed the task and the amount of time spent on each task shown in six minute increments. Upon evaluation of the nature, extent and difficulty of the legal services rendered, Plaintiff was required to expend considerably more time and effort on this case due to specific actions of the Defendant who created unnecessary delays, filed meritless motions, and forced Plaintiff to incur additional attorney's fees and costs above and beyond what would otherwise have been incurred. See Ariail Affidavit ¶ 5. A review of the billing records submitted by Plaintiff clearly indicates that they are properly detailed and that the time and labor spent by Plaintiff's counsel is both reasonable for the effort required to litigate this case and not duplicative in any manner. See Exhibits C-F of Ariail Affidavit. Plaintiff's team of legal counsel consists of experienced, skilled

#3
2/15

attorneys, of high professional standing in the community and in good standing with the Bar of this State. The fees charged in this matter were on an hourly basis and not based upon a contingency of compensation. The hourly fees charged by Plaintiff's counsel are of those customarily charged in the locality for similar legal services. See Emge Affidavit ¶¶ 5-6. Plaintiff 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 Defendant's counterclaims.

This Court finds that Plaintiff is entitled to the recovery of attorney's fees and costs in this matter pursuant to S.C. Code Ann. § 29-5-10 and S.C. Code Ann. § 27-1-15 in the amount of \$235,030.31. Further, this Court finds that the attorney's fees and costs awarded are reasonable based upon the six criteria established by the Supreme Court of South Carolina for determining attorney's fees. There is no requirement that an attorney's fee be less than or comparable to a party's monetary judgment. See Taylor v. Medenica, 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 recover. Id. at 582; see also Baron Data Systems, Inc. v. Loter, 297 S.C. 382, 377 S.E.2d 296 (1989)(finding that trial court did not abuse its discretion in awarding attorney fees to Plaintiff greater than recovery realized by Plaintiff).

Plaintiff is also entitled to an award of prejudgment interest on the verdict reached in the amount of \$37,413.92 being calculated at the legal rate of interest as set forth in S.C. Code Ann. § 34-31-20(A) from February 9, 2009.

THEREFORE, judgment in the total amount of \$446,434.76 is to be entered in this matter against the Defendant in favor of the Plaintiff.

#4
2/13

FURTHER, the Bond for Release of Mechanic's Lien deposited with the Court in the amount of \$265,112.71 and filed with the Register of Deeds Office in Colleton County at Book 1742 at Page 276 shall be released to the Plaintiff in full, along with any interest accrued thereon.

IT IS SO ORDERED this 30th day of August, 2011.



The Honorable William H. Seals, Jr.
Presiding Judge

Defendant.

ORDER FOR AWARD OF INTEREST
FEES AND COSTS TO PLAINTIFF

2011 OCT -3 PM 1:47

PATRICIA C. GRANT
COLLETON COUNTY
COMMON PLEAS

Pursuant to S.C. Code Ann. § 29-5-10, et seq., 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. See S.C. Code Ann. § 29-5-10. The fee must be determined by the court in which the action is brought but the fee and court costs may not exceed the amount of the lien. Id. For purposes of the award of attorney's fees, the party whose offer is closer to the verdict

#1 2/18

reached is considered the prevailing party in the action. Id. In this case, Plaintiff's offer of \$198,834.53 is closer to the verdict reached than Defendant's offer of \$100,000.00, which was filed with the Court in accordance with the S.C. Mechanic's Lien Statute prior to the commencement of trial. Thus, the Plaintiff is the prevailing party in the action and can be awarded attorney's fees and costs pursuant to the statute. The determination as to the amount of attorney fees which should be awarded under the mechanic's lien statute 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).

In addition to the attorney's fees and costs allowable under the verdict rendered on Plaintiff's foreclosure of mechanic's lien claim, S.C. Code Ann. § 27-1-15 also provides for a recovery of attorney's fees and interest at the judgment rate on the money claimed due. See S.C. Code Ann. § 27-1-15. The express provisions of S.C. Code Ann. § 27-1-15 do not limit the recovery of attorney's fees to the amount of the lien as expressed in the S.C. Mechanic's Lien Statute. Id. Thus, the allowable attorney's fees and costs are not required to be capped by the amount of the mechanic's lien.

Also, Plaintiff sought pre-judgment interest in its complaint as to all causes of action against Defendant and has moved the Court for an award of the same. See Ariail Affidavit ¶ 13. South Carolina law allows prejudgment interest on obligations to pay money from time when payment is demandable, if sum due is capable of being reduced to certainty. See GTR Rental, LLC v. DalCanton, 547 F.Supp.2d 510 (2008). S.C. Code Ann. § 27-1-15 provides for interest to be awarded from the date of the demand being sent pursuant to the statute. In this case, the evidence in the record indicates that the sum due Plaintiff was demandable as of February 9, 2009. In addition, Plaintiff sent a demand to Defendant pursuant to S.C. Code Ann. § 27-1-15 on

March 15, 2010. Under South Carolina law, the fact that a sum due is disputed does not render the claim unliquidated for purposes of an award of prejudgment interest. Id.

In determining an 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.E.2d 659 (1993); Dedes v. Stickland, 307 S.C. 155, 414 S.E.2d 134 (1992). Consideration should be given to all six criteria in establishing reasonable attorney's fees; none of these factors is considered controlling. Baron Data Systems, Inc. v. Loter, 297 S.C. 382, 377 S.E.2d 296 (1989) (citing Darden v. Witham, 263 S.C. 183, 209 S.E.2d 42 (1974)).

To support its Motion for Interest, Attorney's Fees and Costs, Plaintiff submitted the Affidavits of A. Bright Ariail and N. Keith Emge, Jr. Included in the Affidavit of A. Bright Ariail are detailed bills for legal services rendered setting forth each task performed, who performed the task and the amount of time spent on each task shown in six minute increments. Upon evaluation of the nature, extent and difficulty of the legal services rendered, Plaintiff was required to expend considerably more time and effort on this case due to specific actions of the Defendant who created unnecessary delays, filed meritless motions, and forced Plaintiff to incur additional attorney's fees and costs above and beyond what would otherwise have been incurred. See Ariail Affidavit ¶ 5. A review of the billing records submitted by Plaintiff clearly indicates that they are properly detailed and that the time and labor spent by Plaintiff's counsel is both reasonable for the effort required to litigate this case and not duplicative in any manner. See Exhibits C-F of Ariail Affidavit. Plaintiff's team of legal counsel consists of experienced, skilled

WVS

attorneys, of high professional standing in the community and in good standing with the Bar of this State. The fees charged in this matter were on an hourly basis and not based upon a contingency of compensation. The hourly fees charged by Plaintiff's counsel are of those customarily charged in the locality for similar legal services. See Emge Affidavit ¶¶ 5-6. Plaintiff 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 Defendant's counterclaims.

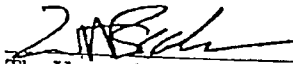
This Court finds that Plaintiff is entitled to the recovery of attorney's fees and costs in this matter pursuant to S.C. Code Ann. § 29-5-10 and S.C. Code Ann. § 27-1-15 in the amount of \$235,030.31. Further, this Court finds that the attorney's fees and costs awarded are reasonable based upon the six criteria established by the Supreme Court of South Carolina for determining attorney's fees. There is no requirement that an attorney's fee be less than or comparable to a party's monetary judgment. See Taylor v. Medenica, 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 recover. Id. at 582; see also Baron Data Systems, Inc. v. Loter, 297 S.C. 382, 377 S.E.2d 296 (1989)(finding that trial court did not abuse its discretion in awarding attorney fees to Plaintiff greater than recovery realized by Plaintiff).

Plaintiff is also entitled to an award of prejudgment interest on the verdict reached in the amount of \$37,413.92 being calculated at the legal rate of interest as set forth in S.C. Code Ann. § 34-31-20(A) from February 9, 2009.

THEREFORE, judgment in the total amount of \$446,434.76 is to be entered in this matter against the Defendant in favor of the Plaintiff.

FURTHER, the Bond for Release of Mechanic's Lien deposited with the Court and transferred to the Register of Deeds for Colleton County in the amount of \$265,112.71 as documented by the Receipt for Bond Posted for the Release of Mechanic's Lien Filed in BK 1742 PG 276 that is and filed with the Register of Deeds Office in Colleton County at Book ~~1742~~ 1753 at Page ~~276-81~~ shall be released by the Register of Deeds for Colleton County to the Plaintiff in full, along with any interest accrued thereon.

IT IS SO ORDERED this 12th day of ~~August~~ September, 2011.


The Honorable William H. Seals, Jr.
Presiding Judge

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF COLLETON	)	FOURTEENTH JUDICIAL CIRCUIT
THE SPRIGGS GROUP, PC.	)	CASE NO.: 2009-CP-15-595
	)	
Plaintiff,	)	
	)	
v.	)	ORDER DENYING DEFENDANT'S
	)	MOTION TO ALTER/AMEND COURT'S
GENER. SLIVKA	)	ORDER DENYING DEFENDANT'S
	)	MOTION FOR JNOV and/or FOR NEW
Defendant.	)	TRIAL
	)	

PATRICIA C. GRANT
 COLLETON COUNTY
 COMMON PLEAS
 2011 NOV 22 3PM 12:38

This matter is before the Court upon the Defendant's motion pursuant to SCRCP 59(e) to alter/amend the Court's Order of September 7, 2011 denying Defendant's Motion for JNOV and/or For New Trial. Defendant's motion sets forth two arguments for the Court's consideration. First, Defendant asserts that the Court's Order contains an error of law in its ruling that the lien that is the subject of this action was timely filed. Second, Defendant asserts that the Defendant's failure to pay undisputed funds after receiving the demand from the Plaintiff pursuant to S.C. Code Ann. § 27-1-15 was not unreasonable and the Defendant is entitled to judgment under this claim as a matter of law.

Both of these arguments were briefed by the Defendant in its Motion for JNOV and/or For New Trial and by the Plaintiff in its response to Defendant's Motion for JNOV and/or For New Trial. Having carefully reviewed Defendant's original Motion for JNOV and/or For New Trial and Defendant's Motion Pursuant to SCRCP 59(e) Regarding the Court's Order Denying Defendant's Motion for JNOV and/or for New Trial, this Court sees no basis to alter or amend its prior Order filed September 7, 2011.

THEREFORE, Defendant's SCRCP 59(e) motion regarding the Court's Order denying Defendant's motion for JNOV and/or for new trial is hereby denied.

Handwritten initials

IT IS SO ORDERED this ^{Not} 3 day of September, 2011.


The Honorable William H. Seals, Jr.
Presiding Judge

) IN THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT
) CASE NO.: 2009-CP-15-595

(

7

4

)

1

)

ORDER DENYING DEFENDANT'S
RULE 59 MOTION REGARDING AWARD
OF INTEREST, FEES AND COSTS TO
PLAINTIFF

)

)

1

PATRICIA C. GRANT
COLLETON COUNTY
COMMON PLEAS
59
2011 NOV 22 PM 12:39
JUN 12 2011

#1 WBS

the Second Affidavit of A. Bright Ariail in support thereof, this Court finds that Defendant's Motion is denied for the following reasons:

1. Plaintiff is entitled to recover all of its fees as it prevailed under the Mechanic's Lien Statute and S.C. Code Ann. § 27-1-15.

Determination as to the amount of attorney's fees which should be awarded under the mechanic's lien statute is addressed to the sound discretion of the trial court. Seckinger v. Vessel Excalibur, 326 S.C. 382, 483 S.E.2d 775 (S.C. App. 1997). Defendant argues that because the Court is basing its award on one or both of the referenced statutes, it must specify what fees are awarded under which statute. Plaintiff is entitled to recover all of its fees and costs by the cumulative affect of reading both statutes. Under South Carolina's mechanic's lien statute, the prevailing party S.C. Code Ann. § 29-5-10, et seq., 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. The verdict reached as to Defendant's failure to comply with S.C. Code Ann. § 27-1-15 provides for a recovery of attorney's fees and interest at the judgment rate on the money claimed due, but the express provisions of the statute do not limit the recovery of attorney's fees to a maximum amount like the mechanic's lien statute. See S.C. Code Ann. § 27-1-15. Thus, Plaintiff is entitled to attorney's fees and costs up to the amount of the mechanic's lien. Additionally, any fees and costs over and above the amount of the mechanic's lien are recoverable under S.C. Code Ann. § 27-1-15. Alternatively, Plaintiff could have recovered all fees and costs incurred after March 15, 2010 under S.C. Code Ann. § 27-1-15 if its mechanic's lien action had failed.

Defendant also argues that Plaintiff asserted and prosecuted and defended several causes of action which are separate from the claims under the Mechanic's Lien Statute and S.C. Code Ann. § 27-1-15. All claims submitted by Plaintiff were ancillary to Plaintiff's mechanic's lien

action, which serves as the primary basis for the damages sought by Plaintiff. Plaintiff's quantum meruit/unjust enrichment, which was voluntarily dismissed at trial, and breach of contract causes of action relied upon the same facts and seek the same damages as those sought under the mechanic's lien cause of action. See Ariail Second Affidavit ¶ 4. Attorney's fees and costs related to these causes of action are indistinguishable from those incurred related to the mechanic's lien action. See Ariail Second Affidavit ¶ 4. Defendant's counterclaims for Slander of Title, Violation of the Frivolous Claims Sanction Act, and Tortious Interference with Contractual Relationships with Third-Parties Resulting from Defective Notice of Mechanic's Lien all relate to the mechanic's lien action brought by Plaintiff. The Mechanic's Lien statute allows for a party to recover attorney's fees related to the mechanic's lien action. See S.C. Code Ann. § 29-5-10, et seq.

2. The fees and costs awarded to the Plaintiff are reasonable and not excessive

In determining the award of attorney's fees, the court considered six factors: (1) nature, extent, and difficulty of legal services rendered; (2) time and labor devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) fee customarily charged in locality for similar services; and (6) beneficial results obtained. See Collins v. Collins, 239 S.C. 170, 122 S.E.2d 1 (1961); Blumberg v. Nealco, Inc., 310 S.C. 492, 427 S.E.2d 659 (1993); Dedes v. Stickland, 307 S.C. 155, 414 S.E.2d 134 (1992). The Court gave consideration to all six criteria in establishing the attorney's fees awarded and none of these factors was controlling. Baron Data Systems, Inc. v. Loter, 297 S.C. 382, 377 S.E.2d 296 (1989)(citing Darden v. Witham, 263 S.C. 183, 209 S.E.2d 42 (1974)). The 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 Plaintiff's counsel at trial. The Court analyzed all six factors under Collins thoroughly and made specific findings as to each factor, which supports the award given.

3. The total recovery under the Mechanic's Lien Statute is not limited to the amount of the cash bond posted by the Defendant.

Defendant argues that a bond was posted with the Court pursuant to S.C. Code Ann. § 39-5-110 which limits Plaintiff's total recovery to the amount of posted bond. The statutory language of S.C. Code Ann. § 39-5-110 does not limit a mechanic's lien judgment to the amount of the cash bond posted. See S.C. Code Ann. § 39-5-110. Under South Carolina's Mechanic's Lien Statute, 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. The express language of the Mechanic's Lien Statute indicates that a party is entitled to a judgment up to twice the amount of the lien. Defendant's interpretation of S.C. Code Ann. § 39-5-110 is inconsistent with the express language of S.C. Code Ann. § 29-5-10.

4. The South Carolina Mechanic's Lien Statute does not exclude staff members from the definition of attorney's fees.

Defendant argues that time spent by staff members is not recoverable in its claim for attorney's fees under the statutes. South Carolina's Mechanic's Lien Statute does not define what is considered to be included as attorney's fees. Attorneys fees, as defined by Black's Law Dictionary, is the charge to a client for services performed for the client, such as an hourly fee, a flat fee, or a contingent fee. See Black's Law Dictionary 7th Edition (1999). The definition does not restrict the charge to a client solely to services provided by an attorney. Plaintiff's fee agreement with counsel sets forth that time billed by attorneys, paralegals and law clerks are part of the legal services being provided. See Ariail Second Affidavit ¶ 3.

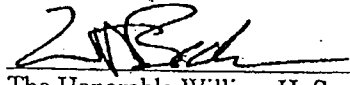
Both paralegals, Ms. Skelly and Mrs. Whitsett, are qualified legal professionals with thirty (30) years of combined paralegal experience whose time billed in this matter supported the legal services provided and furthered the prosecution of the case. See Ariail Second Affidavit ¶¶ 6-7. The hours spent by law clerks in performing legal research in support of the case also constitutes legal services performed on behalf of the client. The Court finds that the fees incurred by the Plaintiff for attorney, paralegal and law clerk time are the types of legal services intended to be included in the attorney's fees award pursuant to S.C. Code Ann. § 29-5-10 and S.C. Code Ann. § 27-1-15.

5. Plaintiff is entitled to an award of pre-judgment interest

This Court's award of pre-judgment interest is based upon Plaintiff's demand in its Complaint and is calculated from February 9, 2009 per the South Carolina interest statute. See S.C. Code Ann. § 34-31-20(A). Plaintiff's breach of contract claim allows for recovery of prejudgment interest based upon the pleadings. South Carolina law allows prejudgment interest on obligations to pay money from 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 (2008). The fact that a sum due is disputed does not render the claim unliquidated for purposes of an award of prejudgment interest. Id.

THEREFORE, Defendant's SCRCP 59 motion regarding the Court's Order For Award of Interest, Fees and Costs to Plaintiff is hereby denied.

IT IS SO ORDERED this 3 day of ^{Nov.} October, 2011.


The Honorable William H. Seals, Jr.
Presiding Judge

STATE OF SOUTH CAROLINA

COUNTY OF COLLETON

THE SPRIGGS GROUP, PC
Plaintiff,

vs.

GENE R. SLIVKA

Defendant.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO.

COMPLAINT
(Enforcement of Claim Against Mechanic's
Lien Bond, Breach of Contract, Unjust
Enrichment)

The Plaintiff, The Spriggs Group, PC, ("The Spriggs Group"), complaining of Defendant
Gene R. Slivka ("Slivka"), alleges and states as follows:

1. The Spriggs Group is a corporation organized and existing under the laws of the state of Georgia and is licensed to do business in the state of South Carolina.
2. Slivka is, upon information and belief, a resident of the state of South Carolina.
3. On or about November 27, 2006, The Spriggs Group provided a written proposal (the "Proposal"), Exhibit 1, to perform architectural and engineering design services for Slivka for renovations on property known as the New Julianton Plantation (also known as the Myrtle Grove Plantation or the Myrtle Grove Tract) in Colleton County, South Carolina (the "Project").
4. The Proposal estimated the total fee at \$161,500.00 and indicated that some work would be done at an additional cost based on hourly rates.
5. At Slivka's request and pursuant to the terms of the Proposal, The Spriggs Group provided architectural and engineering design services for renovation of the Project.
6. The Spriggs Group performed its obligations and responsibilities under the contract with Slivka.
7. The Spriggs Group performed additional work pursuant to oral direction from Slivka.

2009 JUN -8 PM:58
PATRICIA C. GRANT
COLLETON COUNTY
COMMON PLEAS

8. The Spriggs Group has presented four proper invoices to Slivka totaling One Hundred, Ninety Eight Thousand, Eight Hundred and Thirty Four Dollars and Fifty Three Cents (\$198,834.53); however, Slivka has failed to make a single payment for services rendered.
9. The Spriggs Group last performed services related to the project on February 13, 2009.
10. Slivka has not paid The Spriggs Group for its work despite its contractual obligations and its demands for payment from The Spriggs Group.
11. Slivka has retained the benefit of the services performed by The Spriggs Group.
12. Pursuant to Section 29-5-10, et. seq. of the South Carolina Code, The Spriggs Group timely notified Slivka that it had not been paid in full and subsequently filed a Notice of Mechanic's Lien which was filed in Volume 1742 at Page 276 at the Register of Deeds Office for Colleton County, SC.
13. Subsequent to filing of the Mechanic's Lien, Slivka posted a cash bond with the Clerk of Court for Colleton County, SC which is filed in Volume 1751 at Page 118.
14. On or about May 15, 2009, the cash bond was transferred from the Clerk of Court to the Register of Deeds for Colleton County, South Carolina. A receipt for the bond is filed in Volume 1753 at Page 81 with the Colleton County Register of Deeds.

FOR A FIRST CAUSE OF ACTION
(Enforcement of Claim against Mechanic's Lien Bond)

15. The Spriggs Group realleges and incorporates the allegations contained in paragraphs 1-14 above as if they were restated herein verbatim.
16. The Spriggs Group has filed a Notice and Certificate of Mechanic's Lien and an Affidavit and Statement of Account, which is attached as Exhibit 2, for architectural and

engineering services provided for the Project stating that Defendant Slivka has failed to pay The Spriggs Group for those services.

17. The services provided for which it has not been paid total \$198,834.53 and were performed within ninety (90) days of the filing of the Notice and Certificate of Mechanic's lien and within six months of the date of the filing of this Complaint.
18. As of the date of this Complaint, Slikva's mechanic's lien is still unsatisfied in at least the amount of \$198,834.53.
19. Slikva filed a cash bond (the "Bond") in the amount of two hundred Sixty Five Thousand, One Hundred Twelve and 71/100 Dollars (\$264,112.71) to take the place of the real property upon which The Spriggs Group's lien existed, such Bond now being subject to The Spriggs Group's lien.
20. The Spriggs Group is judgment against the Bond in the sum of \$198,834.53, plus pre-judgment interest, costs and reasonable attorneys' fees incurred as allowed by the mechanic's lien statutes.

FOR A SECOND CAUSE OF ACTION
(Breach of Contract)

21. The Spriggs Group realleges and incorporates the allegations contained in paragraphs 1-20 above as if they were restated herein verbatim.
22. The Spriggs Group and Slivka entered into a contract with modifications wherein Slivka agreed to pay The Spriggs Group for the performance of architectural and engineering design services for renovation of the New Julianton Plantation property.
23. Slivka breached its contract with The Spriggs Group by failing to remit full payment to The Spriggs Group for the performance of architectural and engineering design services for renovation of the New Julianton Plantation property.

24. As a direct and proximate cause of Slivka's breach of its contractual obligations, The Spriggs' Group has suffered damages.

25. The Spriggs Group is entitled to payment of the amounts due under the contract, plus consequential damages, pre-judgment interest, and attorneys' fees.

FOR A THIRD CAUSE OF ACTION
(Unjust Enrichment/Quantum Meruit)

26. The Spriggs Group realleges and incorporates the allegations contained in paragraphs 1-25 above as if they were restated herein verbatim.

27. Slivka has received a benefit from the architectural and engineering design services performed by The Spriggs Group for renovation of the New Julianton Plantation property.

28. While Slivka has realized and retained the benefit conferred, The Spriggs Group has not been paid for the value of the service provided to the Project.

29. Equity demands that The Spriggs Group be paid for the value of the architectural and engineering design services performed for Slivka and provided to renovate the Project for which Slivka has not reimbursed The Spriggs Group.

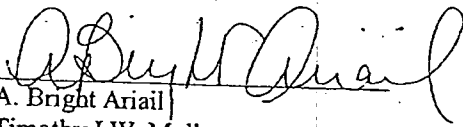
30. The Spriggs Group is entitled to a judgment against Slivka for the value of the architectural and engineering design services performed for renovation of the New Julianton Plantation project and remaining owed to The Spriggs Group, plus prejudgment interest, costs and attorneys' fees.

WHEREFORE, Plaintiff prays that the Court grant the following relief:

1. Grant judgment against Slivka in the amount of at least \$198,834.53 plus prejudgment interest, costs and reasonable attorney's fees for the prosecution of this action, together with interest thereon as allowed by the mechanic's lien statute in an amount not to exceed the amount of the bond;

2. Grant judgment against Slivka for actual damages, including incidental and consequential damages as may be proven at trial;
3. Grant judgment against Slivka for the costs incurred in prosecuting this action, including reasonable attorneys' fees;
4. Award prejudgment interest against the sum certain amount set forth in the Notice and Certificate of Mechanic's Lien and Affidavit of Mechanic's Lien; and
5. Award such other and further relief as the Court deems just and appropriate.

ROSEN, ROSEN & HAGOOD, LLC

By: 

A. Bright Ariail

Timothy J.W. Muller

P. O. Box 893

Charleston, SC 29402

134 Meeting Street, Suite 200

Charleston, SC 29401

(843) 577-6726

ATTORNEY(S) FOR THE SPRIGGS
GROUP, PC

Charleston, South Carolina
July 8, 2009.

The
Spriggs
Group
P.C.

27th Year Anniversary

545 East York Street
P.O. Box 10062
Savannah
Georgia
31412
USA

Planning
Architecture
Interior Design

Tel. 912.232.6441
Fax. 912.232.6443
tsg@spriggsgroup.com
www.spriggsgroup.com

27 November 2006

Mr. Gene Slivka

Reference: New Residence and Outbuildings
Julianton Plantation

Dear Gene:

For your project, I have provided three focus areas for your consideration. The first is an estimate of probable construction cost for each of seven buildings. The second is our estimate of drawings and specifications needed by the contractor to build the structures. The third is our fee proposal to complete the architectural and engineering work with restrictions and limitations noted. I have enclosed national average fee schedules from 2005 for this type of project. for your information.

Estimated Construction Cost Based on Program Outlined in 5 October 2006 Letter

Main House

Total Gross Heated Space	13,056 SF x \$250/SF	\$3,264,000
Basement	7,168 SF x \$ 70/SF	501,760
Porches	1,152 SF x \$ 60/SF	69,120
Exterior Porch Stairs	4 x \$12,000 each	48,000
Total Main House		\$3,882,880

Conservatory

Total Gross Space	864 SF x \$150/SF	\$ 129,600

Stable

Total Gross Ground Space	2,250 SF x \$125/SF	\$ 315,000
Hay Loft	1,000 SF x \$70/SF	70,000
Total Stable		\$ 385,000

Garages

Total Gross Ground Space	1,300 SF x \$90/SF	\$ 117,000
Attic (No HVAC)	900 SF x \$75/SF	67,500
Total Each Garage		\$ 184,500
Total Garages		\$ 369,000

Pavilion and Grotto

Total Gross Space	200 SF x \$100/SF	\$ 20,000

EXHIBIT

Boat House		
Total Gross Space	540 SF x 110/SF	\$ 59,400

Total Buildings		\$4,845,880

Walls at Conservatory and Stable (4 F High x 100 LF)	400 SF x \$40/SF	\$ 16,000

Additional Costs

Site Grading
Civil: Wells & Piping.
Septic Tanks & Drain Fields
Solar Energy System
Grassing & Landscaping

Drawings and Specifications

Main House

Sheet Number-Description

A1-Site Plan (includes adjacent out-buildings)

A2-Foundation Plan & Details

A3-Basement & First Floor Plans

A4-Second Floor & Attic Plans

A5 & 6-Enlarged Partial Plans

A7-Building & Wall Sections & Details

A8-Schedules

A9 & 10-Elevations

A11- Roof Plan & Details

A12 & 13-Framing Plans

A14-Structural Details

P1-Plumbing Basement & First Floor Plans

P2-Plumbing Second Floor & Attic Plans

P3-Plumbing Riser Plans & Schedules

M1-Mechanical Basement & First Floor Plans

M2-Mechanical Second Floor & Attic Plans

M3-Mechanical Schedules & Details

E1-Electrical Basement & First Floor Plans (Power & Lighting)

E2-Electrical Second Floor & Attic Plans (Power & Lighting)

E3-Electrical Schedules & Details

Conservatory

Sheet Number-Description

A1-Foundation & Floor Plans & Details

A2-Elevations

A3-Framing Plan, Building & Wall Sections

Conservatory Continued

A4-Window & Door Elevations & Details

PME1-Plumbing, Mechanical & Electrical Plans

PME2-Plumbing, Mechanical & Electrical Details

Stable

Sheet Number-Description

A1-Foundation Plan & Details

A2-Floor & Hay Loft/Attic Plans

A3-Building & Wall Sections

A4-Elevations

A5-Schedules & Details

A6-Framing & Details

A7-Roof & Details

PME1-Plumbing, Mechanical & Electrical Plans

PME2-Plumbing, Mechanical & Electrical Schedules

PME3-Plumbing, Mechanical & Electrical Details

Garages

Sheet Number-Description

A1-Foundation & Floor Plans

A2-Attic & Roof Plans

A3-Elevations & Sections

A4-Framing Plans & Details

PME1-Plumbing, Mechanical, Electrical Plans & Details

Grotto

Sheet Number-Description

A1-Foundation & Floor Plans & Details

A2-Roof Plan, Elevations & Details

PE1-Plumbing & Electrical Plans & Details

Boat House

Sheet Number-Description

A1-Site Plan, Foundation & Floor Plans & Details

A2-Elevations & Sections

A3-Framing Plan & Details

PE1-Plumbing & Electrical Plans & Details

Total drawings: 52 sheets consisting of 34 architectural and 18 engineering drawings plus cover sheet.

Specifications

Applicable sections of 16-Division Master Format. Preliminary estimate is approximately 100 pages.

Fee Proposal

Concept Design sit-down sessions and Design Refinement for six building types Project architect 80 hours @ \$175/hr		\$ 14,000
Project Management		
Internal - Project architect 40 hours @ \$175/hr		7,000
Consultants - project architect 40 hours @ \$175/hr		7,000
Construction Documents		
Drawing set-up, lay-outs, design details, and schedules 24 hours/sheet @ \$105/hr X 34 sheets		85,680
Cover sheet 4 Hours @ \$105/hr		420
Specifications		
Project architect 80 hours @\$175/hr		14,000
Clerical 40 hrs@\$35/hr		1,400
Consultants		
Plumbing, mechanical, electrical engineering		20,000
Structural engineering		12,000
Total Fee		\$161,500
Estimated Reimbursable Expenses		\$ 1,000
Computer plots, printing, copying		

You are welcome to use material samples, catalogs and other resources at our office.
This proposal is based on the following assumptions:

- 1) You will layout the kitchen and will work with a supplier such as Home Depot who will produce a floor plan and cabinet elevations for our use to confirm room size and dimensions and to determine plumbing locations and hood exhaust location.
- 2) You will select all kitchen appliances and will provide manufacturers, model numbers, and cut sheets for our use in preparing applicable plumbing and electrical plans.
- 3) You will work with a stair builder who will provide a stair shop drawing for the main house central stair for our use to determine structural support and framing.
- 4) You will contact and work with a solar energy system provider who will give us all information about panel locations, support requirements, and connections for our use to determine structural framing, connections, and ventilation of storage batteries.

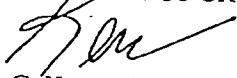
- 5) You will provide molding and trim supply sources and model numbers for our inclusion on the drawings.
- 6) You will select all lighting fixtures and will supply manufacturers and models for our use in preparing electrical schedules.
- 7) You will contract directly with a civil engineering firm, landscape architect and/or nursery . We will be provided with site drawings for water wells, septic tanks, and drain fields locations to determine our water and sanitary line entries to the buildings.
- 8) You will engage a testing laboratory to provide soils tests requested by our structural engineer.
- 9) You will engage a testing laboratory to provide tests for concrete requested by our structural engineer.
- 10) You will select brick manufacturer, color, and style.
- 11) You will select roofing material, manufacturer, and style.
- 12) You will select flooring material, colors, and styles and will provide manufacturer, and model numbers for our inclusion on finish schedules.
- 13) You will select interior and exterior colors and will provide manufacturers and numbers for our inclusion on finish schedules.
- 14) We will select door, window, and shutter hardware for your review and approval.
- 15) We will select plumbing fixtures for your review and approval.
- 16) We will provide shop drawing review for mechanical systems, site visits for electrical inspection prior to cover up, and final plumbing, mechanical, and electrical punch list.
- 17) We will provide structural foundation inspections and one framing inspection for each building.
- 18) We will provide any requested construction phase services by the project architect or staff on an hourly basis.
- 19) Once we begin construction documents, any changes in room layouts, sizes, window locations, door locations, and exterior elevation designs will be performed on an hourly basis.
- 20) We have not included any dock design for the boat house area since none was mentioned earlier.

I am concerned that we may not have estimated enough time for this project and that our fee is too low. However, I am going on the information you gave over the telephone. If you look at the attached fee schedule, you will see that fees range from 15 to 19 percent of construction cost for custom single family dwellings. Typically fees breakdown by phases with the following percentages of fee by phase: schematic design - 15%, design development - 15%; construction documents - 45%; bidding or contractor negotiations - 5%; construction administration - 20%. For the construction documents phase, our proposed fee is less than half the fee that would be charged under national averages.

Gene, this is an exciting project, and I think that my estimates are accurate. I suggest you might contact Jim Turner and his chief estimator Mark Hiott to go over my projections. Let me know his review turns out. I will happy to talk with you further about the project.

Yours very truly,

THE SPRIGGS GROUP, P.C.



C. Kenneth Spriggs, AIA

CKS:bwp

FEEES

2005

FEEES FOR PROFESSIONAL DESIGN SERVICES

A GUIDELINES PUBLICATION

HOUSING

Typical Fee Range as % of construction cost	Scope of Design Services			
	Baseline Economy	Standard Average	Comprehensive Superior	Highest Level Full-Service Fees

Dwellings, Single Family (Developer, Quality Tract)

New Construction	3 - 8%	3%	6.4%	8%	8 - 12%

Typical construction cost range: \$56 to \$130
Average cost: \$85 sq. ft. (not including sitework)
Typical range of building sizes: 1,400 - 3,000 sq. ft.
Average size: 1,900 sq. ft.

Note: Higher priced tract housing is rarely designed by architects, and unlicensed designer or drafting service fees are considerably lower than those cited above.

Renovation/Additions (Not applicable.)

Dwellings, Single Family (Developer, Luxury)

New Construction	7.5 - 12.5%	7.5%	9.5%	12.5%	12.5 - 14%

Typical construction cost range: \$105 to \$262
Average cost: \$140 sq. ft. (not including sitework)
Typical range of building sizes: 2,500 - 6,000 sq. ft.
Average size: 3,500 sq. ft.

Renovation/Additions	n/a - 16%	n/a	15%	16%	16 - 18%

Dwellings, Single Family (Custom Luxury)

New Construction	n/a - 17.5%	n/a	15.2%	17.5%	17.5 - 19%

Typical construction cost range: \$117 to \$295
Average cost: \$175 sq. ft. (not including sitework)
Typical range of building sizes: 3,000 - 9,000 sq. ft.
Average size: 3,900 sq. ft.

Renovation/Additions	n/a - 20%	n/a	18.5%	20%	20 - 22%

The architectural fee percentages include normal structural, mechanical, and electrical engineering fees.
See page 4 for an explanation of building size and construction cost information.
See page 5 for more details about what is and what is not included in consultant pass-through fees.
See page 6 for an explanation of how to read and use the information in this survey.

STATE OF SOUTH CAROLINA
COUNTY OF COLLETON
THE SPRIGGS GROUP, PC

Plaintiff,

vs.

GENE R. SLIVKA

Defendant.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO.

NOTICE OF MECHANIC'S LIEN

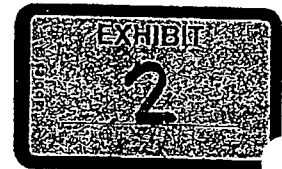
200909011272
Filed for Record in
COLLETON COUNTY SC
KARLA DADDIECO
04-13-2009 At 02:44 pm.
MECH LIEN 17.00
DR Volume 1742 Page 276 - 286

TO THE DEFENDANT ABOVE NAMED AND ALL OTHERS CONCERNED;

YOU WILL PLEASE TAKE NOTICE that the Plaintiff above named, by virtue of the attached Affidavit, does hereby claim a mechanic's lien of real estate hereinafter described, said lien being in the amount of One Hundred Ninety Eight Thousand, Eight Hundred and Thirty-Four Dollars and Fifty Three Cents (\$198,834.53) plus prejudgment interest, costs and attorney's fees, for labor, services and materials furnished and used for the improvements situated on the below described real estate. Such having been authorized by the Owner, or made by virtue of and in agreement with and by consent of the owner of such improvements or some person or agent having authority from or rightfully acting for such owner of the procuring or furnishing of such materials.

The property upon which this lien is attached includes those parcels below for which architectural and engineering services have been provided by The Spriggs Group, PC and is more particularly described as follows:

All those pieces, parcels and tracts of land containing two thousand seven hundred ninety-three and seven-tenths (2,793.7) acres, more or less, together with the buildings and improvements thereon, situate in the County of Colleton, State of South Carolina, known as Myrtle Grove Plantation, and delineated on two (2) survey plats prepared by S.S. Snook, Registered Land Surveyor, one delineated as containing one hundred eleven and three-tenths (111.3) acres, dated May 7, 1980, and recorded November 3, 1982, in Plat book 21 at Page 150; and the other delineated as containing two thousand six hundred eighty-two and four-tenths (2,682.4) acres, dated July 11, 1980, and recorded November 3, 1982, in Plat Cabinet C at Slide 47, in the Office of the Clerk of Court for Colleton County, South Carolina.



LESS AND EXCEPT All that certain tract or parcel of land lying and being in Colleton County, South Carolina and being know as Five (5) acres which parcel is a portion of the property more commonly known as MYRTLE GROVE TRACT, as shown on that certain map recorded in the Colleton County Register of Deeds, Colleton County, South Carolina in Deed Book CX, Page 47, and being more particularly described as follows: beginning 200 feet due North from the Northeast corner of the Myrtle Grove House being the POINT OF BEGINNING and running East for a distance of 200 feet; thence running due South for a distance of 900 feet; thence due West for a distance of 2420 feet; thence due North for a distance of 900 feet; thence due East for a distance of 700 feet to the POINT OF BEGINNING. Said tract to include the house currently known as Myrtle Grove.

BEING ALL OF TMS#: 282-00-00-021.000/271-00-00-082.000/282-00-00-020.000/282-00-00-008.000/281-00-00-057.000/ and 291-00-00-002.000 AND the remaining Portion of 291-00-00-001.000 and/or 282-00-00-021/271-00-00-082/282-00-00-020/282-00-00-008/281-00-00-057 and 291-00-00-002 AND the remaining Portion of 291-00-00-001

This being the same property conveyed to Berwind LLC by Limited Warranty Deed from William Henry Varn, dated February 22, 2007, recorded in Deed Book 1474, Page 61, recorded in the Office of the Register of Deeds for Colleton County, South Carolina.

ROSEN, ROSEN, & HAGOOD, LLC.

By: 
A. Bright Ariail
134 Meeting Street, Suite 200
Post Office Box 893
Charleston, SC 29402
(843) 577-6726

ATTORNEYS FOR PLAINTIFF
THE SPRIGGS GROUP, PC

Charleston, South Carolina

April 13, 2009

STATE OF SOUTH CAROLINA

COUNTY OF COLLETON

THE SPRIGGS GROUP, PC

Plaintiff,

vs.

GENE R. SLIVKA,

Defendant.

) IN THE COURT OF COMMON PLEAS

) CIVIL ACTION NO.

) AFFIDAVIT OF MECHANIC'S LIEN

PERSONALLY appeared before me, The Spriggs Group, PC, a professional corporation, by C. Kenneth Spriggs, its President, who, being first duly sworn, deposes and states that certain labor, services and/or materials were furnished for the improvement of the property described in the attached Notice of Mechanic's Lien, such materials having been furnished at the special instance and request of the owner of said property or by consent of the owners or some person or agent having authority from or rightfully acting for such owner or authorized by the owner and were last furnished within ninety (90) days from the date of this Affidavit.

Deponent further states that there is past due and owing from the owners of said property to it the sum of One Hundred Ninety Eight Thousand, Eight Hundred and Thirty-Four Dollars and Fifty-Three Cents (\$198,834.53), representing the sum to which materials are reasonably worth as evidenced by the statement of account (attached hereto and incorporated herein as Exhibit "A") plus prejudgment interest, costs and reasonable attorney's fee.

THE SPRIGGS GROUP, P.C.

By: C. Kenneth Spriggs
C. KENNETH SPRIGGS
PRESIDENT

SWORN TO before me this

10th Day of April, 2009.

Olivia Mason
NOTARY PUBLIC FOR [state]

My Commission Expires:

OLIVIA MASON
Notary Public, Chatham County, GA
My Commission Expires December 1, 2010

The Spriggs Group P.C.
New Julianton Plantation
Architectural/Engineering Services

Statement of Account

<u>Invoice</u>	<u>Amount Due</u>
0609-2	\$ 163,574.00
0609-3	\$ 11,849.50
0609-4	\$ 19,532.50
0609-5	\$ 3,878.53
	\$ 198,834.53

**Spriggs
Group
P.C.**

INVOICE
0609-2

9 February 2009

30th Year Anniversary

545 East York Street
P.O. Box 10062
Savannah
Georgia
31412
USA

Planning
Architecture
Interior Design

Tel. 912.232.6441
Fax. 912.232.6443
tsg@spriggsgroup.com
www.spriggsgroup.com

Mr. Gene Slivka

Reference: Architectural/Engineering Services
New Julianton Plantation
Colleton County, South Carolina

January 2007 through December 2008:

Design and preparation of final drawings based on
formula stated in our proposal letter dated 27 November 2006.

Main House	42 sheets x 24 hours/sheet x \$105/hr.	\$105,840
Conservatory	6 sheets x 24 hours/sheet x \$105/hr.	15,120
Potting Shed	6 sheets x 24 hours/sheet x \$105/hr.	15,120
Barn	12 sheets x 24 hours/sheet x \$105/hr.	30,240
Garages (2)	18 sheets x 24 hours/sheet x \$105/hr.	45,360
Grotto	3 sheets x 24 hours/sheet x \$105/hr.	7,560

Total Preparation of Final Drawings	\$219,240
Consultants Paid by Architect	20,535
Sub-Total	239,775

Previous Invoice 0609-1 Credit	(76,201)

Total this Invoice	\$163,574

Please remit to:

The Spriggs Group, P.C.
P. O. Box 10062
Savannah, GA 31412

9 February 2009

30th Year Anniversary

545 East York Street
P.O. Box 10062
Savannah
Georgia
31412
USA

Planning
Architecture
Interior Design

Tel. 912.232.6441
Fax. 912.232.6443
tsg@spriggsgroup.com
www.spriggsgroup.com

Mr. Gene Slivka

Reference: Architectural/Engineering Services
New Julianton Plantation
Colleton County, South Carolina

Additional Services and Changes based on items
listed in our proposal letter dated 27 November 2006:

August 2007:

Re-design rear wall system and change
construction documents for potting shed. 6 hrs. @ \$105/hr. \$ 650.00

October 2007:

Drafting for steps and retaining walls at garden.
Meet with contractor and prepare grid plan. 11 hrs. @ \$75/hr. 825.00

March - April 2008:

Research dentil mouldings at Taft House Museum,
Cincinnati; contact Historic American Building Survey
(HABS), obtain drawing and photo, develop and
reproportion original mouldings for barn and garages.
Reproportion original moulding for Main House.
Develop alternative moulding details for barn and
garages. 32 hrs. @ \$105/hr. 3,360.00

May 2008:

Research dog wash equipment and provide
cut sheets of products. 1.5 hrs. @ \$105/hr. 157.50

Design interior trim and details to incorporate
existing doors from Julianton Plantation,
McIntosh County, Georgia. 4 hrs. @ \$105/hr. 420.00

9 February 2009

Page 2

August 2008:

Redesign front entry windows, delete
palladian exterior window and change
6 foot window to 8 feet.

15 hrs. @ \$105/hr. 1,575.00

Provide manufacturer sources for slate,
millwork, mouldings.

9.5 hrs. @ \$105/hr. 997.50

Research Rinnai hotwater system.

1.5 hrs. @ \$105/hr. 157.50

September 2008:

Column redesign.

7 hrs. @ \$105/hr. 735.00

Chimney redesign from steel frame to
masonry.

23.5 hrs. @ \$105/hr. 2,467.00

Interior Palladian window redesign.

5 hrs. @ \$105/hr. 525.00

Total this Invoice

\$11,849.50

Please remit to:

The Spriggs Group, P.C.
P. O. Box 10062
Savannah, GA 31412

9 February 2009

30th Year Anniversary

Mr. Gene Slivka

545 East York Street
P.O. Box 10062
Savannah
Georgia
31412
USA

Reference: Architectural/Engineering Services
New Julianon Plantation
Colleton County, South Carolina

Planning
Architecture
Interior Design

Tel. 912.232.6441
Fax. 912.232.6443
tsg@spriggsgroup.com
www.spriggsgroup.com

Construction Administration Services.

Distribute documents for bid pricing, identify
trade contractors, answer field questions and
produce field sketches for garages, barn, main
house and grotto. Do quantity take-offs for
main house sheet rock panels.

May 2008:

Project Architect (P.A.)	2 hrs. @ \$175/hr.	350.00
Project Architectural Designers (P.A.D.)	2.5 hrs. @ \$105/hr.	262.50

June 2008:

P.A.	2 hrs. @ \$175/hr.	350.00
P.A.D.	3 hrs. @ \$105/hr.	315.00

July 2008:

P.A.D.	8 hrs. @ \$105/hr.	840.00

August 2008:

P.A.	.5 hrs. @ \$175/hr.	87.50
P.A.D.	19 hrs. @ \$105/hr.	1,995.00

September 2008:

P.A.	1.5 hrs. @ \$175/hr.	262.50
P.A.D.	13.5 hrs. @ \$105/hr.	1,417.50

October 2008:

P.A.	14.5 hrs. @ \$175/hr.	2,537.50
P.A.D.	44.4 hrs. @ \$105/hr.	4,672.50

November 2008:

P.A.	9.5 hrs. @ \$175/hr.	1,662.50
P.A.D.	1 hr. @ \$105/hr.	105.00

December 2008:

P.A.	10.5 hrs. @ \$175/hr.	1,837.50
P.A.D.	27.5 hrs. @ \$105/hr.	2,887.50

Total this Invoice

\$19,532.50

Please remit to:

The Spriggs Group, P.C.
P. O. Box 10062
Savannah, GA 31412

THE
**Spriggs
Group**
P.C.

INVOICE
0609-5

9 February 2009

30th Year Anniversary

Mr. Gene Slivka

545 East York Street
P.O. Box 10062
Savannah
Georgia
31412
USA

Reference: Architectural/Engineering Services
New Julianon Plantation
Colleton County, South Carolina

Planning
Architecture
Interior Design

Tel. 912.232.6441
Fax. 912.232.6443
tsg@spriggsgroup.com
www.spriggsgroup.com

Reimbursable Expenses:

January 2007 through December 2008:

Copies: Xerox, Laser, Fax	
B/W	\$ 397.50
Color	33.20

Postage:	\$ 27.07
Blue Prints:	51.03
Computer Plots:	964.50

Coastal Digital Reprographics	
Paid Invoices	\$2,270.51

Savannah Blue Print Co.	
Paid Invoices	\$ 134.72

Total	\$3,878.53

Please remit to:

The Spriggs Group, P.C.
P. O. Box 10062
Savannah, GA 31412

Defendant.

ANSWER AND COUNTERCLAIM

PATRICIA C. GRANT
COLLETON COUNTY
COMMON PLEAS
2009 SEP 10 AM 9:16

Plaintiff's Complaint as state that the Plaintiff presented four invoices but denies the remaining portions of Paragraph 8 and demands strict proof thereof.

6. Answering Paragraph 12 of Plaintiff's Complaint, the Defendant admits that Plaintiff filed a Notice of Mechanics Lien on April 13, 2009, but asserts that such filing was not timely. Defendant denies the remaining allegations contained in Paragraph 12 of Plaintiff's Complaint and demands strict proof thereof.

SECOND, FOR A FIRST DEFENSE TO PLAINTIFF'S FIRST CAUSE OF ACTION
(Statute of Limitation - Filing of Lien)

7. Plaintiff's Mechanic's Lien was not filed within the time prescribed by statute for the filing of mechanic's liens.

THIRD, FOR A SECOND DEFENSE TO PLAINTIFF'S FIRST CAUSE OF ACTION
(Statute of Limitation - Service of Lien)

8. Plaintiff's Mechanic's Lien was not served within the time prescribed by statute for the filing of mechanic's liens.

FOURTH, FOR A THIRD DEFENSE TO PLAINTIFF'S FIRST CAUSE OF ACTION
(Statute of Limitation - Filing of Suit
to Enforce Mechanic's Lien)

9. Plaintiff's suit to enforce the lien of Plaintiff's Mechanic's Lien was not filed within the time prescribed by statute for the filing of suits to enforce mechanic's liens.

FIFTH, FOR A FOURTH DEFENSE TO PLAINTIFF'S FIRST CAUSE OF ACTION
(General Denial)

10. Defendant, responding to Paragraph 15 of Plaintiff's Complaint, incorporates all preceding paragraphs of this Answer and Counterclaim as if rewritten here verbatim.

11. Defendant admits the allegations contained in Paragraphs

16 and 19 of Plaintiff's Complaint.

12. Defendant denies those allegations contained in Paragraphs 17, 18 and 20 of Plaintiff's Complaint and demands strict proof thereof.

SIXTH, FOR A FIRST DEFENSE TO PLAINTIFF'S SECOND CAUSE OF ACTION
(General Denial)

13. Defendant, responding to Paragraph 21 of Plaintiff's Complaint, incorporates all preceding paragraphs of this Answer and Counterclaim as if rewritten here verbatim.

14. Defendant denies those allegations contained in Paragraphs 22, 23, 24 and 25 of Plaintiff's Complaint and demands strict proof thereof.

SEVENTH, FOR A FIRST DEFENSE TO PLAINTIFF'S THIRD CAUSE OF ACTION
(General Denial)

15. Defendant, responding to Paragraph 26 of Plaintiff's Complaint, incorporates all preceding paragraphs of this Answer and Counterclaim as if rewritten here verbatim.

16. Defendant denies the allegations contained in Paragraphs 27, 28, 29 and 30 of Plaintiff's Complaint and demands strict proof thereof.

EIGHTH, FOR A FIRST COUNTERCLAIM
(Declaratory Judgment - Mechanic's Lien Not Timely Filed)

17. Defendant and Counter-claimant incorporates all preceding paragraphs of this Answer and Counterclaim as if rewritten here verbatim.

18. This Counterclaim is brought, in part, pursuant to the Uniform Declaratory Judgments Act, Section 15-13-10, et seq, of the

MF&C

Code of Laws of South Carolina, 1976.

19. Defendant is a citizen and resident of Colleton County, South Carolina.

20. Defendant is informed and believes that the Plaintiff is a professional corporation, organized and existing under the laws of the State of South Carolina.

21. On April 13, 2009, Plaintiff filed a Notice of Mechanic's Lien, with Affidavit of Mechanic's Lien, in Volume 1742 at Pages 276 - 286, in the Office of the Register of Deeds for Colleton County, South Carolina, claiming a mechanic's lien upon certain real estate owned by the Defendant located in Colleton County, South Carolina, and a copy of said Mechanic's Lien is attached to Plaintiff's complaint as Exhibit 2.

22. The Statements of Account attached to and incorporated in said Affidavit of Mechanic's Lien showed that last work or services, for which the lien was claimed, was performed in December 2008.

23. That Section 29-5-90 of the Code of Laws of South Carolina, 1976, provides, among other things, that any claimed mechanic's lien shall be dissolved unless the claimant thereof files a statement or Notice of Lien with the Clerk of Court within ninety (90) days after he ceases to perform labor or services for which the lien is claimed and serves same upon the owner within said time.

24. The Notice of Mechanic's Lien, referred to in Paragraph

20 above, should have been filed by the end of March 2009 in order be timely; in that the Statement of Account, referred to in Paragraph 19 above, showed that the last work or services in question was performed in December 2008

25. The same was served upon Gene R. Slivka on April 13, 2009, although for the lien to be valid, it should have been served by the end of March 2009.

26. On May 12, 2009, pursuant to Section 29-5-110 of the Code of Laws of South Carolina, 1976, Defendant duly filed, with the Clerk of Court for Colleton County, his undertaking or bond for the discharge of his property from said mechanic's lien and deposited cash with said Clerk in the amount of Two Hundred Sixty-five Thousand One-hundred and Twelve and 71/100 (\$265,112.71) Dollars as security therefore.

27. Said transaction was referred to in an Order dated May 12, 2009, signed by the Honorable Perry M. Buckner, Judge for the Court of Common Pleas, Fourteenth Judicial Circuit, which is on file with the Clerk of Court, which provided that the mechanic's lien be released and the said bond and cash so deposited were substituted therefor; and said Order further provided that said cash be deposited in an interest bearing account for the benefit of the parties as their interests may be determined and that the posting of said bond and cash security should not prejudice the right of Gene R. Slivka to contest said alleged lien or from having said bond cancelled and said cash returned to him.

MF&C

MFC
MS

28. Defendant is entitled to an Order of this Honorable Court declaring that said mechanic's lien is invalid and was invalid *ab initio*, that the mechanic's lien is dissolved as not being timely filed, that the mechanic's lien is of no force and effect, that the bond or undertaking posted in connection therewith is unnecessary as the mechanic's lien for which it was substituted was invalid *ab initio*, and ordering that the undertaking or bond hereinabove referenced be cancelled, and ordering that said Clerk of Court return the cash deposited as security for said bond, to Plaintiff with accrued interest.

NINTH, FOR A SECOND COUNTERCLAIM

(Declaratory Judgement - Civil Action Not Timely Filed)

29. Defendant and Counter-claimant incorporates all preceding paragraphs of this Answer and Counterclaim as if rewritten here verbatim.

30. This Counterclaim is brought, in part, pursuant to the Uniform Declaratory Judgments Act, Section 15-13-10, *et seq*, of the Code of Laws of South Carolina, 1976.

31. That Section 29-5-120 of the Code of Laws of South Carolina, 1976, provides that any claimed mechanic's lien shall be dissolved unless the claimant thereof filed a suit for enforcing the lien within six months after he ceases to perform labor or services for which the lien is claimed.

32. The suit should have been filed by the end of June 2009 in order to be timely in that the last work or services in question were performed in December 2008; and no suit was filed by the

MF&C

Plaintiff until on or about July 20, 2009, which was not timely, as aforesaid.

33. Defendant is entitled to an Order of this Honorable Court declaring that said mechanic's lien is dissolved as no suit was timely filed, that said mechanic's lien is of no force and effect, and ordering that the undertaking or bond hereinabove referenced be cancelled, and ordering that said Clerk of Court return the cash deposited as security for said bond to Plaintiff with accrued interest.

TENTH, FOR A THIRD COUNTERCLAIM

(Declaratory Judgement - Lien Filed on Wrong Property)

34. Defendant and Counter-claimant incorporates all preceding paragraphs of this Answer and Counterclaim as if rewritten here verbatim.

35. This Counterclaim is brought, in part, pursuant to the Uniform Declaratory Judgments Act, Section 15-13-10, et seq, of the Code of Laws of South Carolina, 1976.

36. That Section 29-5-90 of the Code of Laws of South Carolina, 1976, provides, among other things, that any claimed mechanic's lien shall be filed in the office of the registrar of deeds or clerk of court in which the building or structure is situated with a statement of a just and true account of the amount due, together with a description of the property intended to be covered by the lien that is sufficiently accurate.

37. Plaintiff failed to properly follow Section 29-5-90 as Plaintiff, in its lien and suit did not list the property on which

MF&C

MF&C
#7

the alleged contract work was done, and specifically excluded the property on which the alleged contract for work was allegedly done or to be done.

38. No work was done by Plaintiff on the property described in the mechanic's lien.

39. Defendant is entitled to an Order of this Honorable Court declaring that said mechanic's lien is dissolved and of no force and effect, ordering that the undertaking or bond hereinabove referred to be cancelled, and ordering that said Clerk of Court return said cash so deposited as security to Plaintiff with accrued interest.

ELEVENTH, FOR A FOURTH COUNTERCLAIM

(Request for an Award of Attorneys Fees and Costs
on Defense of Mechanic's Lien)

40. Defendant and Counter-claimant incorporates all preceding paragraphs of this Answer and Counterclaim as if rewritten here verbatim.

41. Due to the actions of the Plaintiff in wrongfully filing and serving the within mentioned mechanic's lien and filing and serving a suit to enforce the mechanic's Defendant has been forced to incur attorneys fees and incur costs in defending the suit to enforce the mechanic's lien.

42. Plaintiff should be required to reimburse or pay directly the attorneys fees and costs incurred by Defendant in defending the suit to enforce mechanic's lien file by Plaintiff.

TWELFTH, FOR A FIFTH COUNTERCLAIM
(Slander of Title)

39. Defendant and Counter-claimant incorporates all preceding paragraphs of this Answer and Counterclaim as if rewritten here verbatim.

40. Plaintiff did some work for Defendant on a five (5) acre, more or less, tract of land in Colleton County, South Carolina owned by Defendant.

41. Defendant and Counter-claimant also owns a tract of land containing two thousand seven hundred eighty-eight (2,788) acres, more or less, in Colleton County, South Carolina, on which no work was contracted for with Plaintiff and on which no work was done for Defendant by Plaintiff.

42. On April 13, 2009, Plaintiff filed a Notice of Mechanic's Lien, with Affidavit of Mechanic's Lien, in Volume 1742 at Pages 276 - 286, in the Office of the Register of Deeds for Colleton County, South Carolina, claiming a mechanic's lien upon this tract of land owned by the Defendant, and a copy of said Mechanic's Lien is attached to Plaintiff's complaint as Exhibit 2.

43. Said mechanic's lien was false in one or more or all of the following particulars:

- a. In stating Plaintiff had entered a contract to do work on a tract of land on which Plaintiff had not been contract to do work;
- b. In stating Plaintiff had done work on a tract of land on which Plaintiff had done no work; and

- c. In stating Plaintiff was entitled to file a mechanic's lien when the time period for filing a mechanic's lien had expired.
44. Plaintiff published said mechanic's lien.
45. Plaintiff filed and published said mechanic's lien in reckless and/or wanton disregard of the rights of Defendant and/or without legal justification and/or with other intentions of malice.
46. As a result of Plaintiff's actions the quality of Defendant's title and the value of Defendant's property, used as collateral to secure his credit line was diminished in the eyes of his lender.
47. As a result of Plaintiff's actions, Defendant directly and immediately suffered pecuniary loss, from the effect of Plaintiff's actions on Defendant's lender and others, to wit: expenses, including, but not limited to, attorney fees, abstract fees, title fees, title insurance fees, bank fees, interest payments on loans and the like, in funding a bond to lift said mechanic's lien, so that Defendant could exercise his right to take down advances he was permitted to take down under the terms of his credit line secured by a mortgage on the two thousand seven hundred eighty-eight (2,788) acres, more or less, tract.
48. Defendant has also incurred attorneys fees and other costs in defending this action and Plaintiff should be required reimburse him for said attorneys fees or to pay said attorneys fees.
49. Plaintiff should be required to pay punitive damages to

Defendant because of Plaintiff's reckless and/or wanton disregard of the rights of Defendant and/or because Plaintiff's actions were without legal justification and/or because Plaintiff's actions were taken with other intentions of malice.

THIRTEENTH, FOR A SIXTH COUNTERCLAIM
(Breach of Contract)

50. Defendant and Counter-claimant incorporates all preceding paragraphs of this Answer and Counterclaim as if rewritten here verbatim.

51. Plaintiff breached its contract with the Defendant, and as a natural consequence and proximate result of said breach Defendant suffered damages in that Defendant's completion of his project has been delayed and he has to incur additional expenses in completion of his project, which Plaintiff, knew or should have known Defendant would have to incur if Plaintiff did not complete it's contracted for work.

52. Plaintiff knew or should have known that it performed no work on said tract of land, yet acting in a negligent, grossly negligent, wanton and willful manner it filed said mechanic's lien on this large tract of land.

WHEREFORE, having fully answered the Plaintiff's Complaint, Defendant prays:

1. That the Complaint be dismissed with costs; and
2. That Defendant be granted judgement for the declaratory relief he seeks in his First Counterclaim, including an Order determining, adjudging and decreeing that Plaintiff's mechanic's

MF&C

NAC
#11

lien is dissolved and of no force and effect and cancelling the Defendant's undertaking or bond and directing the Clerk of Court to return the cash deposited as security for said bond to the Plaintiff with accrued interest; and

3. That Defendant be granted judgement for the declaratory relief he seeks in his Second Counterclaim, including an Order determining, adjudging and decreeing that Plaintiff's mechanic's lien is dissolved and of no force and effect and cancelling the Defendant's undertaking or bond and directing the Clerk of Court to return the cash deposited as security for said bond to the Plaintiff with accrued interest; and

4. That Defendant be granted judgement for the declaratory relief he seeks in his Third Counterclaim, including an Order determining, adjudging and decreeing that Plaintiff's mechanic's lien is dissolved and of no force and effect and cancelling the Defendant's undertaking or bond and directing the Clerk of Court to return the cash deposited as security for said bond to the Plaintiff with accrued interest; and

5. That Defendant be awarded judgement for the attorneys fees he seeks in his Fourth Counterclaim; and

6. That Defendant be awarded judgement for the actual and punitive damages he seeks in his Fifth Counterclaim; and

7. That Defendant be awarded judgement for the damages he seeks in his Sixth Counterclaim; and

MFC
12

MF&C

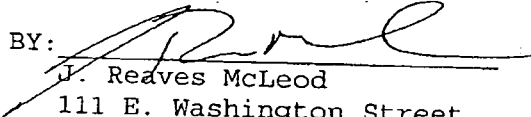
8. As to all counterclaims before the court, that the Defendant be awarded, prejudgement interest where warranted by the facts and allowed by law; and

9. As to all claims and counterclaims before the court, that the Defendant be awarded, the costs and expenses of this action; and

10. As to all claims and counterclaims before the court, that the Court award Defendant such other and further relief as the Court deems to be just, proper and equitable and as the nature of such claim or counterclaim may require.

MCLEOD, FRASER & CONE

BY:


J. Reaves McLeod
111 E. Washington Street
Post Office Drawer 230
Walterboro, SC 29488
(843) 549-2516
Attorneys for Gene R. Slivka

September 9, 2009

Walterboro, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF COLLETON	)	CIVIL ACTION NO. 2009-CP-15-595
THE SPRIGGS GROUP, PC	)	
Plaintiff,	)	AMENDED COMPLAINT
	)	(Jury Trial Requested)
vs.	)	
GENE R. SLIVKA	)	
Defendant.	)	

2010 MAY -5 AM 8:53

FILED
CLERK OF COURT
COMMON PLEAS

The Plaintiff, The Spriggs Group, PC, ("The Spriggs Group"), complaining of Defendant Gene R. Slivka ("Slivka"), alleges and states as follows:

1. The Spriggs Group is a professional corporation organized and existing under the laws of the state of Georgia and is licensed to do business in the state of South Carolina.
2. Slivka is, upon information and belief, a resident of the state of South Carolina.
3. On or about November 27, 2006, The Spriggs Group provided a written proposal (the "Proposal"), Exhibit 1, to perform architectural and engineering design services for Slivka for improvements on property known as the New Julianton Plantation (also known as the Myrtle Grove Plantation or the Myrtle Grove Tract) in Colleton County, South Carolina (the "Project").
4. The Proposal estimated the total fee for preparation of fifty-two design drawings at \$161,500.00 plus reimbursable expenses and indicated that other work such as changes to the design or construction phase services would be done at an additional cost based on hourly rates.
5. After receipt of the Proposal, Slivka verbally deleted the requirement for Boat House drawings, reduced the fee accordingly to \$152,420, and indicated that he would pay one-

half of that fee (\$76,210) up front and the remainder upon completion of the remaining drawings.

6. Work commenced on the design on or about January 3, 2007. Despite Slivka's promise to pay one-half of the fee up front, The Spriggs Group did not receive payment until February 26, 2007.
7. At Slivka's request and pursuant to the terms of the Proposal, The Spriggs Group provided architectural and engineering design services for the Project and ultimately produced eighty-five drawings for the project.
8. The Spriggs Group performed its obligations and responsibilities under its agreement with Slivka.
9. The Spriggs Group performed additional work, including modifications to the design during construction document preparation, research and design of numerous custom details, and construction administration services, all pursuant to oral direction from Slivka.
10. The Spriggs Group has presented five proper invoices for completion of the work to Slivka totaling One Hundred, Ninety Nine Thousand, Nine Hundred and Nineteen Dollars and Fifty Three Cents (\$199,919.53); however, Slivka has failed to make payment for those services as rendered.
11. During March 2009, Slivka indicated that he would pay an additional \$76,210 for services accomplished by The Spriggs Group, but would not pay additional monies due for preparation of the additional drawings, for the modifications during construction document preparation, for custom details, or for construction administration services, all as requested by Slivka.

12. The Spriggs Group last performed services related to the project on January 13, 2009.
13. Slivka has not paid The Spriggs Group for its work despite Slivka's contractual obligations and demands for payment from The Spriggs Group.
14. Slivka has retained the benefit of the services performed by The Spriggs Group.
15. Slivka acknowledges owing certain amounts to The Spriggs Group but has refused to tender additional payment unless The Spriggs Group releases him from claims related to additional sums The Spriggs Group is due for services provided for the Project.
16. Pursuant to Section 29-5-10, et. seq. of the South Carolina Code, The Spriggs Group timely notified Slivka that it had not been paid in full and subsequently filed a Notice of Mechanic's Lien which was filed in Volume 1742 at Page 276 at the Register of Deeds Office for Colleton County, SC.
17. Subsequent to filing of the Mechanic's Lien, Slivka posted a cash bond with the Clerk of Court for Colleton County, SC which is filed in Volume 1751 at Page 118.
18. On or about May 15, 2009, the cash bond was transferred from the Clerk of Court to the Register of Deeds for Colleton County, South Carolina. A receipt for the bond is filed in Volume 1753 at Page 81 with the Colleton County Register of Deeds.
19. On March 15, 2010, The Spriggs Group made a proper demand for payment of outstanding fees pursuant to S.C. Code Ann. §27-1-15.

FOR A FIRST CAUSE OF ACTION
(Enforcement of Claim against Mechanic's Lien Bond)

20. The Spriggs Group realleges and incorporates the allegations contained in paragraphs 1-19 above as if they were restated herein verbatim.
21. The Spriggs Group has filed a Notice and Certificate of Mechanic's Lien and an Affidavit and Statement of Account, which is attached as Exhibit 2, for architectural and

engineering services provided for the Project stating that Defendant Slivka has failed to pay The Spriggs Group for those services.

22. The services provided for which it has not been paid total \$199,919.53 and were performed within ninety (90) days of the filing of the Notice and Certificate of Mechanic's lien and within six months of the date of the filing of this Complaint.
23. As of the date of this Complaint, Slivka's mechanic's lien is still unsatisfied in at least the amount of \$198,834.53.
24. Slivka filed a cash bond (the "Bond") in the amount of Two Hundred Sixty-Five Thousand, One Hundred Twelve and 71/100 Dollars (\$264,112.71) to take the place of the real property upon which The Spriggs Group's lien existed, such Bond now being subject to The Spriggs Group's lien.
25. The Spriggs Group is due a judgment against the Bond in the sum of \$198,834.53, plus pre-judgment interest, costs and reasonable attorneys' fees incurred as allowed by the mechanic's lien statutes.

FOR A SECOND CAUSE OF ACTION
(Breach of Contract)

26. The Spriggs Group realleges and incorporates the allegations contained in paragraphs 1-25 above as if they were restated herein verbatim.
27. The Spriggs Group and Slivka entered into a contract wherein Slivka agreed to pay The Spriggs Group for the performance of architectural and engineering design services, modifications to the design during construction document preparation, research and design of numerous custom details, and construction administration services for the Project.

28. Slivka breached its contract with The Spriggs Group by failing to remit full payment to The Spriggs Group for the performance of architectural and engineering design services, modifications to the design during construction document preparation, research and design of numerous custom details, and construction administration services for the Project.
29. As a direct and proximate cause of Slivka's breach of its contractual obligations, The Spriggs' Group has suffered damages.
30. The Spriggs Group is entitled to payment of the amounts due under the contract, plus consequential damages, pre-judgment interest, and attorneys' fees.

FOR A THIRD CAUSE OF ACTION
(Breach of Contract Accompanied by Fraudulent Acts)

31. The Spriggs Group realleges and incorporates the allegations contained in paragraphs 1-30 above as if they were restated herein verbatim.
32. The breaches of contract by Slivka were accompanied by fraudulent acts which included, without limitation:
- a. In inducing The Spriggs Group to perform additional work related to the Project based on an agreement that Slivka would pay The Spriggs Group for the additional work when, in fact, Slivka intended at the time of the agreement not to make payment in full to The Spriggs Group; and
 - b. In withholding payment he acknowledges is due to The Spriggs Group in an effort to exact a reduction or forgiveness in other sums due to The Spriggs Group.

33. The breaches of contract accompanied by fraudulent acts by Slivka were committed intentionally, wrongfully, without justification and maliciously, thereby justifying an award of punitive damages against Slivka.
34. As a direct and proximate cause of Slivka's breach of its contractual obligations, The Spriggs' Group has suffered damages.
35. The Spriggs Group is entitled to payment of the amounts due under the contract, plus consequential damages, pre-judgment interest, attorneys' fees and punitive damages.

FOR A FOURTH CAUSE OF ACTION
(Unjust Enrichment/Quantum Meruit)

36. The Spriggs Group realleges and incorporates the allegations contained in paragraphs 1-35 above as if they were restated herein verbatim.
37. Slivka has received a benefit from the architectural and engineering design services, modifications to the design during construction document preparation, research and design of numerous custom details, and construction administration services for the Project.
38. While Slivka has realized and retained the benefit conferred, The Spriggs Group has not been paid for the value of the services provided to the Project.
39. Equity demands that The Spriggs Group be paid for the value of the architectural and engineering design services, modifications to the design during construction document preparation, research and design of numerous custom details, and construction administration services performed for Slivka and provided for the Project for which Slivka has not reimbursed The Spriggs Group.

40. The Spriggs Group is entitled to a judgment against Slivka for the value of the architectural and engineering design services, modifications to the design during construction document preparation, research and design of numerous custom details, and construction administration services performed for the Project and remaining owed to The Spriggs Group, plus prejudgment interest, costs and attorneys' fees.

FOR A FIFTH CAUSE OF ACTION
(Failure to Comply with S. C. Code Ann. §27-1-15)

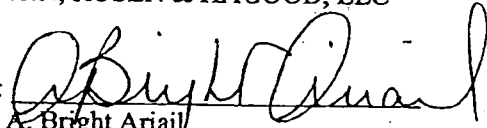
41. The Spriggs Group realleges and incorporates the allegations contained in paragraphs 1-40 above as if they were restated herein verbatim.
42. The Spriggs Group provided notice via certified mail to Slivka on March 15, 2010, making a demand pursuant to the statutory requirements of S.C. Code Ann. § 27-1-15.
43. Slivka has failed to make a fair and reasonable investigation of the merits of The Spriggs Group's claim and has further failed to pay it or a portion of it to date.
44. Upon the passage of forty-five (45) days from the date of the notice pursuant to the statutory requirements of S.C. Code Ann. § 27-1-15, The Spriggs Group is entitled to its attorney's fees as well as interest at the judgment rate from the date Slivka was first notified of The Spriggs Group's claim.

WHEREFORE, Plaintiff prays that the Court grant the following relief:

1. Grant judgment against Slivka in the amount of at least \$199,919.53 plus prejudgment interest, punitive damages, costs and reasonable attorney's fees for the prosecution of this action, together with interest thereon as allowed by the mechanic's lien statute and by S.C. Code Ann. § 27-1-15;
2. Grant judgment against Slivka for actual damages, including incidental and consequential damages, as may be proven at trial;

3. Grant judgment against Slivka for the costs incurred in prosecuting this action, including reasonable attorneys' fees;
4. Award prejudgment interest against the sum certain amount set forth in the Notice and Certificate of Mechanic's Lien and Affidavit of Mechanic's Lien;
5. Award interest pursuant to S.C. Code Ann. § 27-1-15; and
6. Award such other and further relief requested herein and as the Court deems just and appropriate.

ROSEN, ROSEN & HAGOOD, LLC

By: 

A. Bright Ariail

Timothy J.W. Muller

P. O. Box 893

Charleston, SC 29402

134 Meeting Street, Suite 200

Charleston, SC 29401

(843) 577-6726

ATTORNEY(S) FOR THE SPRIGGS
GROUP, PC

Charleston, South Carolina
April 28, 2010.

**The
Spriggs
Group
P.C.**

27 November 2006

27th Year Anniversary

Mr. Gene Slivka

545 East York Street
P.O. Box 10062
Savannah
Georgia
31412
USA

Reference: New Residence and Outbuildings
Julianton Plantation

Planning
Architecture
Interior Design

Dear Gene:

Tel. 912.232.6441
Fax. 912.232.6443
tsg@spriggsgroup.com
www.spriggsgroup.com

For your project, I have provided three focus areas for your consideration. The first is an estimate of probable construction cost for each of seven buildings. The second is our estimate of drawings and specifications needed by the contractor to build the structures. The third is our fee proposal to complete the architectural and engineering work with restrictions and limitations noted. I have enclosed national average fee schedules from 2005 for this type of project. for your information.

Estimated Construction Cost Based on Program Outlined in 5 October 2006 Letter

Main House

Total Gross Heated Space	13,056 SF x \$250/SF	\$3,264,000
Basement	7,168 SF x \$ 70/SF	501,760
Porches	1,152 SF x \$ 60/SF	69,120
Exterior Porch Stairs	4 x \$12,000 each	48,000
Total Main House		\$3,882,880

Conservatory

Total Gross Space	864 SF x \$150/SF	\$ 129,600

Stable

Total Gross Ground Space	2,250 SF x \$125/SF	\$ 315,000
Hay Loft	1,000 SF x \$70/SF	70,000
Total Stable		\$ 385,000

Garages

Total Gross Ground Space	1,300 SF x \$90/SF	\$ 117,000
Attic (No HVAC)	900 SF x \$75/SF	67,500
Total Each Garage		\$ 184,500
Total Garages		\$ 369,000

Pavilion and Grotto

Total Gross Space	200 SF x \$100/SF	\$ 20,000

EXHIBIT

1

Mr. Gene Slivka
20 November 2006

Boat House		
Total Gross Space	540 SF x 110/SF	\$ 59,400

Total Buildings		\$4,845,880

Walls at Conservatory and Stable (4 F High x 100 LF)	400 SF x \$40/SF	\$ 16,000

Additional Costs

Site Grading
Civil: Wells & Piping.
Septic Tanks & Drain Fields
Solar Energy System
Grassing & Landscaping

Drawings and Specifications

Main House
Sheet Number-Description
A1-Site Plan (includes adjacent out-buildings)
A2-Foundation Plan & Details
A3-Basement & First Floor Plans
A4-Second Floor & Attic Plans
A5 & 6-Enlarged Partial Plans
A7-Building & Wall Sections & Details
A8-Schedules
A9 & 10-Elevations
A11- Roof Plan & Details
A12 & 13-Framing Plans
A14-Structural Details
P1-Plumbing Basement & First Floor Plans
P2-Plumbing Second Floor & Attic Plans
P3-Plumbing Riser Plans & Schedules
M1-Mechanical Basement & First Floor Plans
M2-Mechanical Second Floor & Attic Plans
M3-Mechanical Schedules & Details
E1-Electrical Basement & First Floor Plans (Power & Lighting)
E2-Electrical Second Floor & Attic Plans (Power & Lighting)
E3-Electrical Schedules & Details

Conservatory
Sheet Number-Description
A1-Foundation & Floor Plans & Details
A2-Elevations
A3-Framing Plan, Building & Wall Sections

Conservatory Continued

A4-Window & Door Elevations & Details
PME1-Plumbing, Mechanical & Electrical Plans
PME2-Plumbing, Mechanical & Electrical Details

Stable

Sheet Number-Description
A1-Foundation Plan & Details
A2-Floor & Hay Loft/Attic Plans
A3-Building & Wall Sections
A4-Elevations
A5-Schedules & Details
A6-Framing & Details
A7-Roof & Details
PME1-Plumbing, Mechanical & Electrical Plans
PME2-Plumbing, Mechanical & Electrical Schedules
PME3-Plumbing, Mechanical & Electrical Details

Garages

Sheet Number-Description
A1-Foundation & Floor Plans
A2-Attic & Roof Plans
A3-Elevations & Sections
A4-Framing Plans & Details
PME1-Plumbing, Mechanical, Electrical Plans & Details

Grotto

Sheet Number-Description
A1-Foundation & Floor Plans & Details
A2-Roof Plan, Elevations & Details
PE1-Plumbing & Electrical Plans & Details

Boat House

Sheet Number-Description
A1-Site Plan, Foundation & Floor Plans & Details
A2-Elevations & Sections
A3-Framing Plan & Details
PE1-Plumbing & Electrical Plans & Details

Total drawings: 52 sheets consisting of 34 architectural and 18 engineering drawings
plus cover sheet.

Specifications

Applicable sections of 16-Division Master Format. Preliminary estimate is
approximately 100 pages.

Mr. Gene Slivka
20 November 2006

Fee Proposal

Concept Design sit-down sessions and Design Refinement for six building types	
Project architect 80 hours @ \$175/hr	\$ 14,000
Project Management	
Internal - Project architect 40 hours @ \$175/hr	7,000
Consultants - project architect 40 hours @ \$175/hr	7,000
Construction Documents	
Drawing set-up, lay-outs, design details, and schedules	
24 hours/sheet @ \$105/hr X 34 sheets	85,680
Cover sheet 4 Hours @ \$105/hr	420
Specifications	
Project architect 80 hours @ \$175/hr	14,000
Clerical 40 hrs @ \$35/hr	1,400
Consultants	
Plumbing, mechanical, electrical engineering	20,000
Structural engineering	12,000
Total Fee	\$161,500
Estimated Reimbursable Expenses	\$ 1,000
Computer plots, printing, copying	

You are welcome to use material samples, catalogs and other resources at our office.
This proposal is based on the following assumptions:

- 1) You will layout the kitchen and will work with a supplier such as Home Depot who will produce a floor plan and cabinet elevations for our use to confirm room size and dimensions and to determine plumbing locations and hood exhaust location.
- 2) You will select all kitchen appliances and will provide manufacturers, model numbers, and cut sheets for our use in preparing applicable plumbing and electrical plans.
- 3) You will work with a stair builder who will provide a stair shop drawing for the main house central stair for our use to determine structural support and framing.
- 4) You will contact and work with a solar energy system provider who will give us all information about panel locations, support requirements, and connections for our use to determine structural framing, connections, and ventilation of storage batteries.

- 5) You will provide molding and trim supply sources and model numbers for our inclusion on the drawings.
- 6) You will select all lighting fixtures and will supply manufacturers and models for our use in preparing electrical schedules.
- 7) You will contract directly with a civil engineering firm, landscape architect and/or nursery . We will be provided with site drawings for water wells, septic tanks, and drain fields locations to determine our water and sanitary line entries to the buildings.
- 8) You will engage a testing laboratory to provide soils tests requested by our structural engineer.
- 9) You will engage a testing laboratory to provide tests for concrete requested by our structural engineer.
- 10) You will select brick manufacturer, color, and style.
- 11) You will select roofing material, manufacturer, and style.
- 12) You will select flooring material, colors, and styles and will provide manufacturer, and model numbers for our inclusion on finish schedules.
- 13) You will select interior and exterior colors and will provide manufacturers and numbers for our inclusion on finish schedules.
- 14) We will select door, window, and shutter hardware for your review and approval.
- 15) We will select plumbing fixtures for your review and approval.
- 16) We will provide shop drawing review for mechanical systems, site visits for electrical inspection prior to cover up, and final plumbing, mechanical, and electrical punch list.
- 17) We will provide structural foundation inspections and one framing inspection for each building.
- 18) We will provide any requested construction phase services by the project architect or staff on an hourly basis.
- 19) Once we begin construction documents, any changes in room layouts, sizes, window locations, door locations, and exterior elevation designs will be performed on an hourly basis.
- 20) We have not included any dock design for the boat house area since none was mentioned earlier.

Mr. Gene Slivka
20 November 2006

I am concerned that we may not have estimated enough time for this project and that our fee is too low. However, I am going on the information you gave over the telephone. If you look at the attached fee schedule, you will see that fees range from 15 to 19 percent of construction cost for custom single family dwellings. Typically fees breakdown by phases with the following percentages of fee by phase: schematic design - 15%, design development - 15%; construction documents - 45%; bidding or contractor negotiations - 5%; construction administration - 20%. For the construction documents phase, our proposed fee is less than half the fee that would be charged under national averages.

Gene, this is an exciting project, and I think that my estimates are accurate. I suggest you might contact Jim Turner and his chief estimator Mark Hiott to go over my projections. Let me know his review turns out. I will happy to talk with you further about the project.

Yours very truly,

THE SPRIGGS GROUP, P.C.


C. Kenneth Spriggs, AIA

CKS:bwp

FEEES

2005

FEEES FOR PROFESSIONAL DESIGN SERVICES

A GUIDELINES PUBLICATION

HOUSING

	Typical Fee Range as % of construction cost	Scope of Design Services			
		Baseline	Standard	Comprehensive	
		Construction & Design Quality Economy	Average	Superior	Highest Level Full-Service Fees
Dwellings, Single Family (Developer, Quality Tract)					
New Construction	3 - 8%	3%	6.4%	8%	8 - 12%
Typical construction cost range: \$56 to \$130 Average cost: \$85 sq. ft. (not including sitework) Typical range of building sizes: 1,400 - 3,000 sq. ft. Average size: 1,900 sq. ft.					
Note: Higher priced tract housing is rarely designed by architects, and unlicensed designer or drafting service fees are considerably lower than those cited above.					
Renovation/Additions (Not applicable.)					
Dwellings, Single Family (Developer, Luxury)					
New Construction	7.5 - 12.5%	7.5%	9.5%	12.5%	12.5 - 14%
Typical construction cost range: \$105 to \$262 Average cost: \$140 sq. ft. (not including sitework) Typical range of building sizes: 2,500 - 6,000 sq. ft. Average size: 3,500-sq. ft.					
Renovation/Additions	n/a - 16%	n/a	15%	16%	16 - 18%
Dwellings, Single Family (Custom Luxury)					
New Construction	n/a - 17.5%	n/a	15.2%	17.5%	17.5 - 19%
Typical construction cost range: \$117 to \$295 Average cost: \$175 sq. ft. (not including sitework) Typical range of building sizes: 3,000 - 9,000 sq. ft. Average size: 3,900 sq. ft.					
Renovation/Additions	n/a - 20%	n/a	18.5%	20%	20 - 22%

The architectural fee percentages include normal structural, mechanical, and electrical engineering fees.
See page 4 for an explanation of building size and construction cost information.
See page 5 for more details about what is and what is not included in consultant pass-through fees.
See page 6 for an explanation of how to read and use the information in this survey.

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF COLLETON)

CIVIL ACTION NO.

THE SPRIGGS GROUP, PC)

NOTICE OF MECHANIC'S LIEN

Plaintiff,)

vs.)

GENE R. SLIVKA)

Defendant.)

200900011272
 Filed for Record in
 COLLETON COUNTY SC
 KARLA DADDIECO
 04-13-2009 At 02:44 pm.
 MECH LIEN 17.00
 DR Volume 1742 Page 276 - 286

TO THE DEFENDANT ABOVE NAMED AND ALL OTHERS CONCERNED;

YOU WILL PLEASE TAKE NOTICE that the Plaintiff above named, by virtue of the attached Affidavit, does hereby claim a mechanic's lien of real estate hereinafter described, said lien being in the amount of One Hundred Ninety Eight Thousand, Eight Hundred and Thirty-Four Dollars and Fifty Three Cents (\$198,834.53) plus prejudgment interest, costs and attorney's fees, for labor, services and materials furnished and used for the improvements situated on the below described real estate. Such having been authorized by the Owner, or made by virtue of and in agreement with and by consent of the owner of such improvements or some person or agent having authority from or rightfully acting for such owner of the procuring or furnishing of such materials.

The property upon which this lien is attached includes those parcels below for which architectural and engineering services have been provided by The Spriggs Group, PC and is more particularly described as follows:

All those pieces, parcels and tracts of land containing two thousand seven hundred ninety-three and seven-tenths (2,793.7) acres, more or less, together with the buildings and improvements thereon, situate in the County of Colleton, State of South Carolina, known as Myrtle Grove Plantation, and delineated on two (2) survey plats prepared by S.S. Snook, Registered Land Surveyor, one delineated as containing one hundred eleven and three-tenths (111.3) acres, dated May 7, 1980, and recorded November 3, 1982, in Plat book 21 at Page 150; and the other delineated as containing two thousand six hundred eighty-two and four-tenths (2,682.4) acres, dated July 11, 1980, and recorded November 3, 1982, in Plat Cabinet C at Slide 47, in the Office of the Clerk of Court for Colleton County, South Carolina.

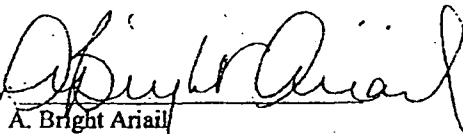


LESS AND EXCEPT All that certain tract or parcel of land lying and being in Colleton County, South Carolina and being know as Five (5) acres which parcel is a portion of the property more commonly known as MYRTLE GROVE TRACT, as shown on that certain map recorded in the Colleton County Register of Deeds, Colleton County, South Carolina in Deed Book CX, Page 47, and being more particularly described as follows: beginning 200 feet due North from the Northeast corner of the Myrtle Grove House being the POINT OF BEGINNING and running East for a distance of 200 feet; thence running due South for a distance of 900 feet; thence due West for a distance of 2420 feet; thence due North for a distance of 900 feet; thence due East for a distance of 700 feet to the POINT OF BEGINNING. Said tract to include the house currently known as Myrtle Grove.

BEING ALL OF TMS#: 282-00-00-021.000/271-00-00-082.000/282-00-00-020.000/282-00-00-008.000/281-00-00-057.000/ and 291-00-00-002.000 AND the remaining Portion of 291-00-00-001.000 and/or 282-00-00-021/271-00-00-082/282-00-00-020/282-00-00-008/281-00-00-057 and 291-00-00-002 AND the remaining Portion of 291-00-00-001

This being the same property conveyed to Berwind LLC by Limited Warranty Deed from William Henry Varn, dated February 22, 2007, recorded in Deed Book 1474, Page 61, recorded in the Office of the Register of Deeds for Colleton County, South Carolina.

ROSEN, ROSEN, & HAGOOD, LLC.

By 

A. Bright Ariail
134 Meeting Street, Suite 200
Post Office Box 893
Charleston, SC 29402
(843) 577-6726

ATTORNEYS FOR PLAINTIFF
THE SPRIGGS GROUP, PC

Charleston, South Carolina

April 13, 2009

STATE OF SOUTH CAROLINA

COUNTY OF COLLETON

THE SPRIGGS GROUP, PC

Plaintiff,

vs.

GENE R. SLIVKA,

Defendant.

) IN THE COURT OF COMMON PLEAS

) CIVIL ACTION NO.

) AFFIDAVIT OF MECHANIC'S LIEN

PERSONALLY appeared before me, The Spriggs Group, PC, a professional corporation, by C. Kenneth Spriggs, its President, who, being first duly sworn, deposes and states that certain labor, services and/or materials were furnished for the improvement of the property described in the attached Notice of Mechanic's Lien, such materials having been furnished at the special instance and request of the owner of said property or by consent of the owners or some person or agent having authority from or rightfully acting for such owner or authorized by the owner and were last furnished within ninety (90) days from the date of this Affidavit.

Deponent further states that there is past due and owing from the owners of said property to it the sum of One Hundred Ninety Eight Thousand, Eight Hundred and Thirty-Four Dollars and Fifty-Three Cents (\$198,834.53), representing the sum to which materials are reasonably worth as evidenced by the statement of account (attached hereto and incorporated herein as Exhibit "A") plus prejudgment interest, costs and reasonable attorney's fee.

THE SPRIGGS GROUP, P.C.

By: C. Kenneth Spriggs
C. KENNETH SPRIGGS
PRESIDENT

SWORN TO before me this

10th Day of April, 2009.

Olivia Mason
NOTARY PUBLIC FOR [state]

My Commission Expires:

OLIVIA MASON
Notary Public, Chatham County, GA
My Commission Expires December 2, 2010

EXHIBIT A

The Spriggs Group P.C.
New Julianton Plantation
Architectural/Engineering Services

Statement of Account

<u>Invoice</u>	<u>Amount Due</u>
0609-2	\$ 163,574.00
0609-3	\$ 11,849.50
0609-4	\$ 19,532.50
0609-5	\$ 3,878.53
	\$ 198,834.53

**The
Spriggs
Group
P.C.**

INVOICE
0609-2

9 February 2009

30th Year Anniversary

545 East York Street
P.O. Box 10062
Savannah
Georgia
31412
USA

Planning
Architecture
Interior Design

Tel. 912.232.6441
Fax. 912.232.6443
tsg@spriggsgroup.com
www.spriggsgroup.com

Mr. Gene Slivka

Reference: Architectural/Engineering Services
New Julianton Plantation
Colleton County, South Carolina

January 2007 through December 2008:

Design and preparation of final drawings based on
formula stated in our proposal letter dated 27 November 2006.

Main House	42 sheets x 24 hours/sheet x \$105/hr.	\$105,840
Conservatory	6 sheets x 24 hours/sheet x \$105/hr.	15,120
Potting Shed	6 sheets x 24 hours/sheet x \$105/hr.	15,120
Barn	12 sheets x 24 hours/sheet x \$105/hr.	30,240
Garages (2)	18 sheets x 24 hours/sheet x \$105/hr.	45,360
Grotto	3 sheets x 24 hours/sheet x \$105/hr.	7,560

Total Preparation of Final Drawings	\$219,240
Consultants Paid by Architect	20,535
Sub-Total	239,775

Previous Invoice 0609-1 Credit (76,201)

Total this Invoice \$163,574

Please remit to:

The Spriggs Group, P.C.
P. O. Box 10062
Savannah, GA 31412

**The
Spriggs
Group
P.C.**

**INVOICE
0609-3**

9 February 2009

30th Year Anniversary

545 East York Street
P.O. Box 10062
Savannah
Georgia
31412
USA

Planning
Architecture
Interior Design

Tel. 912.232.6441
Fax. 912.232.6443
tsg@spriggsgroup.com
www.spriggsgroup.com

Mr. Gene Slivka

Reference: Architectural/Engineering Services
New Julianton Plantation
Colleton County, South Carolina

Additional Services and Changes based on items
listed in our proposal letter dated 27 November 2006:

August 2007:

Re-design rear wall system and change
construction documents for potting shed. 6 hrs. @ \$105/hr. \$ 650.00

October 2007:

Drafting for steps and retaining walls at garden.
Meet with contractor and prepare grid plan. 11 hrs. @ \$75/hr. 825.00

March - April 2008:

Research dentil mouldings at Taft House Museum,
Cincinnati; contact Historic American Building Survey
(HABS), obtain drawing and photo, develop and
reproportion original mouldings for barn and garages.
Reproportion original moulding for Main House.
Develop alternative moulding details for barn and
garages. 32 hrs. @ \$105/hr. 3,360.00

May 2008:

Research dog wash equipment and provide
cut sheets of products. 1.5 hrs. @ \$105/hr. 157.50
Design interior trim and details to incorporate
existing doors from Julianton Plantation,
McIntosh County, Georgia. 4 hrs. @ \$105/hr. 420.00

Mr. Gene Slivka
9 February 2009

August 2008:

Redesign front entry windows, delete palladian exterior window and change 6 foot window to 8 feet.	15 hrs. @ \$105/hr.	1,575.00
Provide manufacturer sources for slate, millwork, mouldings.	9.5 hrs. @ \$105/hr.	997.50
Research Rinnai hotwater system.	1.5 hrs. @ \$105/hr.	157.50

September 2008:

Column redesign.	7 hrs. @ \$105/hr.	735.00
Chimney redesign from steel frame to masonry.	23.5 hrs. @ \$105/hr.	2,467.00
Interior Palladian window redesign.	5 hrs. @ \$105/hr.	525.00

Total this Invoice		\$11,849.50

Please remit to:

The Spriggs Group, P.C.
P. O. Box 10062
Savannah, GA 31412

**The
Spriggs
Group
P.C.**

**INVOICE
0609-4**

9 February 2009

30th Year Anniversary

Mr. Gene Slivka

545 East York Street
P.O. Box 10062
Savannah
Georgia
31412
USA

Reference: Architectural/Engineering Services
New Julianton Plantation
Colleton County, South Carolina

Planning
Architecture
Interior Design

Tel. 912.232.6441
Fax. 912.232.6443
tsg@spriggsgroup.com
www.spriggsgroup.com

Construction Administration Services.

Distribute documents for bid pricing, identify
trade contractors, answer field questions and
produce field sketches for garages, barn, main
house and grotto. Do quantity take-offs for
main house sheet rock panels.

May 2008:

Project Architect (P.A.)	2 hrs. @ \$175/hr.	350.00
Project Architectural Designers (P.A.D.)	2.5 hrs. @ \$105/hr.	262.50

June 2008:

P.A.	2 hrs. @ \$175/hr.	350.00
P.A.D.	3 hrs. @ \$105/hr.	315.00

July 2008:

P.A.D.	8 hrs. @ \$105/hr.	840.00

August 2008:

P.A.	.5 hrs. @ \$175/hr.	87.50
P.A.D.	19 hrs. @ \$105/hr.	1,995.00

September 2008:

P.A.	1.5 hrs. @ \$175/hr.	262.50
P.A.D.	13.5 hrs. @ \$105/hr.	1,417.50

October 2008:

P.A.	14.5 hrs. @ \$175/hr.	2,537.50
P.A.D.	44.4 hrs. @ \$105/hr.	4,672.50

**The
Spriggs
Group
P.C.**

**INVOICE
0609-5**

9 February 2009

30th Year Anniversary

Mr. Gene Slivka

545 East York Street
P.O. Box 10062
Savannah
Georgia
31412
USA

Reference: Architectural/Engineering Services
New Julianton Plantation
Colleton County, South Carolina

Planning
Architecture
Interior Design

Reimbursable Expenses:

January 2007 through December 2008:

Tel. 912.232.6441
Fax. 912.232.6443
tsg@spriggsgroup.com
www.spriggsgroup.com

Copies: Xerox, Laser, Fax	
B/W	\$ 397.50
Color	33.20
Postage:	\$ 27.07
Blue Prints:	51.03
Computer Plots:	964.50
Coastal Digital Reprographics	
Paid Invoices	\$2,270.51
Savannah Blue Print Co.	
Paid Invoices	\$ 134.72
Total	\$3,878.53

Please remit to:

The Spriggs Group, P.C.
P. O. Box 10062
Savannah, GA 31412

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CASE NO: 2009-CP-15-595

COUNTY OF COLLETON)

THE SPRIGGS GROUP, PC)

Plaintiff,)

v.)

GENE R. SLIVKA,)

Defendant.)

ANSWER AND COUNTERCLAIMS TO
AMENDED COMPLAINT

2010 MAY 18 PM 2:45

CLERK OF COURT
COLLETON COUNTY
COMMON PLEAS

TO THE ABOVE NAMED PLAINTIFF AND ITS ATTORNEY A. BRIGHT ARIAIL:

The Defendant above named, answering the Complaint herein and Counterclaiming against Plaintiff, would show this Honorable Court as follows:

ANSWER

1. The Defendant (herein also "Mr. Slivka") denies each and every allegation of the Amended Complaint which is not specifically admitted herein.
2. Mr. Slivka is without sufficient information upon which to formulate a belief as to the truth or falsehood of the material allegations contained in paragraph 1 Plaintiff's Amended Complaint; and they are, therefore, denied, and strict proof is demanded thereof.
3. The material allegations contained in paragraphs 2, 17 and 18, of Plaintiff's Amended Complaint are admitted.
4. Responding to the material allegations contained in paragraphs 3 and 4 of Plaintiff's Amended Complaint, it is admitted that Exhibit "1" attached to the Amended Complaint speaks for itself, but its completeness, contents, construction, relevance and

enforceability are denied, and strict proof is demanded thereof; and all other material allegations contained in those paragraphs are denied, and strict proof is demanded thereof.

5. Responding to the material allegations contained in paragraphs 5 and 11 of Plaintiff's Amended Complaint, it is admitted that the parties engaged in negotiations; but any and all other material allegations of those paragraphs are denied, and strict proof is demanded thereof.

6. Responding to the material allegations contained in paragraphs 6-9 of Plaintiff's Amended Complaint, it is admitted that the Plaintiff performed some work; and that Mr. Slivka paid for it; but any and all other material allegations of those paragraphs are denied, and strict proof is demanded thereof.

7. Responding to the material allegations contained in paragraphs 10 and 19, of Plaintiff's Amended Complaint, it is admitted that the Plaintiff has demanded additional payment from Mr. Slivka; but any and all other material allegations of that paragraph are denied, and strict proof is demanded thereof.

8. The material allegations of paragraphs 12 and 16 of Plaintiff's Amended Complaint are denied.

9. Responding to the material allegations contained in paragraphs 13-15 of Plaintiff's Amended Complaint, it is admitted that the parties engaged in negotiations; that Plaintiff performed some work; and that Mr. Slivka paid for it; but any and all other material allegations of those paragraphs are denied, and strict proof is demanded thereof.

10. To the extent relevant, the preceding and following paragraphs are re-stated and incorporated hereat by reference in answer to Paragraphs 20, 26, 31, 36 and 41 of Plaintiff's Amended Complaint.

11. Responding to the material allegations contained in paragraphs 21-25 of Plaintiff's Amended Complaint, it is admitted that Exhibit "2" attached to the Amended Complaint speaks for itself; but its completeness, contents, construction, relevance and enforceability are denied, and strict proof is demanded thereof; and all other material allegations contained in those paragraphs are denied, and strict proof is demanded thereof.

12. Responding to the material allegations contained in paragraphs 27-30; 32-35; 37-40; and 42-44 of Plaintiff's Amended Complaint, it is admitted that the parties engaged in negotiations; that Plaintiff performed some work; and that Mr. Slivka paid for it. The remaining material allegations contained in those paragraphs amount to conclusions of law requiring no response from Mr. Slivka; but, to the extent that a response is deemed to be required, all remaining material allegations in those paragraphs are denied, and strict proof is demanded thereof.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE
(Rule 12(b)6)

13. The preceding paragraphs are incorporated here by this reference as if re-stated here verbatim.

14. Plaintiff has failed to state a valid claim for relief against Mr. Slivka; and Plaintiff's Amended Complaint should be dismissed, with prejudice.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE
(Statutes of Limitations and/or Repose)

15. The preceding paragraphs are incorporated here by this reference as if re-stated here verbatim.

16. Pursuant to the contents of its Exhibit "2" to the Amended Complaint Plaintiff has judicially admitted that it ended its work at issue in this matter on or before December 31, 2008.

17. Pursuant to the contents of its Exhibit "2" to the Amended Complaint Plaintiff has judicially admitted that it first filed its Notice of Mechanic's lien on April 13, 2009.

18. Mr. Slivka hereby requests that this Court take judicial notice of the fact that April 13, 2009 is more than 90 days following December 31, 2008.

19. The Court's record of this matter reflects that Plaintiff filed its law suit in this matter on July 20, 2009.

20. Mr. Slivka hereby requests that this Court take judicial notice of the fact that July 20, 2009 is more than 6 months following December 31, 2008.

21. Plaintiff's claims of right under its mechanic's lien, notice of mechanic's lien, and/or mechanic's lien bond are completely barred by Plaintiff's judicially admitted failures to comply with the requirements of the statutes of limitations and/or repose, contained within S.C. Code Ann. Title 29, Chapter 5, including, but not limited to §29-5-90 and §29-5-120, in that Plaintiff failed to file and serve a valid Notice of Mechanic's Lien within 90 days of its last work on the property described therein; and it further failed to file this law suit within 6 months of its last work on that property.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE
(Material Defect in Notice of Mechanic's Lien)

22. The preceding paragraphs are incorporated here by this reference as if re-stated here verbatim.

23. Pursuant to the contents of its Exhibit "2" to the Amended Complaint, Plaintiff's Notice of Mechanic's Lien was filed and attached to real property other than the real property where work was performed by the Plaintiff, in violation of statute; and this amounts to an uncured and incurable material defect voiding Plaintiff's lien and Notice of lien, *ab initio*.

24. Plaintiff's claims of right under its mechanic's lien, notice of mechanic's lien, the original filing of this lawsuit, and/or mechanic's lien bond are completely barred by Plaintiff's failures to comply with the requirements of the Mechanic's Lien statutes contained in S.C. Code Ann. Title 29, Chapter 5, including, but not limited to §29-5-90; and Mr. Slivka should be awarded all his costs and fees incurred in defending this matter pursuant to the same statutes.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE
(Frivolous Lien)

25. The preceding paragraphs are incorporated here by this reference as if re-stated here verbatim.

26. All of the facts alleged above, together with the contents of Plaintiff's Exhibit "2" to the Amended Complaint, demonstrate that Plaintiff filed a frivolous lien, as contemplated by S.C. Code Ann. Title 29, Chapter 5, including, but not limited to §29-5-15.

27. As a result of all of the above, Plaintiff's frivolous lien claims should be dismissed with prejudice, and all costs and attorneys fees should be awarded in favor of the Defendant, pursuant to S.C. Code Ann. Title 29, Chapter 5, including, but not limited to §29-5-20.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE
(Payment)

28. The preceding paragraphs are incorporated here by this reference as if re-stated here verbatim.

29. Plaintiff's Amended Complaint, at its paragraphs 5 and 6, judicially admits that Mr. Slivka paid the Plaintiff \$76,210.00; and this payment is pled as an affirmative defense and complete bar to some or all of the claims contained in Plaintiff's Amended Complaint.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE
(Waiver)

30. The preceding paragraphs are incorporated here by this reference as if re-stated here verbatim.

31. Plaintiff is bound by its admissions as follows:

(a) Plaintiff's Amended Complaint, at its paragraph 3, judicially admits that its Exhibit "1" is a "Proposal" rather than a "contract";

(b) Its paragraph 4 judicially admits that Exhibit "1" is an "estimate", rather than a "contract";

(c) Its paragraph 5 judicially admits that Mr. Slivka was permitted to make verbal changes to its Exhibit "1", including the material terms of amount of payment; scope of work; and time for payment;

(d) Its paragraphs 6, 7, 8 and 9 judicially admit that Plaintiff began work and continued to perform work when Mr. Slivka was allegedly in breach of the payment term; and,

(e) One or more of these judicially admitted facts constitute waiver of any and all rights of the Plaintiff to the relief it seeks under any and all of its causes of action.

32. Waiver is pled as an affirmative defense and complete bar to the Plaintiffs' Amended Complaint.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE
(Modification/Ratification)

33. The preceding paragraphs are incorporated here by this reference as if re-stated here verbatim.

34. Plaintiff's Amended Complaint, at its paragraphs 3-9, judicially admits that the terms stated in its "Proposal" were modified by acts and/or omissions of one or more of the parties, and the modification was assented to and ratified by acts of the Plaintiff.

35. Modification and ratification are pled as an affirmative defense and complete bar to any and all rights of the Plaintiff to the relief it seeks under any and all of its causes of action.

AS AND FOR A EIGHTH AFFIRMATIVE DEFENSE
(Statute of Frauds, S.C.Code Ann. § 32-3-10).

36. The preceding paragraphs are incorporated here by this reference as if re-stated here verbatim.

37. Plaintiff's Amended Complaint, at its paragraph 6, judicially admits that work allegedly contracted for began on January 3, 2007; its paragraph 12 judicially admits that it last worked on the same project on January 13, 2009 (this date is disputed by Mr. Slivka and contradicted by Plaintiff's Exhibit "2"; but it is alleged here that its allegation in paragraph 12 is a binding judicial admission by the Plaintiff).

38. Plaintiff's pleadings demonstrate that Plaintiff's causes of action based upon a "contract" (at its paragraph 27) or "agreement" (at its paragraph 32) are completely barred by the Statute of Frauds, S.C.Code Ann. § 32-3-10(5), because the contract was not to be performed within the space of one year; and no written agreement was signed by Mr. Slivka.

39. The Statute of Frauds is pled as an affirmative defense and complete bar to the Plaintiff's Amended Complaint.

AS AND FOR A FIRST COUNTERCLAIM
(Slander of Title)

40. The preceding paragraphs are incorporated here by this reference as if re-stated here verbatim.

41. As is alleged throughout this responsive pleading, the Plaintiff published a false Notice of Mechanic's lien, with false and defective attachments in support thereof, on April 13, 2009, as to real property owned by Mr. Slivka, upon which Plaintiff did not perform work. (Plaintiff's Exhibit "2" and attachments thereto are incorporated herein by this reference.)

42. Plaintiff's false publication was made knowingly, intentionally and with malice.

43. Plaintiff's false publication was compounded by the filing of this law suit, in furtherance of additional knowing and intentional false statements claiming legitimacy of the Notice of Mechanic's Lien.

44. Plaintiff's false publication(s) was derogatory to plaintiff's title to the property to which it attached its Notice of Mechanic's Lien.

45. As a direct and proximate result of Plaintiff's false publication(s), Plaintiff suffered special damages as a result of diminished value of Mr. Slivka's property in the eyes of one or more third parties; and, as a result of all of the above, Mr. Slivka is entitled to recover special and punitive damages, together with all his attorneys fees and costs herein, from the Plaintiff.

AS AND FOR A SECOND COUNTERCLAIM
(Violation of the Frivolous Claims Sanctions Act)
(S.C.Code Ann. § 15-36-10)

46. The preceding paragraphs are incorporated here by this reference as if re-stated here verbatim.

47. Plaintiff's Complaint and Amended Complaint were signed; and this litigation has been maintained and continued, in violation of the Frivolous Claims Sanctions Act; and as a result, Mr. Slivka is entitled to sanctions and all his costs and attorneys fees incurred as a result of the Act violations by the Plaintiff with regard to this litigation.

AS AND FOR A THIRD COUNTERCLAIM
(Tortious Interference with Contractual Relationships with Third Parties Dependent Upon Performance by Plaintiff)

48. The preceding paragraphs are incorporated here by this reference as if re-stated here verbatim.

49. At all times relevant to this matter, the Plaintiff knew of the existence of one or more valid contracts between Mr. Slivka and one or more third parties, engaged in various, mutually dependent and time sensitive aspects of a substantial construction and landscaping project on real property owned by Mr. Slivka.

50. At one or more times relevant to this matter, the Plaintiff intentionally or recklessly, in utter disregard for the rights of the Plaintiff, failed to perform work as it had promised, upon which work, Plaintiff knew, other contracts between Mr. Slivka and third parties depended.

51. As a result of Plaintiff's failure to perform its work as it had promised, Plaintiff intentionally or recklessly, in utter disregard for the rights of the Plaintiff, procured the breach of, and caused the breach of, one or more of these contracts, without justification therefor.

52. As a proximate result of the acts and omissions of the Plaintiff, in failing to perform its work as it had promised, the overall project was delayed, additional costs and expenses were incurred; and Mr. Slivka suffered damages, in amounts to be proved at the trial of this matter, for which Plaintiff should be held liable.

AS AND FOR A FOURTH COUNTERCLAIM
(Tortious Interference with Contractual Relationships with Third Parties Resulting From Defective Notice of Mechanic's Lien)

53. The preceding paragraphs are incorporated here by this reference as if re-stated here verbatim.

54. At all times relevant to this matter, the Plaintiff knew, or should have known, that it did not perform work on the tract of land to which it falsely attached its Notice of Mechanic's Lien.

55. At all times relevant to this matter, Plaintiff knew or should have known of the existence of one or more valid contracts between Mr. Slivka and one or more third parties, in the form of mortgages or other secured interests in the tract of land to which Plaintiff falsely attached its Notice of Mechanic's Lien.

56. The false filing, on April 13, 2009, of Plaintiff's Notice of Mechanic's Lien, intentionally, or recklessly, in utter disregard for the rights of the Plaintiff, procured the breach of, and caused the breach of, one or more of these contracts, without justification therefor.

57. As a proximate result of the acts and omissions of the Plaintiff, in falsely attaching its Notice of Lien to property on which it had not performed work, Mr. Slivka was deprived of his contractual rights to advances of credit, secured by a mortgage on the property to which the Notice of Mechanic's Lien attached; and this deprivation is, in and of itself, an injury and damage; and, he suffered additional resulting damages, in amounts to be proved at the trial of this matter, for which Plaintiff should be held liable.

WHEREFORE, having fully answered the Plaintiff's Amended Complaint, and having Counterclaimed against the Plaintiff, Mr. Slivka prays for the following relief:

1. That Plaintiff's Amended Complaint be dismissed, with prejudice;
2. That a judgment be entered in favor of Mr. Slivka, awarding him damages on each of his four Counterclaims: Slander of Title; Violation of the Frivolous Claims Sanctions Act; Tortious Interference with Contractual Relationships with Third Parties Dependent Upon

Performance by Plaintiff; and Tortious Interference with Contractual Relationships with Third Parties Resulting From Defective Notice of Mechanic's Lien;

3. That punitive damages be awarded to Mr. Slivka on his Counterclaims and affirmative defenses, as allowed by law;

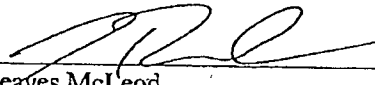
4. That all costs and attorneys fees be awarded to Mr. Slivka, as allowed by law;

5. That pre- and post-judgment interest be applied to any judgment in Mr. Slivka's favor, as allowed by law;

6. That an Order issue from this Court, directing the Clerk of Court to release and return to Mr. Slivka his undertaking or cash bond, in the amount of \$264,112.71, plus accrued interest;

7. That this Court award all other, different or additional relief to Mr. Slivka as it deems to be just, proper and equitable in this matter.

MCLEOD, FRASER & CONE

By: 

J. Reaves McLeod
111 E. Washington Street
Post Office Drawer 230
Walterboro, SC 29488
(843)549-2516
Attorneys for Defendant, Gene R. Slivka

Walterboro, South Carolina

May 18, 2010.

1 STATE OF SOUTH CAROLINA

2 COUNTY OF COLLETON

CIRCUIT COURT
2009-CP-15-00595

3
4 SPRIGGS GROUP, PC,
Plaintiff,

5 -vs-

TRANSCRIPT OF RECORD

6 GENE R. SLIVKA,
7 Defendant.

VOLUME ONE

8
9 Heard on Monday, July 18, 2011

10 & Tuesday, July 19, 2011

11 & Wednesday, July 20, 2011

12 in

13 Walterboro, South Carolina

14 BEFORE:

15 THE HONORABLE WILLIAM H. SEALS, JR.

16 AND A JURY

17 APPEARANCES:

18 Counsel on Behalf of the Plaintiff:

19 A. Bright Ariail, Esq.

20 James A. Bruorton, Esq.

21 Counsel on Behalf of the Defendant:

22 Robert T. Lyles, Jr., Esq.

23 Cheri L. Young, RPR
Circuit Court Reporter
P O Box 1154
24 Aiken, SC 29802-1154
25

1 half of that. Mr. Hughes fixed the wall and then sent him
2 a bill for \$130,000.

3 That has no relevance at all to this case and so to
4 the extent that is the reason for these witnesses, we
5 would strongly object to their being allowed to testify.

6 THE COURT: Any reply?

7 MR. BRUORTON: Yes, Your Honor. I passed up a brief
8 to you earlier today that I believe sets forth all the
9 reasons on why we're entitled to get this testimony in.

10 The evidence is admissible under Rule 401, 404-B, and
11 under Rule 406. Part of our claims in this matter is a
12 breach of contract accompanied by fraudulent act which
13 requires the proof of three things.

14 Number one is breach of contract. Number two is
15 fraudulent intent relating to the breach. And number
16 three is a fraudulent act accompanying the breach. And
17 intent normally is proven by circumstances surrounding the
18 breach.

19 And fraudulent intent -- and in Campus Sweater versus
20 MB Conn case, that's a district court case in the State of
21 South Carolina from 1979. It states that the fraudulent
22 intent is an issue of character allowing it to be
23 supported by the use of similar bad acts under 404-B.

24 A fraudulent act under Harper versus Ethridge which
25 is a 1986 South Carolina case, 29 South Carolina 112, a

1 counterclaim for Mr. Hughes for about a million dollars
2 because as it turns out Mr. Hughes was recommended to
3 Mr. Slivka by Mr. Spriggs, was not licensed in the State
4 of South Carolina to do any business, and was practicing
5 in engineering without a license.

6 So what does his testimony have to do with whether or
7 not there's a breach of contract in this case?

8 The Superior Heating and Air representative, they
9 were also in litigation and they recently settled that
10 case. So there's no common scheme, there's no common
11 evidence, that this evidence is completely irrelevant and
12 has no probative value whatsoever.

13 THE COURT: Go ahead and move on to your next
14 motion.

15 MR. LYLES: Yes, sir. The next motion that we have,
16 this is the, I think, what's-good-for-the-goose-is-good-
17 for-the-gander motion.

18 Last week we received a number of documents from
19 Mr. Spriggs which has not been previously produced. And
20 we have moved -- those were documents identified as
21 Spriggs 04-337 through 04-350. And then Friday we got
22 documents 04-351 through 04-439. This is all contained in
23 our motion.

24 I will candidly tell the Court that those documents
25 appear to be a number of invoices from vendors, presumably

1 them and see if I have them down right. The motion to
2 strike the offer of settlement made by the Plaintiff. I'm
3 going to deny that motion.

4 The next motion was in reference 14-7-1320 to allow
5 the jury to view the premises. I'm going to deny that
6 motion as well. This is a contract case and I think it
7 would be prejudicial to have them go out there and see a
8 wealthy plantation owner and all of that good stuff. And
9 I think the Defendant is very, very wealthy and they can
10 go back there and try to base some opinion on that. I
11 think they should have everything they need in front of
12 them in this courtroom for this particular trial.

13 Excluding Cathleen Slivka. I'm going to grant that
14 motion.

15 Also there was the exclusion of statute of frauds.
16 29-9-15, frivolous claims act. That's granted because
17 everybody's consented to that.

18 The Plaintiff's fourth motion has been resolved as we
19 just discussed.

20 All right. The defendant's motion in limine to
21 exclude the three witnesses. I'm going to grant that.
22 And I'm going to find that even though their testimony may
23 be relevant, I find that it substantially is prejudicial.
24 And that their testimony would start getting into other
25 disputes, other cases, other facts not necessarily

GENE RAYMOND SLIVKA - DIRECT

1 Q. And you paid them that money?

2 A. Yes, ma'am.

3 Q. And you paid that in February of 2007; correct?

4 A. Yes, ma'am. That's right.

5 Q. And you paid that prior to receiving an invoice;
6 didn't you?

7 A. I asked for an invoice at the time. But, yes, I paid
8 it prior to receiving the invoice.

9 Q. Okay. And you admit that you owe them the additional
10 76,210; right?

11 A. I admit that I owe them 76,210 as the remainder of
12 that contract, but less the \$20,000 that I claim in
13 damages for structural issues, and less the \$50,000 that I
14 claim for having had my \$265,000 tied up for three years.
15 So, less those, yes, I --

16 Q. You've made no demand for these so-called structural
17 issues in the amount of \$20,000. There's nothing that's
18 been submitted to Mr. Spriggs --

19 A. During my deposition you asked me about those things.
20 And, absolutely, I submitted them to you along with the
21 invoices for the cost of having that work done.

22 Q. So your testimony is that you have submitted invoices
23 specifically relating to structural problems at your home?

24 A. Yes, ma'am. And I believe we did it the day you took
25 my deposition. You asked me about them. I talked to you

GENE RAYMOND SLIVKA - DIRECT

1 these invoices? Chaffin Construction?

2 A. Chaffin Construction.

3 Q. Is there anybody else?

4 A. Yes, ma'am. The other one would be the masonry
5 company, Randolph's his name. I can't think of the name
6 of the company at the moment, but masonry, I think it's
7 Low Country Masonry.

8 Q. So you admit that you owe a portion of the \$76,210 to
9 the Spriggs Group; right?

10 A. Yes, ma'am.

11 Q. And you have not paid them that today?

12 A. I placed that money in escrow in the courts.

13 Q. And they've had to actually sue you and spend money
14 suing you to go after that money; right?

15 A. I don't know how to answer that question --

16 Q. In addition to --

17 A. -- I mean --

18 Q. -- the contract services that are in this document,
19 there was also a requirement that you pay them an hourly
20 basis for construction administration services; right?

21 A. Yes, ma'am. That's right.

22 Q. And you agreed to that; right?

23 A. Yes, ma'am. I did.

24 Q. And they have performed construction administration
25 services at your request; haven't they?

GENE RAYMOND SLIVKA - DIRECT

1 Q. You called them courtesy things. He's not supposed to
2 get paid for doing that?

3 A. Well, it wasn't something that I asked him to do.
4 It's something that he offered to do. I think it was a
5 nice thing to do for somebody who's giving you \$150,000.

6 Q. Which you haven't done; have you?

7 A. Yes, ma'am. I've given him \$76,200 and I have another
8 \$265,000 sitting over in the courthouse, though. So I've
9 paid my money, thank you.

10 Q. Earlier you mentioned inspections on site and
11 reviewing work in place. Those are actually covered by
12 other paragraphs in this agreement; right? They're not
13 covered by the construction phase service paragraph?

14 A. Yes, ma'am.

15 Q. And you also agreed to pay the Spriggs Group in the
16 event that once they had the drawings done, if there were
17 changes that you requested, you agreed to pay for those
18 changes; right?

19 A. Yes, ma'am. That's right.

20 Q. And that, again, was supposed to be done on an hourly
21 basis?

22 A. Yes, ma'am. That's right.

23 Q. And you asked them to design a garden stair for you;
24 right?

25 A. Yes, ma'am. I did.

GENE RAYMOND SLIVKA - DIRECT

1 Q. And that was over and above the original scope of work
2 in the original contract?

3 A. Not only was it over and above the original scope, I
4 specifically went to him because I knew it was out of the
5 scope of the work. And when I knew it was out of the
6 scope of the work, I went to him and said, like I do with
7 everybody and everything I do in life, how much is it
8 going to cost to do this?

9 When you are -- I think anybody, I think anybody today
10 in our society asks up front, how much is it going to
11 cost? If you are rich, you ask it instantly. You
12 instantly ask it because if you don't, the bill that was
13 going to be a \$100 is \$200 just because they think that's
14 what the traffic will bear.

15 So I ask instantly on anything that I think's going to
16 cost me extra money. So I went to him and I said: How
17 much will this cost? He told me: I will bill it to you
18 by the hour, which would have been the \$105. When the
19 work was done I asked how many hours had been put in on
20 it. And that is what the bill reflects. And that's
21 fine. And I'm happy to pay that \$787 which also I think
22 includes the two hours for the construction.

23 Q. No, actually you agreed to pay \$825 for the garden
24 stairs?

25 A. 825? Okay. Thank you.

GENE RAYMOND SLIVKA - DIRECT

1 Q. And you haven't paid that; have you?

2 A. I have \$265,000 sitting in the court.

3 Q. But you have not paid it to the Spriggs Group; have
4 you?

5 A. But there's a lawsuit going on. No. How can it be
6 released until this gets resolved?

7 Q. And you mentioned the two-hour construction meeting,
8 and you agreed to pay him for that; right?

9 A. Yes, ma'am. And I will add that that is the only time
10 in two years where he ever says to me something about
11 extra charge. In that case he says, you know what would
12 be a good idea is before we start building on this house
13 that you get all of the contractors together, the
14 plumbers, the electricians, the air-conditioning,
15 everybody, in a construction meeting.

16 But, I am going to have to charge you for that. I
17 said, well, that will be fine. Let's go ahead and do it.
18 It was a two-hour meeting. Money well spent. I'm
19 appreciative of the suggestion.

20 Q. And that meeting was attended by both Mr. Spriggs and
21 Mr. Bozeman; right?

22 A. Yes, ma'am.

23 Q. And you have not paid them for those charges; have
24 you?

25 A. Once again, I've got \$265,000 sitting over there.

GENE RAYMOND SLIVKA - DIRECT

1 Don't make it sound like I'm not willing to pay these
2 people. Clearly willing to pay these people. That's why
3 I've got the money in the court.

4 Q. But you haven't paid the Spriggs Group; have you? And
5 they're the ones that performed the work.

6 A. Ma'am, we're in a lawsuit. I don't know how else to
7 do this.

8 Q. Why didn't you pay them before the lawsuit?

9 A. I offered to pay them. He sends me the letter in
10 February for the final bill. I get this thing. I'm blown
11 away by it because I'm -- I'll tell you, I'm so naive. I
12 thought he wasn't going to bill me. I wanted this job
13 done in six months. And it drags out two years and
14 they've done a horrible job.

15 I pull unfinished plans in December of that year,
16 still not completed. The insides of the buildings have
17 never been done. The interior elevations have never been
18 done. I'm thinking, well, you know, maybe he feels so bad
19 about this thing that he's just not going to charge me the
20 balance of this. That's how stupid I am.

21 So anyway, February I get the bill from him. It's not
22 for \$76,000. It's for \$163,000 plus the additional things
23 on the other invoices.

24 I immediately call him up. I tell him, Ken, this is
25 not what we agreed to. You, you send me a corrected

GENE RAYMOND SLIVKA - DIRECT

1 invoice and I'll pay it. He doesn't send me a corrected
2 invoice. Instead, he files a lawsuit.

3 So what am I to do?

4 Q. You mentioned picking up what you call incomplete
5 drawings in December of 2008, but you already had a permit
6 to build the house; didn't you?

7 A. They were so far behind and this creates cost problems
8 and all kinds of things throughout the entire job. If
9 they had had these drawings ready in six months, which is
10 what I anticipated from them, none of this kind of stuff
11 would have occurred.

12 When I pull that permit in August, we're taking to the
13 county an incomplete, inaccurate set -- I won't use the
14 word incomplete, an inaccurate set of drawings that they
15 still don't reflect where we're going because they're not
16 done. But it was sufficient to get the permit and at
17 least begin to get the work moving along.

18 Q. Colleton County thought they were done enough to issue
19 a permit; right?

20 A. Certainly the drawings were complete enough to issue a
21 permit, but they weren't complete enough to construct
22 properly what was to be constructed.

23 Q. And that's because you made a bunch of changes to the
24 design; correct?

25 A. There were no substantive changes in those drawings

GENE RAYMOND SLIVKA - DIRECT

1 development stage. I understand that the plans were
2 submitted but what I'm telling you again is that those
3 plans were not complete, not accurate, and were just
4 submitted to get the project moving.

5 So they were working on design development after the
6 permit date.

7 Q. You admit that you've received invoices one through
8 seven from the Spriggs Group; right?

9 A. Yes, ma'am. I do.

10 Q. Mr. Slivka, I'm going to ask you to identify this
11 document.

12 A. These -- this is Ken's letter of February the 9th of
13 '09, and reflects the invoices. Is that a good
14 definition?

15 Q. Okay. And tell me which numbered invoices are
16 attached to that letter actually.

17 A. Invoice -- use my last number, like one?

18 Q. Sure.

19 A. Invoice one, two, three, four, and five.

20 Q. And you received that letter in February of '09?

21 A. Yes, ma'am.

22 MS. ARIAIL: I'd like to enter Plaintiff's Eight.

23 THE COURT: Any objections?

24 MR. LYLES: No objection.

25 THE COURT: Plaintiff's Number Eight into evidence

GENE RAYMOND SLIVKA - DIRECT

1 without objection.

2 (Thereupon, Plaintiff's Exhibit No. 8, 11-09-09
3 letter, was received into evidence.)

4 BY MS. ARIAIL:

5 Q. I'm going to show you another document and ask you to
6 identify that for me.

7 A. Document number six.

8 Q. Document number six?

9 A. Invoice number six.

10 Q. Invoice number six. And what's the date on that
11 invoice?

12 A. This is May of 2009. May 21st, 2009.

13 Q. And did you receive that invoice?

14 A. Yes, I did.

15 Q. All right. And I pre-marked that as Exhibit Eight-A;
16 is that correct?

17 A. Yes, ma'am. It is.

18 Q. All right. And another one. Tell me what that is.

19 A. This one is dated November 16th of 2009, invoice
20 number seven, Exhibit Eight-B.

21 Q. And did you receive that invoice?

22 A. I did.

23 MS. ARIAIL: All right. I'd like to admit Exhibit
24 Eight-A, and B, also into evidence.

25 THE COURT: Any objections?

GENE RAYMOND SLIVKA - DIRECT

1 MR. LYLES: None.

2 THE COURT: Eight-A, and Eight-B are into evidence
3 without objection.

4 (Thereupon, Plaintiff's Exhibit No. 8-A, invoice
5 dated 05-21-09, and No. 8-B, invoice dated 11-16-09, were
6 received into evidence.)

7 BY MS. ARIAIL:

8 Q. Invoice one is for the original \$76,000 which you paid
9 in; correct?

10 A. Yes, ma'am. It is.

11 Q. And with the exception of that invoice number one,
12 you've made no payment to the Spriggs Group towards any of
13 these other invoices; right?

14 A. Couldn't. He filed a lawsuit and I immediately put
15 the \$265,000 in court.

16 Q. You allege that you terminated the Spriggs Group on
17 December 12th of 2008; right?

18 A. Yes, ma'am.

19 Q. And as of that date the conservatory, the stables, the
20 garages, the potting shed, and the grotto had all been
21 built; hadn't they?

22 A. Prior to that date?

23 Q. Yes.

24 A. No, the grotto, the grotto had not yet been built.

25 Q. The other buildings had been built?

GENE RAYMOND SLIVKA - DIRECT

1 A. Yes, ma'am.

2 Q. And as of that date, December 12, 2008, the house
3 foundation had been built also; correct?

4 A. Yes, ma'am.

5 Q. And as of that date, you had a full set of drawings
6 for the original -- for the main house, right, which had
7 been permitted?

8 A. I had everything except the correct mechanical,
9 electrical, plumbing. And I had no interior drawings or
10 interior elevations to complete the inside of the house.
11 So I had the external drawings and structural drawings.

12 Q. Your testimony is that there were no architectural
13 drawings for the main house?

14 A. My testimony is that there were no architectural
15 elevations and drawings for the interior of the house,
16 only for the exterior of the house.

17 Q. On December 12th of 2008?

18 A. Yes, ma'am.

19 Q. And the mechanical and the electrical drawings, they
20 actually were complete at the date the permit was issued
21 and the things that were added in the fall of 2008 were
22 all at your request; correct?

23 A. They were never correct when the plan -- when the
24 plans were submitted to the County for permitting in
25 August, the mechanical, electrical and plumbing were not

GENE RAYMOND SLIVKA - DIRECT

1 that are made, but they are corrections which reflect the
2 original plan.

3 Q. Now you actually met with Mr. Spriggs after a social
4 event and asked for a litany of changes to the mechanical,
5 electrical and plumbing in November of '08; didn't you?

6 A. Well, I don't remember the social event but, excuse
7 me, I certainly remember he and I sitting down and going
8 over the inaccuracies in the plan that he had so that they
9 reflected what it was that we originally needed and
10 wanted. So certainly I remember the meeting with him. I
11 can't tell you that sequence.

12 Q. I show you another document. It's been pre-marked as
13 Plaintiff's Exhibit Nine. Identify that document for me.

14 A. This is a demand letter from your law firm.

15 Q. And what's the date on that letter?

16 A. I think that's right. And the date of it is March
17 15th of 2010.

18 Q. And did you receive that letter on or about that same
19 time frame?

20 A. Yes, ma'am.

21 Q. Okay. And attached to that document is invoices one
22 through seven?

23 A. Yes, ma'am.

24 MS. ARIAIL: I'd like to submit Plaintiff's Exhibit
25 Nine.

GENE RAYMOND SLIVKA - DIRECT

1 THE COURT: Any objections?

2 MR. LYLES: No objections.

3 THE COURT: Plaintiff's Number Nine into evidence
4 without objection.

5 (Thereupon, Plaintiff's Exhibit No. 9, 03-15-10
6 letter, was received into evidence.)

7 BY MS. ARIAIL:

8 Q. All right. You said you received this letter in the
9 time frame that it was mailed, March of 2010. This letter
10 asks that you make an investigation into the moneys that
11 you owe, that you agree that you owe the Spriggs Group;
12 doesn't it?

13 A. Yes, ma'am.

14 Q. And it tells you that you've got 45 days to make that
15 investigation; right?

16 A. Yes, ma'am.

17 Q. And you didn't make an investigation; did you?

18 A. All right. You asked me this question in my
19 deposition. And, you know, I didn't understand what you
20 meant by the word investigation. It's such an unusual
21 word to me.

22 Anyway, when you're asking somebody to look at money
23 or talking about money, did you make a review of the
24 invoices? Did you look to see if these were legitimate
25 invoices? Did you consider how they should be paid, or if

GENE RAYMOND SLIVKA - DIRECT

1 they should be paid?

2 In that sense, if that's what you meant by the word
3 investigation, I'm telling you, yes, I absolutely
4 investigated. Not only did I investigate them but I
5 already had an attorney. There was already a lawsuit
6 filed and we had an attorney representing us. So surely
7 they were investigated.

8 And had already put \$265,000 in the court.

9 Q. So now your testimony is that you did investigate to
10 determine how much money that you owed the Spriggs Group
11 at that time?

12 A. I investigated that when I received his first
13 invoice. And that's why I immediately went back to him
14 and said, whoa, this isn't what we agreed to. I'm not
15 paying you this additional money. You give me an invoice
16 for the \$76,000 I owe you, and I'm going to pay that.

17 Q. This letter --

18 A. So I investigated early on.

19 Q. This letter says, demand for payment of moneys due is
20 hereby made to pursuant to South Carolina Code Annotated
21 27-1-15, which requires the person upon whom the claim is
22 made to make a reasonable and fair investigation of the
23 merits of the claims and to pay it or whatever portion of
24 it is determined is valid within 45 days after the date of
25 the mailing of this demand.

GENE RAYMOND SLIVKA - DIRECT

1 MR. LYLES: No objection.

2 THE COURT: Plaintiff's 10 and 11 into evidence
3 without objection.

4 (Thereupon, Plaintiff's Exhibit No. 10, mechanic's
5 lien, and Plaintiff's Exhibit No. 11, bond to discharge
6 mechanic's lien, were received into evidence.)

7 BY MS. ARIAIL:

8 Q. There was nothing preventing you from paying the
9 amount that you owe the Spriggs Group when you received
10 the invoices; were there?

11 A. No. Originally when I get the invoices in February?

12 Q. Right. There was nothing preventing you from paying
13 what you agreed that you owed them at that time; was
14 there?

15 A. Yes, there was, because no sooner do I receive those
16 invoices, I call him and tell him that I will pay if he'll
17 send me a corrected invoice. He immediately files a
18 lawsuit. So there's no opportunity.

19 Q. The lawsuit was filed in the Summer of 2009. And the
20 invoices, I believe, are dated February; right?

21 A. I -- you may be right, but I think that it's sooner
22 than that. I believe that the lawsuit was filed maybe in
23 March.

24 Q. No, actually the mechanic's lien was filed in April;
25 right? We just looked at that.

GENE RAYMOND SLIVKA - DIRECT

1 A. Well, you had to file a lawsuit before you filed a
2 mechanic's lien; don't you? I'm not an attorney here,
3 but...

4 Q. No. Actually the mechanic's lien was filed on April
5 13th.

6 A. All right. So he immediately files the mechanic's
7 lien, and then he files a lawsuit after that. Is that how
8 it goes?

9 Q. Actually, actually the invoices are dated February
10 9th --

11 A. Right.

12 Q. -- of 2009. It's your testimony that you couldn't pay
13 him what you owed him based on those invoices because the
14 mechanic's lien was filed in April of '09?

15 A. Yeah, that's exactly right. I asked him for a
16 corrected invoice. He could have sent one which I would
17 have received in March. Instead he files a mechanic's
18 lien and then I subsequently put the \$265,000 in the
19 court. How else could it have been done?

20 Q. But you didn't need a corrected invoice; did you?
21 Because originally you paid him for the first 76,000
22 without an invoice.

23 A. Why would you pay something when you don't have an
24 agreement on it and a correct amount? Sure. I wanted a
25 correct invoice. Absolutely I wanted a correct invoice.

GENE RAYMOND SLIVKA - DIRECT

1 Why not?

2 Q. You didn't require an invoice for the first payment;
3 did you?

4 A. I absolutely did. I asked for one and I got one.

5 Q. After the fact.

6 A. Unfortunately, I -- that's your client, not me.

7 Q. Please let --

8 THE COURT: All right. Let's don't talk over
9 everybody.

10 MS. ARIAIL: Please let me finish the question then
11 say your answer.

12 THE COURT: You say your question --

13 THE WITNESS: I'm sorry. My blood pressure is
14 getting up to here (indicating).

15 THE COURT: I understand. Pause for a second and
16 then you answer. And then you pause and then she'll ask
17 another.

18 MS. ARIAIL: Thank you, Your Honor.

19 Q. The original \$76,000 that was paid at the start of the
20 agreement was paid without an invoice; wasn't it?

21 A. Yes, it was.

22 Q. Thank you.

23 A. And an invoice was requested.

24 MS. ARIAIL: Thank you. That's all I have.

25 THE COURT: Cross?

GENE RAYMOND SLIVKA - CROSS

1 Q. Mr. Slivka, did the mechanic's lien have the effect of
2 impacting the title to your property when they filed it?

3 A. Of course it did.

4 Q. And in response to that, did you post a cash bond
5 pursuant to the mechanic's lien statute?

6 A. Yes, sir.

7 Q. And the amount of that cash bond was \$265,000?

8 A. Yes, sir.

9 Q. And does it cost you to have that money sitting in the
10 court?

11 A. Absolutely. I mean, I have to pay the bank every
12 month on this \$265,000. I had to borrow the money, so I
13 pay the bank interest on this money every month and have
14 for three years, and that's like \$50,000.

15 Q. And that was in an effort to get that cloud off the
16 title to your property?

17 A. Of course. And particularly because this -- it'd been
18 different if they had just even filed a mechanic's lien on
19 the house and the house is on a five-acre tract. If they
20 had just filed a mechanic's lien on the house, that might
21 have been one thing. But to file it on every piece of
22 property that I own, some of it three miles from the
23 house, I mean, it's just crazy.

24 Q. Now I'm going to show you what's been marked as
25 Exhibit 10, Plaintiff's Exhibit 10. See if you recognize

GENE RAYMOND SLIVKA - CROSS

1 Q. Did you have to pay your attorney?

2 A. Tens of thousands of dollars.

3 Q. Are you continuing to pay attorneys?

4 A. Unfortunately.

5 Q. Let me show you what I have marked or what is
6 previously marked as Plaintiff's Exhibit 8-A. Do you
7 recognize that?

8 A. This is probably the most extraordinary of all the
9 invoices, yes.

10 Q. You do recognize it?

11 A. Oh, absolutely.

12 Q. Tell the jury what that is.

13 A. This is an invoice for \$437.50.

14 Q. What's the date of the invoice?

15 A. And this invoice is dated May 21st of 2009.

16 Q. Was that after you received the mechanic's lien?

17 A. It was after the mechanic's lien. We're already in a
18 lawsuit. We're in a lawsuit. And we're in a lawsuit
19 about him charging me for stuff and not clearing it with
20 me. He's trying to charge me -- I did this so I'm going
21 to charge you for this, and never discussed it ahead of
22 time.

23 This -- I had some -- I had an appraisal done on the
24 house for the bank. And the appraisal company,
25 unbeknownst to me, calls Ken Spriggs' office and they ask

GENE RAYMOND SLIVKA - CROSS

1 him for something. I don't -- I guess to generate a small
2 floor plan of the house or something.

3 And, he goes -- he's in a lawsuit with me. He's not
4 getting paid for what he did. And he's in a lawsuit. And
5 he goes ahead and he does the work for this woman and
6 sends me a bill for \$437. It's the most incredible thing
7 I ever heard of. Would anybody ever do that?

8 Q. Was that before or after you had to bond off the lien
9 that he had filed?

10 A. This would be after. I've already put \$265,000 in the
11 court. We've got attorneys. We're fighting this thing
12 out and he goes out and for a woman -- he doesn't even
13 know this woman, and goes out and does, just because she
14 calls him up on phone, does this work and then bills me
15 for it.

16 Q. Does invoice Eight-A reflect any time billed or any
17 work performed in January of '09?

18 A. No.

19 Q. Let me show you what's been marked as Exhibit 8-B.
20 And what is that?

21 A. This is invoice number seven. This is the bill for
22 \$1,000 that he sends out in November of 2009. This is now
23 for work in January. This is the one I'm telling you
24 where I think that it's a bogus bill.

25 He decides I'm not going to meet my mechanic's lien

GENE RAYMOND SLIVKA - CROSS

1 Q. Was there any way for you to determine, based on
2 invoice number two, what he was contending were additional
3 services and whether or not you believed those were
4 justified, correct, proper at all?

5 A. No, because he comes up with a total so he'll say, the
6 architectural services for the main house are \$105,000.
7 But that's not what we agreed to. We agreed to \$150,000
8 for all of the buildings. He's saying just for house it's
9 105,000. So there's no way for me to know how he comes up
10 with these numbers or why.

11 Q. At the time you received the letter from the Rosen
12 Firm, May 15th, 2010 letter, had your lawyer been engaged
13 in what we call discovery?

14 A. Yes.

15 Q. To you, what does that mean, discovery?

16 A. Discovery means trying to find out the facts of the
17 case.

18 Q. And so is that an investigation?

19 A. Yes, that word. An investigation, yes.

20 Q. If it is determined by this Court and the jury that
21 the title to your property was slandered and that you are
22 entitled to recover damages against Mr. Spriggs, and you
23 are entitled to recover your attorney's fees and any costs
24 that might be overlooked, do you think then that anything
25 you would be awarded should be offset by anything

GENE RAYMOND SLIVKA - REDIRECT

1 based on the program outlined in the 5 October 2006
2 letter, it refers to the main house and it shows the total
3 gross heated space. What was that square footage?

4 A. 13,056.

5 Q. Okay. And then it shows the square footage for the
6 basement, too; doesn't it?

7 A. Yes, ma'am.

8 Q. And, what is that amount?

9 A. 7168.

10 Q. And that's actually an entire floor depicted here --

11 A. Yes, ma'am. That's right.

12 Q. -- on Exhibit Three; right?

13 A. Yes, ma'am.

14 Q. So that square footage should be added to the square
15 footage of the house; correct?

16 A. It can. Sure.

17 Q. And the house is complete; right?

18 A. Yes. Pretty much. The interior lacks stuff, but it's
19 pretty much complete.

20 Q. And the Spriggs Group was the only architectural firm
21 that provided design services to you for construction of
22 that house; right?

23 A. Yes, ma'am.

24 Q. And you don't have an architectural background; do
25 you?

GENE RAYMOND SLIVKA - REDIRECT

1 A. You're hurting my feelings here. No.

2 Q. And you don't know what the technical requirements are
3 to get a permit for a house; right?

4 A. No.

5 Q. And you couldn't have gotten a permit from the
6 sketches that you provided and that we've marked as
7 Exhibit Six; right?

8 A. No.

9 Q. I'm going to ask you to look at the first and second
10 floor plans that are contained within Exhibit Six.

11 A. Yes, ma'am.

12 Q. I understand that you testified earlier that there
13 were many walls in the house that were thicker than
14 normal. I want you to look at that plan and tell me --
15 when you look at that plan, I want you to tell me where
16 the walls are indicated that they are greater than regular
17 width.

18 A. The wall in the left side and the right side of the
19 first floor, two rooms had to be thicker to accommodate
20 the fireplace.

21 Q. Okay. And that's the wall that supports the two
22 niches on the first floor; right?

23 A. What do you mean by niche?

24 Q. You don't know what a niche is?

25 A. Well, I know what a niche is, but I don't know that I

GENE RAYMOND SLIVKA - REDIRECT

1 Q. It's actually a historic building, a historic house
2 that you had barged onto that site; right?

3 A. That was already on the property. We had it moved
4 from one portion of the property to another. Yes, ma'am.

5 Q. So you didn't need design services related to that
6 house; right?

7 A. Well, yes, I didn't use design services but we did
8 extensive building to that. We added two flanker wings to
9 it and added the garage to it and built a pavilion, and
10 built a chapel and all kind of things.

11 Q. But that's not part of the main house?

12 A. Oh no, no, no.

13 Q. So you did not have architectural services that were
14 required as part of that?

15 A. I used no architectural services at the old
16 plantation, period, for anything.

17 Q. You never told the Spriggs Group that you were
18 terminating them; did you?

19 A. I absolutely did. I don't know how I could have made
20 it in a nice way any clearer than I did. And that was
21 that I've had it. And they knew this. I mean, this was
22 building up.

23 And I was three months, I'm trying to get these
24 mechanical stuff and, you know, I'm calling Andy and
25 screaming and hollering at Andy and on a couple occasions

GENE RAYMOND SLIVKA - REDIRECT

1 when I'm doing the same thing with Ken.

2 So they knew I was at a breaking point with it but I
3 did not walk in there and say, you are terminated. I
4 said, I'm done. I've had it. Give me my drawings. I'm
5 coming to pick them up tomorrow. And that's it.

6 Q. In fact, that's all you picked up from them was a few
7 sets of drawings; right? You said you picked up their
8 whole file, but you just picked up a hand full of
9 drawings.

10 A. I picked up the mechanical drawings.

11 Q. Right. And you never told them, this means I don't
12 want you performing any more work on this project; did
13 you?

14 A. Well, since I never ever spoke to them again, I surely
15 would have thought they would have understood that.

16 Q. But they had your permission to take calls and
17 questions from the contractors that were working?

18 A. Absolutely not. I was done with them at that point.
19 I never contacted them again. I never asked anyone to
20 contact them.

21 Q. Throughout the period of the design and the
22 construction, they had your permission to take calls from
23 the contractors and the vendors that were working on the
24 house?

25 A. Yes, ma'am.

GENE RAYMOND SLIVKA - REDIRECT

1 Q. So how were they supposed to know? You never said,
2 that's it, stop, don't take any more calls. You never
3 told the Spriggs Group, Mr. Bozeman or Mr. Spriggs, do not
4 take calls from the contractors any more; did you?

5 A. I told them that I was finished with them. And for a
6 guy who's talking to them on the phone just about every
7 day, and all of a sudden you don't ever hear from him
8 again, I think you understand that you're done.

9 Q. No. You told them that you were finished with the
10 mechanical, with the engineers; didn't you?

11 A. No. I told them I was finished, period.

12 Q. You never --

13 A. When I -- I'm sorry.

14 Q. You never told the contractors that were working on
15 your house not to call anyone from the Spriggs Group for
16 information after that; did you?

17 A. I don't know that the conversation came up. If it
18 had, I would have told them not to.

19 Q. But you never told them not to. You never told the
20 contractors --

21 A. -- if someone asked me.

22 Q. -- or the, excuse me. You never told the contractors
23 or the Spriggs Group --

24 A. Uh-huh.

25 Q. -- that they were not to contact the Spriggs Group for

GENE RAYMOND SLIVKA - REDIRECT

1 further information related to your project?

2 A. There was no public announcement. But if a contractor
3 came to me and said, I've got a question about this, can I
4 call Spriggs? I certainly would have told them, no, do
5 not call Spriggs.

6 Q. And how was the Spriggs Group supposed to know that
7 they weren't supposed to take those calls if you didn't
8 tell them?

9 A. Well, I think when you have the kind of scene that I
10 had with them and you tell them, I've had it, I'm done,
11 get my plans ready, I'm coming by to pick them up
12 tomorrow, I think that's pretty explicit.

13 Q. We've marked earlier Exhibit 10 which is the
14 mechanic's lien. You've described Julianston Plantation,
15 the one in South Carolina, as being made up of a multitude
16 of different properties that you somehow assembled and
17 because of it being a multitude of properties that somehow
18 the Spriggs Group incorrectly liened your property, is the
19 allegation as I understand it.

20 A. Yes, ma'am.

21 Q. I want you to look at the property description that's
22 contained in the mechanic's lien on the first page.

23 A. Yes, ma'am.

24 Q. It actually starts out saying, all of those pieces,
25 parcels and tracts of land containing 2,793 and seven-

GENE RAYMOND SLIVKA - REDIRECT

1 of my house.

2 Q. And didn't you testify a little bit earlier about an
3 appraisal?

4 A. Oh, I'm not denying an appraisal was done. I am
5 shocked that you would have a copy of a confidential
6 appraisal that should have only been available to my
7 bank. I mean, it's not anything to do with this case
8 particularly, but it offends me personally.

9 Q. Well, you did tell me that there are some services
10 that are appearing on, I believe it's on invoice number
11 six --

12 A. 437-50.

13 Q. -- that relate to this appraisal. I'm sorry. I don't
14 know what that was in response to. That wasn't my
15 question. This is an appraisal that you asked to have
16 performed; correct?

17 A. Yes, ma'am.

18 Q. And the Spriggs Group has invoiced you for some
19 services related to it; correct?

20 A. Yes, ma'am.

21 Q. Okay. And if you'll look at page, pages 12 through 17
22 of the appraisal itself, aren't those documents that were
23 prepared by the Spriggs Group as -- to support this
24 appraisal?

25 A. Yes, ma'am.

GENE RAYMOND SLIVKA - REDIRECT

1 Q. All right. And if you look on page four, can you tell
2 me what the value of the appraisal was?

3 MR. LYLES: Objection, Your Honor.

4 THE COURT: What grounds?

5 MR. LYLES: On the basis of relevance and hearsay.

6 (Off-the-record discussion.)

7 THE COURT: In fact, Ms. Ariail, why don't you go
8 ahead and take those two posters down? That way everybody
9 can have a clear half to walk in, see each other, unless
10 you need them at the present time.

11 MS. ARIAIL: No, sir.

12 Q. And what was the purpose of having the appraisal done?

13 A. I took out a loan with the bank and they wanted an
14 appraisal on the house.

15 Q. And this was about the same time that the mechanic's
16 lien was filed on the property?

17 A. Yes. Interestingly, that's the money I borrowed.

18 Q. And it shows that the house is substantially complete,
19 it's at a certain percentage of complete; correct?

20 A. Well, at the time they did this appraisal it was
21 particularly incomplete.

22 Q. There is actually a percentage shown on this appraisal
23 --

24 A. I don't know. I've never seen this appraisal before,
25 so you'd have to show me, but ...

GENE RAYMOND SLIVKA - REDIRECT

1 Q. If you look at the -- towards the bottom of page two,
2 the appraisal itself.

3 A. Okay.

4 Q. There is a portion that, the left-hand block is called
5 improvements. And there's some areas that are filled in
6 and then it's got a narrative.

7 And, it says: Per information gathered from architect
8 firm, the Spriggs Group, the total square heated and
9 cooled square footage is 19,900 square feet; correct?

10 A. Yes, I see where you're reading. Uh-huh.

11 Q. And the basement has 10,042 total gross square foot of
12 which 3,761 square feet is heated and cooled; right?

13 A. Yes. It's not accurate but that's what it says here.

14 Q. Then the next sentence that's not a part of the form
15 itself says, the subject property improvement was an
16 estimated 60 to 70 percent completed at the time of
17 inspection; right?

18 A. Yes, ma'am.

19 Q. And this is about the same time that the mechanic's
20 lien was filed; right?

21 A. Yes, ma'am.

22 Q. And all of the works to construct the house to that
23 point was done pursuant to the design prepared by the
24 Spriggs Group; right?

25 A. Yes, ma'am.

THOMAS ANDERSON BOZEMAN - DIRECT

1 Savannah grade brick; a number of historic windows and
2 doors from his previous property at Julianston.

3 Q. And what impact did the fact that the house was being
4 built in Colleton County versus McIntosh County, Georgia,
5 have on the project?

6 A. A large impact. Primarily in structural drawings.
7 Basically architects or even home builders can do
8 structural drawings on residences. However, that's true
9 in most of South Carolina and Georgia, but certain local
10 jurisdictions have higher regulation requirements and here
11 they certainly did.

12 Q. And what did they require here in Colleton County?

13 A. They required a structural engineer to stamp, even
14 garage buildings, you know. They had a structural
15 engineer involved in every building, I believe. Well,
16 certainly the garages, stable, main house, conservatory,
17 potting shed. Yeah, all of those.

18 Q. Okay. And what major changes to the main house
19 drawings did Mr. Slivka request after receiving the
20 permitted set?

21 A. After receiving the permitted set, we had a variety of
22 things added. We had things like the dog wash added. We
23 had the dental moldings first tried to applied to the
24 stable but then we determined it should be on the main
25 house. That was a huge research effort to mimic a

THOMAS ANDERSON BOZEMAN - DIRECT

1 historic thing.

2 We had -- let's see. We changed the medallions at the
3 grotto. We had subtle changes to the porches. We had --
4 yeah, the whole dog wash downstairs development. There
5 was supposed to be a place to wash your dog at the stable
6 and then they put it in the basement of the main house.

7 There was trust adjustments after the original
8 foundation was poured differently than the permitted set.

9 Let's see. There's the drainage, the storm drainage
10 system as it went out to the ponds from the roof of the
11 house. That had to happen internally and the way we
12 originally planned it on the exterior of the building
13 because he wanted to plant his trees first and so he
14 didn't want to trench after that landscaping was done as I
15 remember.

16 I'm sure there are more. There was a HVAC diffuser
17 whole effort where we were at first hiding diffusers in
18 cornice lines so you couldn't see any modern equipment.

19 Geez. What else?

20 Q. What was the point of putting the downspouts and
21 putting the HVAC equipment internal to the wall?

22 A. That was to mimic historic buildings that didn't have
23 such modern conveniences as HVAC. And the internal
24 downspouts, he didn't want to see downspouts on the house
25 but he certainly needed to take care of the runoff. It

THOMAS ANDERSON BOZEMAN - DIRECT

1 would do damage to the landscaping and the pond if he
2 didn't catch it and route it out.

3 Q. What impact did that have on the drawings?

4 A. Well, it was designed in sort of a more standard way
5 where you collect all your storm water and you direct it
6 where it will flow properly. But since the landscaping
7 was done first, then we had to do an internal to the
8 basement perimeter, catch all the rain water and direct it
9 out through the wall system.

10 It's very complicated. I haven't seen anything like
11 it, really, before.

12 Q. Can you tell me what changes were made to the chimney
13 during the design?

14 A. Oh, yes, the chimney. The chimney started with
15 particular requirements for fireplaces and historic
16 details. The chimney heights relative to, say, today's
17 code, were asked to be much taller. Mr. Slivka thought it
18 would look better, and that's fine.

19 But to have very small fireplaces and very tall
20 chimneys is hard to do in the traditional way.
21 Traditional brick masonry would be wide if you're going
22 that tall, otherwise it would fall down.

23 So the idea presented to us was, we'll just do it in a
24 skeletal frame and put brick above the roof. And we're
25 using a lot of gas fireplaces with flues that come in at

THOMAS ANDERSON BOZEMAN - DIRECT

1 angles in some cases. It would be easy to feed these into
2 these small chimneys from multiple fireplace, smaller in
3 fact than a wood burning one. So it was about the only
4 feasible way to do it.

5 After we had the engineer design it and it was a real
6 effort because they were so tall and had wind load
7 issues. The prices came in and Mr. Slivka thought it was
8 too expensive and he would go ahead and do it in concrete
9 block reinforced masonry as opposed to the traditional
10 without reinforcement. That way we could be just a hair
11 bigger at the fireplace size and still the same size he
12 liked way up high at the top of the chimney.

13 The fireplaces, he didn't really want to go wider to
14 accommodate the block until he had to, what with the
15 pricing implication of the other way. But he said it was
16 okay once we had to go with that method that his historic
17 mantles that he bought and the fireboxes that were
18 appropriately sized for them could be the thickness of the
19 block plus the fire brick.

20 Q. And what changes were required to be made to the
21 drawings from the metal supported chimneys to the masonry
22 chimneys?

23 A. I had to replace that aspect of the drawings. So,
24 while it's the same number of sheets, I had to erase the
25 old and put in the new. And I also had to develop the

THOMAS ANDERSON BOZEMAN - DIRECT

1 fireplace sections where -- fireplaces have to be built a
2 certain way or else they won't draw correctly. So there's
3 pieces that I had to research and put in and get all of
4 that right within the concrete block with fire brick
5 facing in order for it to work. There was a lot of
6 effort.

7 Q. I have pre-marked as Plaintiff's Exhibit 13 a roll of
8 drawings that I would like you to look at and identify
9 these for me.

10 A. Okay. This is the main house basement exterior walls
11 and foundation. This is up top it says, issued for permit
12 November 19th, '07. Revisioned permit is January 29th,
13 '08.

14 Q. And why did you have to do a separate set of basement
15 drawings for the main house?

16 A. I think this had to do with his schedule for
17 landscaping which we weren't really privy to, but he
18 needed to plant by a certain time. And he needed to
19 backfill the dirt that he was planting onto the main
20 house's basement to prepare for that.

21 And so while we weren't done designing the main house,
22 he wanted to get this in the ground so he could do his
23 landscaping in time, for his schedule. So, that's that.

24 Q. I've marked -- pre-marked as Plaintiff's Exhibit 14,
25 another roll of drawings. And I'd ask you to identify

THOMAS ANDERSON BOZEMAN - DIRECT

1 these for me.

2 A. Okay. this is the main house above the basement.

3 This says, main house. And issued for permit 8-1-08. So
4 October 1st (sic) of '08.

5 Q. Okay. I have another roll of drawings that are
6 pre-marked as Plaintiff's Exhibit 15. I'd like for you
7 to identify those for me.

8 A. Again, they say, main house. Just like the last one.
9 They have the same permit date. Oh. But this is the one
10 that says, office copy of permit set and subsequent
11 prints, up here.

12 So that means that all the prints that we did after
13 the permit was issued for changes requested or required
14 are in here.

15 Q. So, what's the difference? So I understand, what's
16 the difference between this roll of drawings which is
17 Exhibit 14, main house --

18 A. Uh-huh.

19 Q. -- issued for permit and that roll?

20 A. Well, this roll has certain drawings that reflect
21 changes Mr. Slivka required, such as the elimination of
22 the palladium window on the exterior. And, you know, this
23 has no palladium window. That one does. And a variety of
24 changes of that sort.

25 And as I recall, I think there are some engineering

THOMAS ANDERSON BOZEMAN - DIRECT

1 drawings that have been revised as well. So what we have
2 here is a permitted set, but for-construction changes have
3 been made.

4 Q. Okay. Thank you.

5 At this time, I'd like to submit Exhibits 13, 14 and
6 15 as evidence.

7 THE COURT: Any objections?

8 MR. LYLES: No objections.

9 THE COURT: All right. Plaintiff's 13, 14 and 15 are
10 into evidence without objection.

11 (Thereupon, Plaintiff's Exhibit No. 13, main house
12 plans issued 11-19-08; Plaintiff's Exhibit No. 14, main
13 house plans issued 08-01-08; and Plaintiff's No. 15,
14 office copy of permit set with subsequent prints, were
15 received into evidence.)

16 BY MS. ARIAIL:

17 Q. Mr. Bozeman, are you familiar with this set of
18 documents?

19 A. I have seen that top one. Yes, I have, indeed.

20 Q. Okay. And how about the remaining documents?

21 A. I tell you what. Let's go through them.

22 Q. Okay.

23 A. Okay. What this is, is --

24 Q. Let's -- I'm going to get you to stand up here --

25 A. Okay.

THOMAS ANDERSON BOZEMAN - DIRECT

1 Q. -- so that the jury -- let's put it on the easel.

2 A. Okay.

3 Q. Tell me what that first sheet is.

4 A. Okay. This is talking about roof drainage. And what
5 we have here at the top is a roof plan. And it has all
6 the different roof slopes. These are all differing
7 slopes, really. It's a complex roof, really. It looks
8 good.

9 And then from each of these downspout locations, you
10 can see the DS label. It goes into these DS locations and
11 they sit in this perimeter drainage system. And it exits
12 in a couple different spots.

13 And so this is the interior drainage system I was
14 talking about earlier. Typically you do a loop around the
15 house this way and it just goes straight out. Most people
16 have their downspouts on the exterior so.

17 Q: What's the title of that drawing?

18 A. This is A-15, storm water drainage system.

19 Q. Do you know if that drawing was contemplated by the
20 original agreement between the Spriggs Group and
21 Mr. Slivka?

22 A. I believe it was not part of that list.

23 Q. Are you familiar with what's been marked as
24 Plaintiff's Exhibit Number Seven?

25 A. I have seen this before, yes. This is the 27 November

THOMAS ANDERSON BOZEMAN - DIRECT

1 letter.

2 Q. And that contains a list of the drawings that are
3 contemplated by that agreement?

4 A. Yes. Let's see. Sure. This goes for the main house
5 up to A-14. So that clearly is beyond that.

6 And really this, this list doesn't include any of the
7 structural drawings because at this time they weren't
8 required. We thought we were working in a place that it
9 wasn't required.

10 Q. And where in that letter does it indicate what
11 drawings are required for the main house?

12 A. It's on page -- I got it a listed here as 178. And it
13 says, main house drawings and specifications here. It
14 goes A-1 site plan through -- you want architectural or
15 everything?

16 Q. Everything.

17 A. Well, E-3 is electrical.

18 Q. Tell me how many architectural drawings are required.

19 A. I've got 14.

20 Q. Okay. And how many mechanical?

21 A. I got three.

22 Q. And how many electrical?

23 A. Three.

24 Q. How many plumbing?

25 A. Three.

THOMAS ANDERSON BOZEMAN - DIRECT

1 Q. How many structural?

2 A. None.

3 Q. Okay. All right. Let's look at the next sheet that's
4 on this. Tell me what that sheet is.

5 A. This is S-01 which is the structural general notes and
6 some of the calculations they use for structural engineer
7 to do his work.

8 Q. Okay. And was that drawing contemplated by the
9 original agreement?

10 A. No.

11 Q. All right. And tell me what the, I think you call it
12 a cloud and a carrot?

13 A. Right. A cloud and a carrot is what we say. If you
14 do a revision, the carrot ends up here in the submittal
15 zone, at least in our firm. It's typical in all firms.
16 So if you have an issue occurring up top and you revise
17 something, and the inspection department needs to know
18 about it, you submit it with a revision. And that tells
19 them what change and the cloud just shows them in what
20 area the change occurred.

21 Q. I'm going to look at the next number. Hold that for
22 me. This will make it a little bit easier for us. Okay.

23 A. Next --

24 Q. Let's look at the next sheet. Tell me what that one
25 is.

THOMAS ANDERSON BOZEMAN -- DIRECT

1 A. That's another structural sheet. It's S-02. Doesn't
2 have a revision, but the plot date is January 29, '08.
3 This is details. This is the sort of thing the inspection
4 department looks for. This is drafting details at a sheer
5 wall, I believe. This is a sheer wall? Yeah. This is
6 sheer wall and wind load details.

7 So, this is a sort of thing that we could include in
8 our architectural set, but in this case since an engineer
9 has to stamp it, he has to do all the production.

10 Q. And was that sheet contemplated by the 27 November '06
11 letter?

12 A. No.

13 Q. All right. Let's look at the next one.

14 A. All right.

15 Q. Tell me what drawing, what that drawing is.

16 A. This is a foundation plan for the main house. You can
17 see the clouds and carrots by all these chimneys. Here.
18 That's that chimney truss substitution that happened after
19 the pricing came out.

20 Q. And how do you tell when those changes were made?

21 A. Well, the carrot is up here and dated as 10-24-08.
22 And so it's clouded here. There's the carrot. Here's the
23 reference.

24 Q. And what was the -- was there -- was this a permitted
25 set of drawings initially?

THOMAS ANDERSON BOZEMAN - DIRECT

1 A. Yeah. I had issued for permit October 1st, '08.

2 Q. All right. Let's look at the next drawing.

3 A. Okay.

4 Q. And before you flip it. Was that drawing contemplated
5 by the November 27, '06 letter?

6 A. No.

7 Q. All right. Let's look at the next one. Tell me what
8 that one is.

9 A. This is, it's S-03 structural. It's the first floor
10 framing plan. And it's real similar to the last one in
11 that there are clouds and carrots at the chimney
12 locations. This one has clouds and carrots by the porch
13 columns over on these three sides.

14 Q. Can you show me where the porches are on that drawing?

15 A. This is a porch here. That's a porch there. That is
16 one and that is one.

17 Q. And what is the significance of the clouds on these
18 drawings at the porches?

19 A. The porches had their columns changed toward -- at
20 construction, really. The permitted porches had sort of
21 more standard detail where we had steel column that you
22 frame into, and then you wrap it with a column wrap. It's
23 easier for the framers to work that way. They have
24 something sturdy at which they can frame, and then they
25 put the esthetic piece on last.

THOMAS ANDERSON BOZEMAN - DIRECT

1 Mr. Slivka had been dealing with a column supplier and
2 he was keen on the columns being structural themselves.
3 And you can do that. You'll see these here don't have
4 particular -- well, there's no cloud. These are
5 monumental. They go two stories up. These have
6 balconies. And it's the framing of the balconies at the
7 mid point of the column that's difficult.

8 So these guys had to have adjustments according to the
9 manufacturer's method. So there's what we designed and
10 got permitted. And there's what the column manufacturer
11 had available as a structural column, reinforced to take
12 the framing at the balcony level.

13 Q. And when was that change identified?

14 A. This is October 24th, '08 is the date here. So that's
15 the carrot and the cloud. And there's the reference.

16 Q. And what was the permit date or submitted for permit?

17 A. Submitted for permit, October 1st, '08. I'm sorry.
18 August 1st, '08. I said that wrong. October 24th is the
19 revision. August.

20 Q. August is the permit date?

21 A. Yeah.

22 Q. Tell me what the next date is.

23 A. Very similar. It's the second floor plan. It's
24 structural. And the same areas are being highlighted.

25 There's also some other ones associated with the chimney.

THOMAS ANDERSON BOZEMAN - DIRECT

1 This is steel framing underneath the hearth of the
2 chimneys. Well, at least this one here is. And that
3 was -- this one is over here as well.

4 And so those -- this one's a mezzanine. And there's a
5 protruding sort of a round element or elliptical element
6 where an antique desk, I believe, was displayed. I
7 haven't seen it, but anyway, we had to do that in steel in
8 order to cantilever out like that.

9 Q. Okay. And what was the date of the changes to that
10 drawing?

11 A. Just like the previous one. It's 24 October for the
12 carrot and the clouds. And it's August 1st for the
13 permit.

14 Q. And flipping back to the last drawing --

15 A. Uh-huh.

16 Q. -- tell me what drawing number this is.

17 A. This is S-03. This is S-04.

18 Q. Were either of those drawings contemplated by the
19 letter agreement of 27 November '06?

20 A. Can't see any S's at all.

21 Q. All right. Let's look at the next drawing.

22 A. Okay.

23 Q. Tell me what that is.

24 A. I've got re-framing plan as the title. The clouds and
25 carrots are similar. This has to do with the porches and

THOMAS ANDERSON BOZEMAN - DIRECT

1 the upper framing of the porches at the top of the column.

2 That would also be the case there, and there.

3 And this is chimney substitution in concrete block.

4 Q. And what's the drawing number?

5 A. This is S-05.

6 Q. And tell me the significance of the S in the drawing
7 number.

8 A. That means structural sheet.

9 Q. Okay. And was, what's the date of the changes there?

10 A. It's October 24th for carrot, and the permit is the
11 same as the rest, in August.

12 Q. August of what year?

13 A. August '08. And carrots.

14 Q. And was that --

15 A. That's interesting, too. That's a pre-engineered
16 truss but -- and which means our engineer didn't have to
17 do it, but we had enough of these guys in here, recesses,
18 so where you can push something up into it. That he -- he
19 drew it. This is one, I believe, it goes over, over one
20 of the wings. I believe it's this one.

21 Q. Okay. Help me understand. You said you pushed
22 something up in it, tell me what you mean.

23 A. This is a tray ceiling element. He had an historic --
24 it's a series of glass and a sort of elliptical window set
25 up and he wanted it recessed into a tray ceiling over the

THOMAS ANDERSON BOZEMAN - DIRECT

1 study here and then while there isn't a skylight over it,
2 we were going to back-light it. And so it would look as
3 though it was glowing with daylight. And so this is the
4 detailing to allow for that. The pre-engineer truss
5 manufacturer had to produce it, but that's how we got that
6 in.

7 Q. Okay. And what's the date of the changes that are
8 shown on that drawing?

9 A. October 24th, '08.

10 Q. And what about the permit date?

11 A. August 1st, '08.

12 Q. And was that drawing -- tell me the name of the
13 drawing.

14 A. This is roof framing plan.

15 Q. And what's the number?

16 A. S-05.

17 Q. And was it contemplated by the 27 November, '06
18 letter?

19 A. No. This one in particular with prefabricated
20 trusses, we didn't expect to have to do that.

21 Q. Okay. Let's look at the next one.

22 A. Okay.

23 Q. Tell me what that one is.

24 A. This is a wall section of the main house. This is --
25 it's the combination of the foundation plan that was down

THOMAS ANDERSON BOZEMAN - DIRECT

1 here, with the upper floor plans up here. Let's see.

2 This has been modified. It is a structural drawing and so
3 the modification structurally was this truss right here.

4 Q. And why was that required?

5 A. Okay. The foundation plan, as I was saying up on the
6 chair, he wanted to get it done and in the ground in order
7 to backfill on a certain schedule. He had a contractor at
8 the time we began this. The contractor was working with
9 me to get a permit.

10 Meanwhile, Mr. Slivka asked us to provide him with
11 names of other contractors who did the same work. He was
12 going to check pricing. And so, while the contractor who
13 had the job was busy getting the permit, other contractors
14 were pricing the work.

15 When the foundation was poured, the first contractor
16 had been dismissed. And the second contractor poured this
17 according to non-permitted drawings. And so, the effort
18 of the first contractor to get a permit was on a different
19 tract than the guys who had -- bid this independently on a
20 drawing that wasn't permitted yet. It had an engineer's
21 stamp, but it wasn't permitted yet.

22 So by the time this was poured, we had adjusted the
23 elevation of the basement based on the flood zone
24 requirements of that particular locale which is different
25 than other places where you have to be a foot higher than

THOMAS ANDERSON BOZEMAN - DIRECT

1 the flood zone for your basement.

2 That meant that if we stacked this as one big solid
3 piece it would be six inches too high at a floor level
4 here, relative to what he had already put in ground, over
5 here. He had reflecting pools.

6 And so the way we fixed it is instead of one solid
7 truss which is the same thickness all the way over it, we
8 adjusted it six inches right here. And I was able to put
9 in at the right heights and everybody was pleased.

10 Q. And when was that change made?

11 A. October 24th, '08 is the cloud and the carrot.

12 Q. And what was the original date of that drawing?

13 A. This is the August 1st permit set.

14 Q. And what is the drawing number?

15 A. The drawing number S-06, typical wall sections.

16 Q. And was that contemplated by the original agreement
17 between the Spriggs Group and Mr. Slivka?

18 A. No.

19 Q. Okay. Let's look at the next drawing.

20 A. Okay.

21 Q. Tell me what that drawing illustrates.

22 A. This is that tray ceiling thing I was just talking
23 about. So it's, the prefabricated truss manufacturer, and
24 we always say pre-engineered on our drawings, had to --
25 there's one truss just like this that goes across straight

THOMAS ANDERSON BOZEMAN - DIRECT

1 on the bottom. And there's another truss that goes back
2 up and goes back down to, to allow that tray element to go
3 in here.

4 Okay. Here's that same elevation in here that's been
5 changed.

6 Q. All right.

7 A. Let's see. There's a blocking detail. I remember
8 this. This is the 16-inch-on-center spacing of studs.

9 Q. How was that modified?

10 A. Actually we got the engineer to agree with the way we
11 wanted to do it. So it took me going over the head of the
12 draftsman of the engineer. So, the draftsman wanted to
13 make it at 12-inch-on-center, and I got his boss to agree
14 that we'd go with fewer studs.

15 Q. What were the dates of those changes? When were those
16 changes made to that drawing?

17 A. Same as previously. It's October 24th of '08 for
18 the -- it seems general right here. That's a structural
19 drawing and it's permit set is August 1st '08.

20 Q. And what's the title and the number of that drawing?

21 A. It says hyphen wall section. We call these link
22 elements hyphens. And S-07 is the drawing number.

23 Q. You mentioned the hyphen. And explain to me what a
24 hyphen is.

25 A. Okay. Here's a big block. Here's a big block and

THOMAS ANDERSON BOZEMAN - DIRECT

1 here's one. They're connected by these one-story guys.
2 That's -- a link is a good enough word but they're often
3 called in historic building hyphens, sort of a horizontal
4 thing, like the hyphen.

5 Q. Does it have roof on it?

6 A. Yes, yes. It has a pretty elaborate roof.

7 Q. Is it totally enclosed?

8 A. Yeah. Well, there's an exterior porch element, you
9 can see here in the photo. And really it's kind of a
10 complicated roof. Can I show them?

11 Q. Sure.

12 A. If you look, this is pretty normal roof sure. It's
13 slate but, you know, just a basic dimensions of it. But
14 then there's this this number here is 12 to one. You will
15 have a difficult time finding a metal roof manufacturer,
16 and that's what this ended up being, who will warranty a
17 roof slope that that's low. You can't get a warranty on
18 it.

19 And so the traditional way to handle these low slopes,
20 it's a tricky kind of construction where it's a flat seam
21 metal roof. You have to essentially solder together the
22 seams as they hold them together, you put them together,
23 you fold them over and then you mop them with a solder
24 like a copper solder or a lead solder.

25 So, I can't recall if these were lead-coated copper

THOMAS ANDERSON BOZEMAN - DIRECT

1 sealed roof panels or not. But that's the technique they
2 have to use. So to get this low slope to cover the porch,
3 we had to go with that historic technique.

4 Q. You mentioned that that was a 12-to-one slope.

5 A. Uh-huh.

6 Q. Explain that to me.

7 A. The slope of the roof is, like here's a four-to-12
8 slope. And so it means you go over 12 inches and up four,
9 and that gives you the slope of your roof.

10 Q. So what's a 12 to one?

11 A. A 12 to one is this lower slope one. So for every 12
12 inch out you go, since it's dropping out, you go one inch
13 thick.

14 Twelve to four would be 12 and four. That's pretty
15 good. It's the difference between that pitch and that
16 pitch.

17 Q. Okay. And I might have asked you this, but tell me
18 the name and the number of that drawing.

19 A. This is the hyphen wall section, S-07.

20 Q. Was that drawing contemplated by the original
21 agreement between the Spriggs Group and Mr. Slivka?

22 A. Not as a structural drawing, no.

23 Q. Let's look at the next one. Tell me what that drawing
24 is.

25 A. This is S-08, typical porch section. You can see it's

THOMAS ANDERSON BOZEMAN - DIRECT

1 been modified and carrotted here for the same reason down
2 below.

3 This -- okay. This here is that original steel
4 column. Right here. And so the -- eventually he got
5 columns that were fiberglass with, I think, six by six
6 laminated into one side of the fiberglass which is
7 different than a straight steel column you frame into it
8 and you wrap it with column wrap

9 Q. And when -- tell me what this was over here, this over
10 here, this lower cloud.

11 A. Yeah, this here is dealing with the connection at that
12 modified truss, right here. And I see there's a double
13 plate ledger to receive these porch joists.

14 So, under your floor is what you call a joist unless
15 it's a truss. So these guys got a double ledger. We
16 ended up with a double ledger at the garages at the
17 insistence of the local authority having jurisdiction.
18 That inspection department liked double ledgers. And so
19 we have them there as well as the garage.

20 Q. And that's another structural drawing?

21 A. Uh-huh. It's S-08, typical porch section.

22 Q. And was that drawing contemplated by the original
23 agreement?

24 A. No.

25 Q. Let's look at the next one.

THOMAS ANDERSON BOZEMAN - DIRECT

1 A. Okay.

2 Q. Tell me what that one is.

3 A. The next one, S-09, typical sections some details.
4 That's structural.

5 Q. Okay. And what's included on there?

6 A. Let's see. I've got a typical interior double wall,
7 and how it's supported on a beam, here. That's a steel
8 beam in the basement is what they're implying.

9 This is typical hollow column hold-down anchor. This
10 is basically a tension guide with a coupler right here so
11 you can tighten it up once you put it together. So this
12 resists against wind uplift. So if wind got caught under
13 this column and started pulling, this steel cable
14 essentially keeps it from lifting. So that's a structural
15 calculation you have to run in order to get that.

16 This is that same modified basement truss, right
17 there.

18 Q. Okay. And what changes are shown on that drawing?

19 A. It's the basement truss.

20 Q. Okay. And what date were the changes made?

21 A. Just like the previous, I got October 24th, '08 for
22 the change. And I've got August 1st, '08 for the permit.

23 Q. And was that drawing contemplated by the original
24 agreement between the Spriggs Group and Mr. Slivka?

25 A. No.

THOMAS ANDERSON BOZEMAN - DIRECT

1 Q. All right. Let's look at the next one.

2 A. Okay.

3 Q. Tell me what that is.

4 A. These are my modified chimneys. Now they're made out
5 of concrete block instead of trusses, steel trusses.

6 Q. And how are the changes illustrated on that drawing?

7 A. Well, there's a pretty big cloud over this section.
8 So that half of the sheet is the new system for concrete
9 block that's reinforced. You couldn't do this without
10 reinforcement. It's a modern building technique. That's
11 rebar and that's block.

12 Q. And what date was that modification made?

13 A. Same as the others; October 24th, '08 is the
14 modification. August 1st, '08 is the permit.

15 Q. And if I looked at the original August 1st permit
16 drawings, what would be reflected on that side of the
17 sheet?

18 A. I'd have to look to the specific sheet, but I bet you
19 that it has trusses there.

20 Q. This is Exhibit 14. How about finding that for me?

21 A. Okay. S-10. See if we got it here. (Looking through
22 documents).

23 Typical sections and details, schematic exterior
24 wall. Okay. That's S-10 here.

25 Yeah. There it is. All right. There you go.

THOMAS ANDERSON BOZEMAN - DIRECT

1 Q. Is there any way we can put that up here?

2 A. I think I got it. Okay. Want me to just hold it
3 under?

4 Q. Sure. Describe for me what the change is from this
5 drawing to that drawing.

6 A. Got it?

7 Q. Yep.

8 A. Okay. You can see that these are all concrete
9 blocks. Those are pretty easy to tell. You can see this
10 is a steel system with cross bracing. That all had to be
11 designed structurally to include as little steel as
12 possible and yet cover all the wind loads associated with
13 it as well as gravity loads and so forth.

14 So to work that out, to get it priced, to understand
15 that, okay, we can live with the size associated with
16 this, that's a great deal of effort.

17 Q. All right. And tell me the title of that drawing.

18 A. It's schematic exterior wall elevation.

19 Q. And was that drawing contemplated by the original
20 agreement --

21 A. No.

22 Q. -- between the Spriggs Group and Mr. Slivka?

23 A. No.

24 Q. Okay. Let's look at the next one.

25 A. It is called typical details, S-11. I see that he

THOMAS ANDERSON BOZEMAN - DIRECT

1 changed the size of a particular member here. This level
2 of detail, I'd have to go into the set to find out what
3 reference it goes to here, but I bet this is column
4 related.

5 Here's that beam in the basement that holds the
6 connecting trusses. See, here, they're just flat instead
7 of like at the perimeter where it goes up six inches.
8 That's a beam that they designed there to take care of
9 that.

10 That whole foundation plan, it was supposed to be a
11 retaining wall effort so dirt could be poured so plants
12 could be done. The inspection department however required
13 that the first floor framing plan be attached to that
14 foundation plan because they needed to verify that the
15 connections to the framing were appropriate.

16 So that's the extra effort aside from just the
17 retaining walls that was being pursued by his first
18 contractor even as pricing was being double-checked.

19 Q. Okay. And what was the date the changes were made to
20 the drawing?

21 A. I've got it as 10-24-08 for the change, and 8-01-08
22 for the permit.

23 Q. What was the drawing number?

24 A. S-11.

25 Q. Was the drawing contemplated by the original

THOMAS ANDERSON BOZEMAN - DIRECT

1 agreement?

2 A. No.

3 Q. Tell me what that is.

4 A. This is typical sheer wall details. And that's
5 exactly what it is, it's typical. This is sort of typical
6 framing details that the inspector goes to check.

7 But, every general contractor and framer already knows
8 how to do this stuff. At certain points it's critical to
9 point out that this is a sheer wall, but the details
10 itself, we don't particularly have to produce. It varies
11 by circumstance. I don't want to go too far with that,
12 but these were typical sheer wall details. You can get
13 them out of catalogs.

14 Q. And what is a sheer wall?

15 A. A sheer wall is a wall that, -- say you have a
16 building that's long like this and short on the sides.
17 And it gets a whole lot of wind pushing against it this
18 way (indicating). Well, that means you have to brace
19 against it within the building like this. Those are sheer
20 walls that do that.

21 So, you know, if here's a box, wind's blowing hard
22 this way, these end walls aren't going to do the job all
23 by themselves. You need sheer walls in here to help
24 resist the pressure. So, sheer walls.

25 Q. Were there any changes made to that drawing?

THOMAS ANDERSON BOZEMAN - DIRECT

1 A. I see a carrot right here. I don't see a cloud. I
2 don't particularly see that other than that it's included
3 at all.

4 Q. Okay. The last structural drawing we have?

5 A. That's it for structural, yeah.

6 Q. Okay. And were any of those structural drawings that
7 we've just looked at contemplated by the original
8 agreement?

9 A. No, no. This was the last one. Number 12, and no.

10 Q. If you were originally going to put the structural
11 details required for this project on the architectural
12 drawings, what ended up taking up all the room on all
13 these architectural drawings that are listed in the
14 agreement?

15 A. There's a bunch of additional details.

16 Q. Okay.

17 THE COURT: Can y'all hear on the back row, back
18 there in the corner, can you hear him?

19 THE JUROR: Yes, sir.

20 THE COURT: Be sure to speak up.

21 THE WITNESS: I'll try.

22 BY MS. ARIAIL:

23 Q. I've got a microphone, if you want it.

24 A. I'll try a little harder.

25 Q. Okay. Let me -- identify these drawings again for

THOMAS ANDERSON BOZEMAN - DIRECT

1 me.

2 A. Okay. This one is the main house, main house set.

3 This is above the foundation. This is issued for permit
4 in August 1st, '08. You've got it as 19 -- well, 14.

5 Q. We marked it as 14?

6 A. Okay.

7 Q. You said that there are additional details that were
8 required on the architectural details. I want you to show
9 us some of those. You can put it up here once you get to
10 the right page.

11 A. Okay. We can start on page one. This is sheet
12 that's --

13 Q. I'm happy to help.

14 A. I tell you what, why don't we put it on the floor real
15 quick? I do this all the time.

16 Q. Okay. A-01, I believe, what we have here.

17 A. Okay.

18 Q. Does that help?

19 A. That's the same thing. Good.

20 Q. Okay.

21 A. So, this is similar to what we started with as an
22 idea, but if you get into this, what you'll find is that
23 we've developed an entire driveway system where we have a
24 brick border and gravel drive in this area. There's a
25 bridge here. We have 12-inch wide brick border with

THOMAS ANDERSON BOZEMAN - DIRECT

1 diamond pavers here. It goes around this whole gardening
2 complex. Here's the buildings we did of the conservatory
3 and the potting shed.

4 But all this driveway and all the walls that go into
5 it, we didn't know that up front. All of these connecting
6 walkways and the drive to the side of the horse stable,
7 all of that, didn't really know about. And all of this
8 basic placement we thought was going to be provided to
9 us. That would be the civil engineer.

10 Q. And how was that identified to you?

11 A. Well, we put it in our letter.

12 Q. Okay. The letter, the proposal letter?

13 A. Yeah, yeah. We said we understand that you will
14 provide us with site information.

15 Q. And did they do that?

16 A. No, no.

17 Q. All right. Is there another architectural drawing
18 that shows the details that you're talking about?

19 A. That's sort of a site thing. I'm sorry. I got off
20 topic. Basically I can do this on sheets I suspect.

21 Q. The next one I've actually got on board also if you'd
22 like to use it.

23 A. That's fine. I'm just going to leave that out.

24 Q. Okay.

25 A. Okay. Well, that's a note to me.

THOMAS ANDERSON BOZEMAN - DIRECT

1 Well, extra detail. Well, how about this dental
2 molding here?

3 All of this was that dental molding that was asked
4 about at the level of the stable. Great deal of research
5 and modification to make it work. In the end he agreed
6 that it's more appropriate here and it ended up here but
7 not there. I thought that was the right decision about
8 utilitarian buildings in the primary focus.

9 So all of this dental molding is just an extra
10 assignment. It has nothing to do with the permit. And
11 really a good contractor, you can do that on site.

12 Now a lot of this molding he says -- and really on the
13 interior, the basic idea would be he would give us model
14 numbers and we include it.

15 Well that's done on a schedule. You just put the
16 model numbers to the room and that's it.

17 In this case we had to develop the whole thing at one
18 size to a historic museum. That overhang is like three
19 feet. So we got all the research material which was an
20 effort, and then we traced the profiles of the dental
21 moldings, these little blocks that stick out, decorative,
22 into a crown molding not unlike these guys here. And then
23 we had to shrink it down proportionately to the overhangs
24 at his property.

25 After that he went to molding suppliers and found

THOMAS ANDERSON BOZEMAN - DIRECT

1 similar shapes and gave it to me and said, now, draw these
2 into it. And that's what you have.

3 Now that's a far cry from providing me with model
4 numbers to put on the schedule. So there you have it. So
5 that was all extra.

6 Q. And tell me about the research that you had to perform
7 for that dental molding in the first place. Where did you
8 get those details?

9 A. We were asked to do the dentals from the Taft House.
10 So when you dive in, the most famous Taft is the
11 president. But it's really the Taft House Museum in
12 Cincinnati which is a different reference.

13 And so we found out after looking at the wrong thing
14 first. He told us which one. So we finally went, called
15 the museum trying to do it as quickly and as efficiently
16 as possible to see if they had some photographs. You
17 know, I can do pretty good with photographs, scaling with
18 nearby things that I can identify the size of.

19 But they couldn't do that. And so we went to the
20 Historic American Building Survey at the Library of
21 Congress. And Mr. Slivka asked us to do that. He knew
22 all about it.

23 And so we got the materials. They shipped them to us,
24 and it was off of those really enormous .tif files,
25 computer files, that are hard to work with because they're

THOMAS ANDERSON BOZEMAN - DIRECT

1 so big, that I was able to do this work.

2 Q. What other research did you do for Mr. Slivka?

3 A. The dog wash was a fun one.

4 Q. Tell me about the dog wash research.

5 A. It was the -- we were at the stable when it started.

6 He has big dogs, Newfoundland pups, and they get dirty and
7 the idea was that we would --

8 THE COURT: Hold on one second. Would it help the
9 court reporter out if he got back in the chair? Or does
10 he need to stay at those drawings?

11 THE WITNESS: Should I use a mic?

12 THE COURT: The mic would help a lot. The court
13 reporter's having a hard time hearing and I know over
14 there in the corner it's got to be hard.

15 (Pause.)

16 BY MS. ARIAIL:

17 Q. I'll put him back in the chair shortly.

18 A. So, so -- is this close enough? Dog wash at the
19 stable. Originally I thought that would be something like
20 a bathtub with a hose wash on it.

21 He asked me to research what the, kind of the state of
22 the art of dog washing is. And so I did. I went to Google
23 and between images and websites narrowed down the prints
24 that I could make where he could judge what they were
25 doing.

THOMAS ANDERSON BOZEMAN - DIRECT

1 And that ranged from salons where people have a
2 coffee shop as well as dog washing stations to these vans
3 that pull up to neighborhoods and wash dogs.

4 In the end, we went through a stack about like this
5 (indicating), and he said things like, that one's a little
6 too fancy, that's not suitable. And he found one that he
7 liked, and we modified the design to suit what he wanted
8 in his basement.

9 So that's the development of the dog wash.

10 Q. Let's -- while you're up, let's go ahead and look at
11 the other architectural drawings. And find another detail
12 drawing that has a series of details on it for me.

13 A. I'll let somebody hold this. I have a basic floor
14 plan sheet. So much -- okay. I guess that's not too
15 extra. (Looking through documents.)

16 Q. Why don't you tell me what those drawings are that you
17 just flipped through.

18 A. I flipped through the basement plan. I flipped
19 through the basement plan, and the first and second floor
20 plan. And they all have elevations near them so, you
21 know, you have a direct relationship between the plan and
22 your elevation.

23 And I'm looking over the details of things like thick
24 walls. I wouldn't call that extra at this stage. Maybe
25 at that stage, but this is a fairly well-developed plan.

THOMAS ANDERSON BOZEMAN - DIRECT

1 So I'm going to keep looking past the first floor and
2 second floor framing and elevations. This one here, this
3 is a pretty good one.

4 THE COURT: If the jury needs to stand up and look
5 over the rail, feel free to do it.

6 BY MS. ARIAIL:

7 Q. Let's see if we can get it on the board.

8 A. Okay. Can you hold it while I point? Is that...

9 MS. ARIAIL: Thanks, Mr. Lyles.

10 THE WITNESS: What we have here is a roof plan. All
11 those roof slopes here. And then this is an interior
12 elevation. It's a building section, is the proper term,
13 but includes all these interior elevations. These are all
14 interior elevations.

15 And what you have to do is develop these things to
16 this level in order to incorporate things like the crown
17 molding into the door so it fits. I couldn't get this
18 roof height of 11-8 unless I knew exactly the height of
19 his door from the other property, and the crown molding
20 that goes in as well as the tray that's to fit his
21 historic skylight.

22 So, this is a pretty serious interior elevation.
23 It's printed at a small scale, but I could blow this thing
24 up to real size. It's that accurate. So this is a whole
25 lot of information on a simple drawing. So, that's,

THOMAS ANDERSON BOZEMAN - DIRECT

1 that's what that one shows.

2 BY MS. ARIAIL:

3 Q. What was the level of detail that was contemplated by
4 the drawing of the architectural drawings for the house?

5 A. Well, there's a permit set where you can build it by,
6 build it by floor plan. And, you know, a good contractor
7 and everything that's critical for an inspector to approve
8 of, in there.

9 And then there's multiple interior sections, like
10 this, building sections that include interior elevations.
11 So we worked out everything that you can see when you cut
12 through the building at that spot.

13 So that's a chop right through the middle there.

14 Q. Thank you. You can sit down.

15 A. (Complying.)

16 Q. All right. I'm going to ask you to go back to this
17 board.

18 A. Okay.

19 Q. And tell me what the next drawing is.

20 A. All right. This is a plumbing waste plan. It's
21 P-01. It's issued for permit date.

22 Q. And what did the original contract call for -- this is
23 for the main house?

24 A. This is the main house.

25 Q. What did the original contract call for on plumbing

THOMAS ANDERSON BOZEMAN - DIRECT

1 drawings?

2 A. I've got P-1 , -2, and -3. The first one is plumbing
3 basement first floor plan. The second one is plumbing
4 second floor and attic plan. The third is plumbing water
5 plan and sketches.

6 Q. So there's going to be three sheets?

7 A. Three sheets.

8 Q. What was actually produced?

9 A. I've got P-07. Is the last one.

10 Q. And tell me why it took that many more plumbing
11 drawings than was contemplated by the original agreement.

12 A. Well, more detail by the plumbing engineer. With
13 residential plans, we do have plumbing engineers but
14 depending on the scale, I can do a great deal of drafting,
15 give them the drawing, and then they can finish it.

16 At the level of this project, they had to do it
17 themselves. And it's very similar with the structural.
18 If you look at the structural you'll see it's my drawing,
19 their names. I did the work.

20 And this isn't so different. I did all these plans,
21 but they had to fit all of this information on them. And
22 there's enough of this kind of information that they had
23 to go with seven sheets.

24 Q. Okay. Tell me what on the first sheet, P-01.

25 A. Yeah. This is plumbing waste plan. So this is, this

THOMAS ANDERSON BOZEMAN - DIRECT

1 is, looks like just the first floor or basement floor
2 plan. So this is the waste runs, you know, when you flush
3 the toilet, you have a sink, you have all of that stuff.
4 It goes out these pipes.

5 Q. What's on P-02?

6 A. P-02. This is plumbing water plan. It's in the same
7 basement area so this is water supply to the basement as
8 opposed to removal, like waste.

9 Q. Where was that information supposed to be found on the
10 plumbing drawings that were contemplated by the agreement?

11 A. It looked like the P-1 was supposed to include both
12 the basement and the first floor for both supply and
13 waste.

14 Q. Okay.

15 A. And I could do that if it was a bit less complex.

16 Q. Tell me what the next drawing is.

17 A. This is, looks like the first and second floor. It's
18 plumbing waste plan. So same purpose.

19 Q. And what's the next one?

20 A. This is plumbing water plan. Same idea. It's the
21 first and second floor water supply.

22 Q. And where is the information shown on those two
23 drawings supposed to be shown on the drawings that were
24 contemplated by the original agreement?

25 A. This is first and second floor. So that would be,

THOMAS ANDERSON BOZEMAN - DIRECT

1 it's kind of a split between P-1 and P-2 here.

2 Q. And tell me what the next drawing is, next plumbing
3 drawing is.

4 A. Okay. This is P-05, hydronic water plan.

5 Q. What is that?

6 A. This has to do with the mechanical system. This is
7 water relating to that, and that gets a little outside of
8 my expertise.

9 Q. Okay.

10 A. But it's, it's a plumbing supply to handle the -- this
11 is a water source heat pump detail. So water source heat
12 pump.

13 Q. So water has to be piped to the --

14 A. HVAC system. Mechanical system.

15 Q. That's what hydronic is?

16 A. That's what this is.

17 Q. Tell me what the next two drawings are.

18 A. I've got P-06 plumbing waste risers. This is, you
19 know, the waste diagram. And P-07 is plumbing water
20 riser, the water diagram.

21 Q. Okay. All right. Let's look at the next drawings.

22 Tell me -- just look at that last drawing. Tell me what
23 the dates are on those plumbing drawings.

24 A. I've got it as August 1st, '08.

25 Q. Does it designate what that drawing is?

THOMAS ANDERSON BOZEMAN - DIRECT

1 A. Issued for permit.

2 Q. Okay. Thank you. Tell me what the next drawing is.

3 A. I have E-01 which is the power plan, electrical power
4 plan.

5 Q. And what does the E designation mean?

6 A. Electrical.

7 Q. How many electrical drawings were contemplated in the
8 original agreement?

9 A. Three.

10 Q. And how many were actually produced?

11 A. Five.

12 Q. And why did it take so many more electrical drawings?

13 A. Like the plumbing, it's more detail, scope of the
14 project and, yes, complexity of the systems.

15 Q. Can you tell me what E-01, what that drawing is?

16 A. The power plan. This is what it states, the power
17 plan. And it's power outlets, you know, plugs.

18 Q. What floor is that for?

19 A. This is for the basement it looks like. Yeah.

20 Basement.

21 Q. What's the next drawing?

22 A. This is the lighting plan. It's in the basement.

23 Q. Okay. How about the next one?

24 A. First and second floor power plan, E-03.

25 Q. And what is the next one?

THOMAS ANDERSON BOZEMAN - DIRECT

1 A. First and second floor lighting plan. That's E-04.

2 Q. And what was the next one?

3 A. Electrical details, schedules and risers.

4 Q. And what did, I think you said there were three
5 drawings in the agreement. What were they to include?

6 A. Well, the last sheet, E-3, is very similar to this.

7 The first two anticipated a lot of the previous sheets.

8 So what we anticipated in two there was four here.

9 Q. And why couldn't you combine information like the
10 original agreement contemplates?

11 A. Size and complexity of the project.

12 Q. All right. Let's go to the next drawing and tell me
13 what that is.

14 A. Okay. This is the foundation plan and roof framing
15 plan for the structural, S-1-1.

16 Q. For what building?

17 A. Oh. That is a different building. Yeah. This is
18 garage building west.

19 Q. How many garages were there?

20 A. Two.

21 Q. Tell me what the next drawing is.

22 A. Okay. S-1-2, foundation roof framing plan, garage
23 building east.

24 Q. And how many structural drawings were contemplated for
25 the garage in the original agreement?

THOMAS ANDERSON BOZEMAN - DIRECT

1 A. None.

2 Q. And can you find that for me on this?

3 A. I find a lack of S drawings, yes.

4 Q. Okay. And that is, I'm going to hand you Exhibit
5 Seven.

6 A. Okay.

7 Q. Just confirm for me that this is, which page this is
8 out of that exhibit.

9 A. This is page 0177 at the top.

10 Q. Which is -- does this on the board, is that from this
11 document?

12 A. Yes.

13 Q. Okay.

14 A. Hold on a second. I'm on a different page.

15 Q. Yes, you are.

16 A. Sorry. Now, it matches.

17 Q. Okay. And is the garage shown on that page?

18 A. Yeah.

19 Q. And what page is that?

20 A. This is 0179.

21 Q. Okay. So that's what we're looking at on the blow up?

22 A. Yeah.

23 Q. All right. And again, tell me how many drawings were
24 originally estimated to be prepared for the garages.

25 A. You mean structural drawings or all?

THOMAS ANDERSON BOZEMAN - DIRECT

1 Q. All. Total.

2 A. One, two, three, four, five.

3 Q. And how many structural drawings were estimated for
4 the garages?

5 A. None.

6 Q. Okay. And why were structural drawings required for
7 the garages?

8 A. That would be the local jurisdiction having authority.

9 Q. And you've shown me two separate structural drawings,
10 one for the west garage and one for the east garage. Why
11 did you have to do two?

12 A. There was a siting issue near tree. There's a tree
13 that Mr. Slivka really liked and he wanted the garage to
14 be tucked in next to it and yet if you poured a foundation
15 you'd kill the root and so the tree would die.

16 And so rather than re-siting the garage or getting rid
17 of the tree what we did is a grade beam plan. So instead
18 of having a deeper foundation into the root zone what we
19 did we had a grade beam, structural engineer had to design
20 it that skirted across the top of the roots and didn't
21 kill them. So that's a different foundation plan than the
22 other garage.

23 Q. Okay. Which was the garage with the tree issue?

24 A. Let me look at my -- I think it was the west but let
25 me check my ...

THOMAS ANDERSON BOZEMAN - DIRECT

1 agreement for plumbing for the garage buildings?

2 A. Other than a hose bib, I don't know that we had any
3 idea of plumbing going to the garages.

4 Q. Okay. How about, what's the next drawing?

5 A. This is P-02. Garage buildings plans and elevations.
6 There it says second floor plan plumbing waste. So, it's
7 the waste from all the fixtures of the apartment on the
8 second floor.

9 Q. And describe that apartment for me. Tell me what you
10 got up there.

11 A. Okay. Well, we have a stair coming from down low.
12 Underneath is the hot water heater, the supply is up
13 here. We have a kitchen. We have a living area. We have
14 a bedroom. We have a washer and dryer, bathroom and
15 closet.

16 And while it's hard to tell on this drawing, we have a
17 mechanical system that runs this whole perimeter to run
18 air-conditioner to it.

19 Q. And let's look at the next drawing.

20 A. Okay.

21 Q. Tell me what that one is.

22 A. P-03, plans and elevations. It says second floor plan
23 plumbing water. So it's water supply to the second floor
24 apartment.

25 Q. And is that the last plumbing drawing?

THOMAS ANDERSON BOZEMAN - DIRECT

1 A. Yep.

2 Q. So how many plumbing drawings were prepared for the
3 garages?

4 A. Three.

5 Q. And how many were contemplated by the original letter
6 agreement?

7 A. I see one on this PME here. That's a combination of
8 plumbing, mechanical and electrical on one.

9 Q. Okay. Let's look at the next drawing.

10 A. Okay. This is --

11 Q. What is that?

12 A. -- M-01 garage building, plans and elevations. Here
13 it says first floor plan HVAC.

14 Q. What does the M mean?

15 A. Mechanical. And this would be the kind of engineer
16 that does HVAC systems, air-conditioning systems.

17 Q. What's on the next drawing?

18 A. This is sheet M-02. It says plans and elevations
19 there second floor plan HVAC. It's a mechanical drawing
20 for the apartment.

21 Q. Is that the last mechanical drawing for the garages?

22 A. Yeah.

23 Q. And how many mechanical drawings were contemplated by
24 the original agreement?

25 A. That combines PME. Yeah. So that's, all of those

THOMAS ANDERSON BOZEMAN - DIRECT

1 were supposed to be on one drawing because it was just an
2 empty garage.

3 Q. What do you mean by all of those?

4 A. It means the disciplines of plumbing engineer,
5 electrical engineer and mechanical engineer. All of those
6 came out of the same firm and at least at the level of a
7 garage can fit on one sheet real easily. You don't have
8 HVAC in an open garage.

9 Q. Thank you. All right. Let's look at the next one.
10 Tell me what that one is.

11 A. E-01. Plans and elevations, first floor plan,
12 electrical.

13 Q. That's for what building?

14 A. These are the garage buildings.

15 Q. Okay. And what -- and what does this particular
16 diagram show?

17 A. I see lighting and power. These are lights overhead.
18 That's power outlets on the walls. Here's a switch.
19 Here's a panel that coordinates it all. This is power
20 going to the water heater.

21 Q. And which floor is that?

22 A. This is on the first floor where you park your cars.

23 Q. And let's look at the next one.

24 A. Okay.

25 Q. Tell me what that shows.

THOMAS ANDERSON BOZEMAN - DIRECT

1 A. E-02. Plans and elevations, second floor plan,
2 power. So it's the power plan for the apartment above.

3 Q. And what is it powering?

4 A. I see the air-conditioning, air handling unit there.
5 Just everything you get in an apartment from all the
6 kitchen appliances through the laundry area to what's
7 required in a bedroom by code, to your bathroom which gets
8 ground fault in case water hits your outlet, you got to
9 have a particular kind. So, yeah, an apartment.

10 MR. LYLES: If you don't mind.

11 (Pause.)

12 BY MS. ARIAIL:

13 Q. And what is the next drawing?

14 A. This is E-03. Plans and elevations, second floor
15 plan, lighting. And it's that.

16 Q. All right. And why were these additional plumbing,
17 mechanical and electrical drawings required for the garage
18 apartments?

19 A. Because apartments were added.

20 Q. And who requested that those apartments be added?

21 A. Mr. Slivka.

22 Q. Okay. Let's move on to the potting shed. Let's look
23 at next drawing there.

24 A. Okay. There you go.

25 Q. How many drawings were contemplated by the original

THOMAS ANDERSON BOZEMAN - DIRECT

1 agreement for the potting shed?

2 A. There was no potting shed originally.

3 Q. Okay. And tell me what this drawing is.

4 A. This is wall sections. It's A-03. And it shows
5 exterior stud wall section, non-bearing stud wall section,
6 and section after the covered entry.

7 So, this includes -- well, if you go into it. You got
8 a basement foundation, you have a won't-rot-if-it-touches-
9 moisture ledger here, and then wood stud construction up
10 here. Instead is how you would put a window within that,
11 historic windows in this case, and then brick veneer on
12 the outside, vent space into the attic and so forth.

13 This is an interior non-bearing stud wall of a similar
14 construction.

15 This is the portico.

16 This is the whole roof structure that has that sort of
17 historic reference, and its impediment right here.

18 Q. Let's flip to the next drawing and see what you got.

19 A. Okay. I have S-1-1 potting shed. Foundation plan and
20 roof framing plan.

21 Q. And what is the other -- are there other changes on
22 there?

23 A. Yeah. I see architect's note. Four-inch minimum
24 concrete in lieu of brick pavers. And it has a reference
25 point to another drawing.

THOMAS ANDERSON BOZEMAN - DIRECT

1 This is an architect's note. Area to be enclosed with
2 wood stud walls in lieu of double-wide brick walls per
3 detail BS-1 which is this detail here, BS-1.

4 Q. Speak English and tell me what that change was.

5 A. Okay. This detail says void. This detail matches the
6 conservatory. This is brick on both sides. And because
7 it is two rows of brick real close together, there's grout
8 holding it together and rebar had to be added in order to
9 meet all of our wind load and uplift requirements,
10 basically the hurricane code requirements of this area.

11 So we had it designed as requested to match the
12 conservatory. This half of the potting shed was
13 originally intended to be, as I understand it, sort of a
14 display area. We have an historic sink involved. We have
15 interior walls that look like they're built of brick,
16 whereas this side is storage. You have plywood panels
17 that's cover the historic windows that are required for
18 the hurricane. You have wheelbarrows and ladders and
19 such.

20 I think, so when he switched from this construction to
21 this construction it was less expensive, saved money.

22 Q. And who asked you to do that?

23 A. Mr. Slivka.

24 Q. See if the next drawing is a potting shed drawing.

25 A. It is.

THOMAS ANDERSON BOZEMAN - DIRECT

1 Q. Okay. Let's look at that one. Tell me which one that
2 is.

3 A. This is potting shed. It's PME-01 is the drawing
4 number. It says, plumbing HVAC and electrical plans. And
5 it looks like it got stretched in reproduction.

6 Q. Okay. Before we talk about that one, tell me what --
7 I'm going to hand you a document that's noted as
8 Plaintiff's Exhibit, labeled as Plaintiff's Exhibit Number
9 17. Tell me what that roll of drawings is.

10 A. This is potting shed. It says issued for pricing, on
11 the first issue date at 6-18-07. It says issued for
12 permit at the second submission date of 8-31-07.

13 Q. Did you prepare these drawings?

14 A. Yeah.

15 MS. ARIAIL: Your Honor, I'd like to submit
16 Plaintiff's Exhibit Number 17 as evidence.

17 THE COURT: 17? Any objection?

18 MR. LYLES: No objection.

19 THE COURT: Plaintiff's 17 into evidence.

20 (Thereupon, Plaintiff's Exhibit No. 17, potting shed
21 drawings, was received into evidence.)

22 BY MS. ARIAIL:

23 Q. We're going to roll these out.

24 A. Okay.

25 Q. Tell me what this drawing is.

THOMAS ANDERSON BOZEMAN - DIRECT

1 A. That is a potting shed. This is the exterior
2 elevations of it, piece of wall attaching to it. Up here
3 on the right is the millwork elevations. This is where
4 that fancy sink was in the more display area where it had
5 the great wall on the interior originally before it was
6 changed.

7 So, here's a whole complex of garden walls that I
8 showed on the site plan that were drafted beyond the
9 buildings themselves. Well, that's how it eventually
10 connects in.

11 This detail here, you can see it here. This is called
12 a niche. This is a little recessed area of a wall where
13 you can display things. In this case, a statute, I
14 believe. Windows. Garden gates.

15 We have open shelving above listed but here, but I
16 actually drew them out here. The soapstone sink. So
17 that's an historic sink. Here's a toilet back here. And
18 that was really difficult to fit in. It ended up we had
19 two-by-four studs right across here rather than two by
20 sixes to meet a minimum code requirement.

21 So as we built this out, that cut into the bathroom
22 zone. We were so tight for inches to meet code that we
23 shortened our stud only in this zone in order to fit it
24 in, by two inches.

25 Q. All right. Let's go back to, I believe it's a

THOMAS ANDERSON BOZEMAN - DIRECT

1 plumbing drawing. You were actually -- tell me what that
2 is.

3 A. Plumbing, mechanical and electrical-01 for the potting
4 shed. So it's all the disciplines combined of mechanical,
5 electrical and plumbing engineering on one sheet.

6 Q. And I think you mentioned -- what's included with the
7 plumbing again?

8 A. In the plumbing, I've got toilet and I've got a
9 soapstone sink. So that's going to be supply and waste.

10 Q. How about on the HVAC plan, what's that?

11 A. I've got an exhaust fan for the bathroom.

12 Q. And what's required by the electrical plan for the
13 potting shed?

14 A. I have various outlets that I'm seeing. I have light
15 switches and the exhaust fan. So that's essentially it.
16 Lights, power outlets, exhaust. It looks like there's a
17 J-box for something in the portico.

18 Q. Okay. This has been marked as Plaintiff's Exhibit
19 16. Tell me what those drawings are.

20 A. It says garage buildings. I've got two dates issued
21 for pricing; 6-18-07 and 7-26-07. At 9-26-07, it was
22 issued for permit. And at 11-12-07 it was issued for
23 pricing again.

24 Q. Okay.

25 MS. ARIAIL: I'd like to submit Exhibit 16.

THOMAS ANDERSON BOZEMAN - DIRECT

1 THE COURT: Any objection?

2 MR. LYLES: No.

3 THE COURT: Plaintiff's Exhibit 16 into evidence
4 without objection.

5 (Thereupon, Plaintiff's Exhibit No. 16, garage
6 building drawings, was received into evidence.)

7 BY MS. ARIAIL:

8 Q. I hand you another set of drawings I've got pre-marked
9 as Plaintiff's Exhibit 18. Identify those for me, please,

10 A. It's the garden wall and stair drawings.

11 Q. What's the date on those?

12 A. Got 10-15-07 issued for review.

13 Q. Okay.

14 MS. ARIAIL: Your Honor, I'd like to submit Exhibit
15 Number 18 into evidence.

16 THE COURT: Any objections?

17 MR. LYLES: No objection.

18 THE COURT: Plaintiff's Exhibit 18 into evidence
19 without objection.

20 (Thereupon, Plaintiff's Exhibit No. 18, garden wall
21 and stair drawings, was received into evidence.)

22 BY MS. ARIAIL:

23 Q. All right. let's look at the next drawing that we
24 have on this stack.

25 A. Okay.

THOMAS ANDERSON BOZEMAN - DIRECT

1 Q. And tell me what that is.

2 A. That's the garden wall and stair.

3 Q. Okay.

4 A. What we have is an elevation change on site. I
5 believe it is sort of toward the garden side. Title helps
6 you know that.

7 And you can see a stepped wall. This is a retaining
8 wall. It's holding dirt on the other side. So you enter
9 at the top of the hill, here. And you can walk down this
10 side and go down this diamond paver path. It's the same
11 on both sides. You can see. So this is in plan. That's
12 in elevation. Here's another niche you can put a statue
13 or something in there.

14 Q. Why did the Spriggs Group prepare this document?

15 A. We were asked to by Mr. Slivka.

16 Q. And what was the agreement on payment for this?

17 A. This would be an hourly charge because it wasn't
18 foreseen.

19 Q. Okay. And how many drawings did you end up having to
20 do?

21 A. I remember him talking about this as a particular
22 sign. And so it was discussed, but at hourly charge.

23 Q. And how many drawings did you produce for the garden
24 stair?

25 A. In the end it was three. So, I did this drawing which

THOMAS ANDERSON BOZEMAN - DIRECT

1 shows the majority of it from my perspective, plan
2 elevation and the section here.

3 And then the next page shows how dimensionally you can
4 lay this stuff out. That was difficult for the
5 contractor. And I've dealt with that before. And so I
6 eventually gave them a third sheet that put it on a grid
7 that he can mark on the ground and rather than get these
8 curves with, and making his own giant scale compasses and
9 such, he can just put a grid down and essentially scratch
10 it out on the ground to see what the profile of it was.

11 Q. So when the Spriggs Group initially agreed to prepare
12 a set of garden stair drawings, how many drawings were
13 contemplated?

14 A. This would have done it. Well, I guess you'd say two
15 because I do explain how to do all of this stuff on the
16 next sheet.

17 Q. All right. Show us the next sheet. How does that
18 explain how to do all that?

19 A. This is how you do an ellipse mathematically and
20 graphically. I guess it's geometry. So ellipses are a
21 favorite shape. They look great. We have plenty of them
22 in the job. All of our arches are elliptical.

23 But, it's -- as you can see by the dimensions and
24 shapes and the math here, this is not an easy thing to
25 do. An ellipse is an odd shape. So this is how you would

1 explain it to somebody to get it exactly right.

2 So, that's what that does.

3 Q. All right. And flip to the next sheet for me. Tell
4 me what that is and why you prepared that.

5 A. This is the same profile as on the other sheet. And
6 yet that's difficult for a guy to have his work crew do.
7 However, if you put out a line on the ground, and I'm
8 thinking stakes and string, to produce a grid, then you
9 can mark this on the ground according to the grid and be
10 so close to accurate that you don't have to do the
11 calculations on the previous sheet. You can do this in
12 real, you know, one-to-one space. You put your grid out
13 and you mark it according to the grid.

14 Q. And why did you prepare that drawing?

15 A. The contractor was having difficulty. He asked me to
16 do it.

17 Q. All right. Are there any more drawings on that board?

18 A. No, that's it.

19 Q. Okay. You can have a seat. Thank you very much.

20 THE COURT: Let's take a 15-minute break. We'll be
21 at ease until then.

22 (Jury exits courtroom at 4:30 p.m.)

23 THE COURT: 15 minutes.

24 (Thereupon, a break was taken at 4:30 p.m., at
25 4:44 p.m., the trial resumed:)

THOMAS ANDERSON BOZEMAN - DIRECT

1 accepted the job, or rather, who Mr. Slivka hired, we
2 would incorporate their details.

3 So those are the ones that come to mind right off.

4 Q. And are those considered construction administration
5 functions?

6 A. Those are considered general contractor functions.

7 Q. Okay. How about material takeoffs, what did you
8 perform material takeoffs for?

9 A. Drywall. And eventually -- I'd described earlier,
10 subtracting the paneling where it existed.

11 Q. Okay. And what services did you provide related to an
12 appraisal that was made in the Spring of 2009?

13 A. I got a call from an appraiser who was working for
14 Mr. Slivka and she needed to print out some floor plans at
15 eight and a half by 11 format, a normal sheet of paper.
16 And she was having trouble doing that. And she also
17 needed a translation of the room numbers into room names.
18 Appraisers have to say, you have this many bathrooms,
19 bedrooms, kitchens, whatever.

20 And Mr. Slivka had all the rooms numbered rather than
21 named. I think it was a privacy thing.

22 So, going through the e-mails, you can see in a rather
23 short period I gave her eight and a half by 11 .pdf's and
24 gave her her room name chart. There's a number here, name
25 there. Just a chart.

THOMAS ANDERSON BOZEMAN - DIRECT

1 MS. ARIAIL: May I approach, Your Honor?

2 THE COURT: Sure.

3 BY MS. ARIAIL:

4 Q. Mr. Bozeman, I've just given you a stack of
5 documents. And just tell me generally what those are.

6 A. These are my time sheets of -- well, this is a pile of
7 time sheets. I see Mr. Spriggs' name up top.

8 Q. Okay. And I'd like for you to look at the last time
9 sheet in that stack, the very last one. That's all you
10 and I are going to talk about.

11 A. Okay. That's me.

12 Q. Can you tell me what time period that was for?

13 A. That's January 1st through 15th, 2009.

14 Q. All right. And how do you identify on that time sheet
15 what time is related to the Spriggs project?

16 A. The Slivka project? I mean, they're all Spriggs
17 projects.

18 Q. I'm sorry. Well, the Spriggs design project.

19 A. Yeah. Well, basically I have every project we have
20 listed. And on some projects I have it broken down into
21 particular activities. And I have the days up top. I put
22 the number of hours, or down to the half-hour level in
23 each activity described.

24 Q. Okay. Is there a project number specific to the
25 Slivka --

THOMAS ANDERSON BOZEMAN - DIRECT

1 A. Yeah. This is 06-09. And if you guys can see just
2 the chunk, those are subcategories under that project.
3 These are all just simple, single lines for those
4 projects.

5 Q. And would you read for me from that time sheet --

6 A. Uh-huh.

7 Q. -- what you billed time for on these Slivka projects?
8 Specifically, give me the date and then what the service
9 was that you performed.

10 A. Okay. I guess I'll start with the 2nd. And I have
11 one hour under grotto, construction administration. Then
12 on the 5th, I have one and a half hours on balcony framing
13 flashing.

14 On the 7th I have a half hour under meet slash phone,
15 explain to Gene, Mr. Slivka. On that same day I have one
16 hour for balcony framing flashing. And at the bottom is
17 something associated with the project but not charged to
18 Mr. Slivka which is Carl Lewis, conservatory research.
19 He's the former contractor. He called in to ask about a
20 date that day.

21 Moving on -- actually I think that's it. Yeah, that's
22 it on the 7th.

23 Q. Is there anything on the 13th? I'm not sure if you
24 mentioned that.

25 A. Oh, yes. Yes, there is. I'm sorry.

THOMAS ANDERSON BOZEMAN - DIRECT

1 I have one and a half hours on the 13th. And it just
2 says Slivka residence and out buildings.

3 Q. Do you recall what you did that day?

4 A. I believe the 13th is the day that the -- I believe
5 the 13th is the day the drainage question came in. That's
6 the day that the plumbing sub called in to ask for a
7 substitution of three-inch plumbing lines for what was
8 called for as four-inch plumbing lines.

9 Q. I hand you a document pre-marked as Plaintiff's
10 Exhibit Number 19.

11 A. Okay.

12 Q. I'll give you a minute to look at that, and then I
13 want you to tell me what it is.

14 A. All right. This is a printout of e-mail
15 correspondence from January 13th, 2009. And it is the
16 e-mail back and forth between me and the engineer who
17 designed the lines in the first place to approve the
18 three-inch substitution.

19 Q. And what was the original question from that
20 gentleman?

21 A. Basically I asked Kayton if -- it says here, please
22 verify that you're comfortable with three-inch waste lines
23 serving each bathroom or explain the circumstances if
24 four-inch line is required.

25 And Kayton's response, if you'd like?

THOMAS ANDERSON BOZEMAN - DIRECT

1 Q. Sure.

2 A. The use of three-inch waste lines instead of four-inch
3 waste branch and stack lines is acceptable on this
4 project. The initial decision for using four inch is that
5 the cost difference, parentheses, three inches versus
6 four, is small and reduces the opportunity for waste lines
7 to become fully obstructed. Horizontal slope minimum, and
8 eighth-inch-per-foot requirements apply to both sizes.

9 Q. Who is Kayton Smith?

10 A. Kayton Smith is the mechanical engineer who did the
11 mechanical, electrical and plumbing.

12 Q. I'll hand you another document that was identified
13 yesterday as an appraisal.

14 A. Oh, okay.

15 Q. And I want you to look through that and find -- you
16 said you performed some services. See if there are
17 documents included in that appraisal that you prepared.

18 A. Okay. Yeah. Here's a floor plan that's at the right
19 size.

20 Q. What's it a floor plan of?

21 A. This is the main house there. And this is most likely
22 the .pdf that she wanted done at eight and a half by 11.
23 That's this size paper.

24 Second floor plan is right after it.

25 Basement plan is after that.

THOMAS ANDERSON BOZEMAN - CROSS

1 A. Right.

2 Q. And this among you mentioned extra work that you did
3 in developing sources for materials?

4 A. Correct.

5 Q. Is it your testimony that the work that you performed
6 in connection with all those tasks was additional work,
7 that is, not within the original scope of services?

8 A. My testimony is that the original scope of services
9 defined a finite goal in that we had a clause that
10 described what would be additional work. I also think
11 that once we lost the ability to work with a general
12 contractor, those activities that are normally taken on by
13 the general contractor that I was asked to do would be
14 extra and covered by that clause.

15 Q. So it is your testimony that each of those items
16 represents additional work that is not within the
17 contemplation of the parties?

18 A. It was contemplated in the form of the clause. And
19 so, yes.

20 Q. That it --

21 A. Do you follow what I mean?

22 Q. That -- you were referring to Paragraphs 18 and 19?

23 A. I guess that's their number.

24 Q. Okay. Let me make sure. I have lost the letter that
25 I said I was going to put up here and not lose. You're

THOMAS ANDERSON BOZEMAN - CROSS

1 referring to the provision of agreement that says if we do
2 something extra we're going to charge by the hour?

3 A. That's what I'm referring to.

4 Q. Okay. Is it your testimony to the jury, was it your
5 point yesterday, that each of those items that I just
6 mentioned was not contemplated by the original agreement
7 and it was, therefore, additional?

8 A. That's correct.

9 Q. And in no instance, save the garden and retaining
10 wall, did you document to Mr. Slivka that you believed
11 that all of those tasks were additional?

12 A. I didn't correspond with Mr. Slivka in writing.

13 Q. Okay.

14 A. He is a verbal person.

15 Q. Did you advise him orally that these items, each of
16 these items save the garden and retaining wall, because
17 we're going to talk about that separately --

18 A. Okay.

19 Q. -- did you advise him, in each instance when you were
20 performing these tasks that, Mr. Slivka, this is not
21 covered by the original scope of services and I'm going to
22 bill you extra for it?

23 A. No. No.

24 Q. Okay. Now, did these items add significant work?

25 A. They did.

THOMAS ANDERSON BOZEMAN - CROSS

1 Q. Now, what I'd like to do is to turn your attention to
2 -- let me turn your attention to what yesterday was marked
3 as Plaintiff's Exhibit Nine.

4 A. Okay.

5 Q. And in Exhibit Nine are a number of invoices sent by
6 the Spriggs Group to Mr. Slivka.

7 A. Okay. Yeah, I see that.

8 Q. In February of 2009 initially, and then that letter
9 was dated May or March of 2010, I believe.

10 A. Let me catch up to you real quick.

11 Q. Sure.

12 A. This is -- the cover sheet that you're talking about
13 is March 15th?

14 Q. Of 2010.

15 A. '10, yeah.

16 Q. But the invoices are dated February of 2009; right?

17 A. Correct.

18 Q. Okay. I would like for you to turn to invoice number
19 three --

20 A. Okay.

21 Q. -- which Mr. Slivka received in February of 2009.

22 A. Uh-huh.

23 Q. Would you agree with me that invoice three reflects
24 additional services that go all the way back to August of
25 2007?

THOMAS ANDERSON BOZEMAN - CROSS

1 Q. Okay.

2 A. -- or object to anything.

3 Q. So in terms of billing, that wasn't your
4 responsibility but you've shared with the jury yesterday
5 and today things that you believed would be additional
6 services?

7 A. I did.

8 Q. And if Mr. Slivka's opinion or belief about what's
9 additional and what's not is different than yours, who's
10 to say he's not right?

11 A. I see your point. Yes.

12 Q. Okay. In fact, the line between what's additional and
13 what was basic except where you have a discussion with
14 Mr. Slivka like on the retaining wall, that line is
15 completely subjective based on what somebody's
16 understanding may be?

17 A. That seems true.

18 Q. Okay. Now you mentioned -- and we looked at invoice
19 number four which is contract administration.

20 Now, you explained, I thought, well for the jury what
21 contract administration is. And that is, your services
22 beyond the preparation of plans and specifications in
23 furtherance of the project; is that right?

24 A. Yeah. We title it construction administration, but
25 the -- both terms get used in the industry.

THOMAS ANDERSON BOZEMAN - REDIRECT

1 A. No. I see two garages and an estimate of sheets and
2 hours, but nothing breaks it out to apartments.

3 Q. Okay. The additional sheets that were prepared for
4 the garage appear on that invoice; correct?

5 A. We are looking at invoice two?

6 Q. Yes.

7 A. Okay. Yeah, the additional sheets. Yes.

8 Q. Do you recall how many sheets were originally required
9 by the --

10 A. For the garages, I believe it was something like four,
11 if that. Let's see. What do we have?

12 Q. If you look at Exhibit Number, I think it's Seven?

13 A. Four plus engineering. So it's five.

14 Q. Okay. Did you ever review the actual construction of
15 the main house on site?

16 A. No.

17 Q. Do you have any knowledge related to whether or not it
18 was properly constructed by the contractors?

19 A. Not personally.

20 Q. Do you have any knowledge as to whether or not the
21 contractors constructed the house in accordance with the
22 requirements of the drawings that you guys produced?

23 A. Not personally, no.

24 Q. Did you have authority to take calls from the field?

25 A. I did.

CHARLES KENNETH SPRIGGS - DIRECT

1 A. He asked me what my hourly charge is and he paid me
2 that day.

3 Q. Okay. And what was the next occasion that you had to
4 work for Mr. Slivka?

5 A. In 2006, I think it was April, he contacted us and
6 said that he was concerned about the flood areas of
7 Julianston Plantation and McIntosh County. And he had the
8 idea of taking the existing buildings that he had on-site
9 and raising them up in the air approximately 12 feet.
10 Quite -- shall I say, quite a task to achieve.

11 And wanted us to go about looking at the building and
12 what the implications were.

13 Q. And did you perform those design services?

14 A. We did perform those services as well as some work in
15 detailing fencing in an enclosure area for his swimming
16 pool and tennis courts.

17 Q. How was your fee computed for those services?

18 A. I guess it's the old-friend syndrome. What we did is
19 we took our hours, I wrote him a letter. We did the hours
20 we worked on and then I gave him a fairly low rate of
21 hourly work and put it together and took our hours and
22 sent a bill.

23 Q. And did he pay for that work?

24 A. Yes, he paid for that work.

25 Q. Do you know if that construction was actually

CHARLES KENNETH SPRIGGS - DIRECT

1 performed?

2 A. No, it wasn't.

3 Q. Okay. Do you know why?

4 A. At the time that we were in the middle of this, and we
5 were actually still working at, in McIntosh County on the
6 project up until the end of September, I believe, of
7 2006. And in the same time, he had decided that he
8 perhaps wasn't going to undertake raising these buildings
9 up 12 feet but that he was going to do a new house.

10 And he briefly described as he did, verbally, that it
11 would be so long and this way and that way, and so, we
12 attempted to make a diagram of what he wanted.

13 And so, we are still finishing at McIntosh and we
14 assumed that this is just another place on the
15 plantation. And we drew them out and it sort of sat there
16 for a while.

17 Q. Okay. And what did you understand the new project to
18 include?

19 A. Well, he came back again and said that he would like
20 not only a main house, but some garages, two garages, I
21 think, and a stable sometimes referred to as barn. And a
22 conserv--

23 MR. LYLES: Your Honor, one moment.

24 THE COURT: Excuse me one second.

25 MR. LYLES: We have a witness that came in we agreed

CHARLES KENNETH SPRIGGS - DIRECT

1 to sequester.

2 THE COURT: Any objections?

3 MR. BRUORTON: No.

4 THE COURT: Go ahead.

5 MS. ARIAIL: Thank you.

6 Q. I'm sorry. Go ahead. You were describing what you
7 understood the project to include?

8 A. Let me just give the outline again because we just
9 sort of stopped and started and you'll get confused. A
10 main house and a series of outbuildings we frequently
11 refer to this is as support building, in this case it
12 would be two garages and a, I'm going to call it a
13 greenhouse but we've now know it's a conservatory, and a
14 boat house and a stable and a grotto which I think we've
15 described before which is some cave-like structure.

16 Q. And where did you understand that was going to be --
17 that project was going to take place?

18 A. Well, we never had a site for where this was going to
19 occur. We really talked about buildings, what these
20 buildings were going to be.

21 So at that time we had a group of buildings that he
22 wanted to pursue. And we had no specific site of where it
23 was going although we were at McIntosh County at Julianston
24 Plantation and assumed that it would go somewhere there.

25 Q. And what information did Mr. Slivka give you at that

CHARLES KENNETH SPRIGGS - DIRECT

1 point that described the project?

2 A. Well, it evolved. That he came back and I believe he
3 gave us these sketches which I think you all have seen and
4 they're hand drawn and said basically, this is what I am
5 thinking about doing.

6 Q. I've handed you Exhibit Six.

7 A. Yes.

8 Q. Are those the sketches that you're referring to?

9 A. That's correct.

10 Q. What did you understand his requirements to be?

11 A. Well, he told me besides showing these sketches, that
12 these buildings would be very different from Julianston.

13 And the difference that they were not historic buildings
14 originally, that these would all be new buildings and that
15 they would be constructed of new materials.

16 And he went on to say that there would be products
17 involved for windows and moldings and various things but
18 all of these would come from a manufacturer or something
19 that he would give us.

20 Q. What was your understanding when you were given those
21 sketches as to the requirements for the thickness of the
22 walls?

23 A. Well, really, in this, in these drawings there are no
24 wall thicknesses shown. There's only one mention of a
25 thickness of a wall on the first floor plan.

CHARLES KENNETH SPRIGGS - DIRECT

1 Q. And what did that apply to?

2 A. Well actually, it says 12-inch thick wall comes out of
3 interior dimensions. This was noted earlier but what
4 there is is an arrow that goes from that comment to an
5 interior wall that separates the front foyer, where you
6 come in, and the next room you go into. And there he
7 specifically said, I want to make a 12-inch wall.

8 Q. And where else were there increased wall sizes shown
9 on those sketches?

10 A. There are no other locations of increased wall sizes.

11 Q. I've pre-marked another exhibit, Number 20. I'd like
12 you to take a look at that and tell me what that is.

13 A. In response to Mr. Slivka's description of what he
14 wanted, I went back and sat down and tried to write a
15 scope of work.

16 This is the beginning of what I call verbal
17 instructions that came to us from the very beginning of
18 the project throughout its entire life. And so I took the
19 diagrams that we had drawn, these boxes and shapes that he
20 described in dimensions and I realized, of course, we
21 would need some engineering, mechanical, electrical,
22 plumbing and some structural work because these,
23 particularly the main house would involve that.

24 So I wrote or talked to our consultants and they came
25 back with a series of questions.