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.

INITIAL BRIEF OF APPELLANT

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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". (*Trial Exhibit 7*) 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. (*Transcript* P. 465) 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. (*Trial Exhibit 8*) 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. (*Trial Exhibit 10*) 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. (*Trial Exhibit 11*) On May 21, 2009, Respondent issued additional Invoice 0509-6, for services regarding an appraisal. (*Trial Exhibit 8-A*) On July 8, 2009, Respondent brought suit to foreclose on its mechanic's lien. (*Summons and Complaint*) Respondent answered and initiated counterclaims including slander of title based on the timing of the lien. (*Answer and Counterclaims*) 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. (*Trial Exhibit 8-B*).

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. (*Trial Exhibit 9*) 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. (*Amended Complaint*) Appellant answered again alleging counterclaims. (*Answer and Counterclaims to Amended Complaint*)

The Respondent filed a Motion for Summary Judgment on January 31, 2011, and a Motion to Strike Appellant's counterclaims. (*Plaintiff's Notice of Motion and Motion for Summary Judgment*; *Plaintiff's Motion to Strike Affirmative Defenses and Counterclaims from Defendant's Answer and Counterclaims to Amended Complaint*) Respondent also filed a Motion for Summary Judgment. (*Defendant's Notice of Motion and Motion for Summary Judgment*) At the hearing, Appellant agreed to withdraw certain counterclaims. Respondent's motion for summary judgment as to its claims against Appellant was denied. (*Order of The*

Honorable J. Ernest Kinard, dated April 12, 2011)[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 course selected by the Respondent when it filed its mechanic's lien action. (*Offer Pursuant to S.C. Code Ann. § 29-5-20*) Respondent made no response other than to file a Motion to Strike said offer. (*Plaintiff's Motion to Strike Defendant's Offer of Settlement*)

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. Ken Spriggs testified that items that were not contemplated by the scope of the original agreement were billed pursuant to the contract. (*Transcript* P. 313-314) 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." (*Trial Exhibit 7*) 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

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[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.

agreed upon fee. (*Trial Exhibit 8*) 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. (*Transcript* P. 516-519, *Trial Exhibit 8*) Mr. Spriggs 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. (*Transcript* P. 315)

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. (*Transcript* P. 339) 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. (*Transcript* P. 650) He testified that Mr. Spriggs decided what the charges were and did not inform him of them for two years. (*Transcript* P. 686) Mr. Scott Harvey, an expert on architectural standards and practices, testified on behalf of the Respondent. (*Transcript* P. 708) 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. (*Transcript* P. 716)

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. (Transcript P. 180) 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. (*Transcript* P. 595-600) Appellant also moved for a directed verdict regarding the timeliness of the lien. (*Transcript* P. 600-4) Respondent withdrew the quantum meruit action. (*Transcript* P. 604) Appellant also moved for a directed verdict as to Respondent's breach of contract action. (*Transcript* P. 605-7). All motions were denied (*Transcript* P. 607)

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. (*Transcript* P. 739) 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. (*Transcript* P. 741-5) Over Appellant's objections, the trial judge ruled that both causes of action would be submitted to the jury. (*Transcript* Pp. 744, 755) 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. (*Theume Transcript* P. 3, Ll. 12-21.) The Jury found for the Respondent as to the

Appellant's slander of title claim. (*Theume Transcript* P. 3, Ll. 22-23) The jury awarded the Appellant $173,990.53 in actual damages. (*Theume Transcript* P. 4, Ll. 1). Both parties reserved the right to make post-trial motions within ten days.

Appellant made his post trial motions on August 1, 2011. (*Notice of Motion and Motion Notwithstanding the Verdict and/or for a New Trial Absolute or Nisi Remittitur*) 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. (*Order Denying Defendant's Motion for JNOV and/or For New Trial*) Appellant filed a Rule 59(e), SCRCP motion asking the court to alter, amend or reconsider its order. (*Defendant's Notice of Motion Pursuant to Rule 59(e), SCRCP Regarding the Court's Order Denying Defendant's Motion for JNOV and/or for New Trial*) Said motion was denied. (*Order Denying Defendant's Motion to Alter/Amend Court's Order Denying Defendant's Motion for JNOV and/or for New Trial*)

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. (*Plaintiff's Motion for Interest, Fees and Costs*) 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 leally supportable by statute and were excessive.

(*Defendant's Memorandum in Opposition to Plaintiff's Motion for Interest, Fees, and Costs*) 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. (*Order for Award of Interest, Fees and Costs to Plaintiff*) Appellant filed a motion to reconsider said order. (*Defendant's Notice of Motion Pursuant to Rule 59(e), SCRCP Regarding Order for Award of Interest, Fees and Costs to Plaintiff*) Said motion was denied. (*Order Denying Defendant's Rule 59(e), SCRCP Motion Regarding Award of Interest, Fees and Costs to Plaintiff*)

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 (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 (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 (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 does not fall within the statutory definition of "labor." (*Transcript* P. 600-604) 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. (*Transcript* P. 742-744) 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. (*Transcript* P. 745)

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 preform 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. (*Trial Exhibit 8-B*)

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." (*Transcript* P. 288) He answered a call from a plumbing subcontractor. (*Transcript* P. 289) 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. (*Transcript* P. 365) Mr. Ken Spriggs, principal of The Spriggs Group, described work performed by Mr. Bozeman during this time as "general coordination." (*Transcript* P. 463) Mr. Spriggs also testified that his own activities performed in January, 2009, were related to construction administration. 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. (*Transcript* P. 465) Like Mr. Bozeman, Mr. Spriggs testified that in January, 2009, he participated in answering the phone calls from the plumbing and framing subcontractor. (*Transcript* P. 424-425) The last time that he had been on site was in 2007 or 2008. (*Transcript* P. 473) 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 (1918). (*Order Denying Defendant's Motion for JNOV and/or For New Trial*) 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 (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 (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. (*Transcript*, P. 473, L. 14-P. 474 L. 16)

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. (*Order Denying Defendant's Motion for JNOV and/or For New Trial*) 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. (*Transcript* P. 509 L. 25-P. 510 L. 4) 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. (*Transcript* P. 510 L. 24-25)

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 the he did not know that the appraisal company had contacted Spriggs. (Transcript p. 182 L. 24-P. 183 L. 2) Mr. Slivka also testified that he did not authorize the appraiser to contact Mr. Spriggs (Transcript P. 658 Ll. 1-4) 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." (Transcript P. 510 Ll. 13-14) He admitted that he never talked with Mr. Slivka about it. (Id. at Ll. 18-11.)

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. (*Theume Transcript* P. 4-5, *Order for Award of Attorney's Fees*) 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. (*Order for Award of Attorney's Fees*)

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. (*Transcript* P. 491) Additionally, Appellant raised this issue in the form of a post trial motion. (*Notice of Motion and Motion for Judgment Notwithstanding the Verdict and/or for a New Trial*). 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 facia* 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 (S.C. App. 2000). Black's defines "reasonable" as, "Fair, proper, or moderate under the circumstances." Blacks Law Dictionary 1272 (7th Ed. 1999).

The Respondent filed a Mechanic's Lien on April 13, 2009. (*Trial Exhibit 10*) Respondent brought suit to foreclose on that lien on July 8, 2009. (*Summons and Complaint*) 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. (*Answer and Counterclaims*)

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. (*Trial Exhibit 9*) 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. (*Transcript* P. 187, Ll. 11-14) Appellant testified:

> A: Discovery means trying to find out the facts of the case.
> Q: And so that is in investigation.
> A: Yes, that word. An investigation, yes. (*Transcript*, P. 187 Ll 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. (*Transcript* P. 157)

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'm saying I owe them $76,000 less my $20,000 worth of damages, less the $50,000 of damages from having my $265,000 sitting in the courts for three years. (*Transcript* P. 128)

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 July15, 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 to 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. (*Trial Exhibit 11*) 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

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It should also be noted that after discovery, in conformance with the Mechanic's Lien Statue, 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. (*Offer Pursuant to S.C. Code Ann. § 29-5-20*)

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 .E.2d 370 (S.Ct. 1984). An abuse of discretion 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 (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. *(Order Awarding Attorneys*

Fees). 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. (*Defendant's Memorandum in Opposition to Plaintiff's Motion for Interest, Fees, and Costs*) 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 (a)(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 (S.C. 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. (*Amended Summons and Complaint*).

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." *(Ariail Affidavit*, ¶ 10, exhibit 1 to *Plaintiff's Motion for Interest, Fees, and Costs*) Documentation supporting the amount of these fees was submitted to the Court by Respondent's counsel in the form of billing records. *(Plaintiff's Motion for Interest, Fees, and Costs*, Exhibit "C"- Timehseets) 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. (*Plaintiff's Motion for*

Interest, Fees, and Costs- Timesheets) Additionally, the fees requested include time spent contacting other individuals with whom Appellant had payment disputes. (*Timesheets*) 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. (*Transcript* P. 24) These witnesses were excluded and the Respondent's claim for breach of contract with fraudulent intent was not submitted to the jury. (*Transcript* P. 38) The Respondent is not entitled to recover attorneys fees related to pursing 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). (*Transcript* P. 604)

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. (*Timesheets*) 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 plan 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 (S.C.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 Judgment* dated April 12, 2011. 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 (1997). See also. Blumberg v. Nealco, Inc., 310 S.C. 492, 427 S.E.2d 659 (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 (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. (*Timehseets*) 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 (*Timeheets).* 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. (*Correspondence of A. Bright Ariail* dated July 11, 2011, attached to *Defendant's Memorandum in Opposition to Plaintiff's Motion for Attorneys' Fees and Costs* dated August 11, 2011.) 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). (*Motion to Strike Settlement Offer*) 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. *(Ariail Affidavit* ¶ 5). 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 (*Order Denying Motion for Summary Judgment* dated April 12, 2011).

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. (*Arial Affidavit*) 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. *(Plaintiff's Motion for Attorneys' Fees and Costs* dated August 11, 2011, Exhibit 2). 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 (33⅓ %) 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. (*Trial Exhibit 11*). 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 $92,022.18[3].

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

Respondent includes $28,619.25 in fees for time spent by staff members. (*Timesheets*) 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. Clifflure 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 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

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[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.

697 (Tex. App. Dallas 1998). The timesheets submitted by the Respondent include fees routine tasks such as filing by staff members included in (*Timesheets*) Respondent cannot recover for this no-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. (*Order for Award of Interest, Fees, and Costs*) 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. (*Trial Exhibit 9).* 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. (*Trial Exhibit 7*) 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. (*Trial Exhibit 7*) 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." (*Transcript* P. 339) 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,

April 11, 2012

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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 Initial Brief of Appellant on Respondent by depositing a copy of it in the United States Mail, postage prepaid, on April 11, 2012, addressed to their attorneys of record, A. Bright Ariail, Esquire, Rosen, Rosen & Hagood, LLC, 134 Meeting Street, Suite 200, Post Office Box 893, Charleston, S.C. 29402.

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