VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 3rd day of March 2022.

Present: Mims, Powell, Kelsey, McCullough, and Chafin, JJ., and Russell and Millette, S.JJ.

Sumner Partners LLC, Appellant,

against Record No. 210127
Circuit Court No. CL16-442

Venture Investments LLC, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of Stafford County.

Sumner Partners LLC ("Sumner") appeals from the trial court's order awarding fees and costs upon remand from our opinion in *Sumner Partners LLC v. Venture Investments LLC*, Record No. 181259, 2019 WL 5268643 (Va. Oct. 17, 2019) (unpublished) (*Sumner I*). Sumner argues on appeal that the trial court erred in denying a portion of Sumner's requested fees and costs. Agreeing with several of Sumner's arguments, we affirm in part, reverse in part, and remand.

I.

In *Sumner I*, we ruled in Sumner's favor concerning the interpretation of a contract between Sumner and Venture Investments LLC ("Venture") to purchase commercial real estate, and we remanded the case to the trial court for further proceedings consistent with our order. Upon remand, Sumner requested that the trial court enter final judgment and award its litigation expenses, including those incurred for post-appeal matters. While the trial court entered an order that granted Sumner declaratory relief and specific performance of the purchase agreement, it

retained jurisdiction over the case to resolve objections over certain matters, including the amount of litigation expenses to be awarded.

Sumner had made its request for fees and expenses pursuant to a fee-shifting provision in the parties' purchase agreement, which stated: "In the event either party hereto commences litigation against the other to enforce its rights hereunder, the prevailing party in such litigation shall be entitled to recover from the other its reasonable attorneys', consultants' and experts' fees and expenses incidental to such litigation, including on appeal." J.A. at 204. Sumner ultimately sought $414,726.83 in litigation expenses, including $59,486.06 for post-*Sumner I* expenses. Venture objected to Sumner's request for litigation expenses on multiple grounds.

Relevant to the issues before us on appeal, Venture first argued that Sumner requested post-*Sumner I* litigation expenses that were either unnecessary to respond to Venture's position after the remand or for work on unsuccessful claims. Second, Venture opposed Sumner's request for expert witness fees for Channing Martin and Gary DeClark, both of whom testified. Venture asserted that Martin's fees were excessive with an hourly rate of $550 and a total bill of over $30,000. As for DeClark's fees while he was an employee at Valbridge Property Advisors, Venture contended that they were unnecessary because his trial testimony was unrelated to the issues upon which the case was ultimately decided. Further, the invoice of DeClark's fees while he was an employee at CBRE, Inc. provided insufficient detail as to the work that he performed. Finally, Venture argued that awarding prejudgment interest on the litigation expenses Sumner had paid prior to our decision in *Sumner I* was impermissible as a matter of law because interest is only awarded for liquidated amounts, not an unliquidated amount of expenses that had not yet been awarded.

At the conclusion of a hearing over the disputed litigation expenses, the trial court awarded $278,007.32 to Sumner, reducing the total amount requested to exclude, inter alia: (i) all

post-*Sumner I* fees and costs, (ii) all of Martin's fees, (iii) all of DeClark's fees while an employee of both Valbridge and CBRE, and (iv) any prejudgment interest. As for the post-*Sumner I* fees and costs, the trial court only noted that it was "not rendering an opinion on whether they were reasonable or not, but they are simply not related at all to the prevailing party's suit." *Id.* at 412. The trial court disallowed Martin's fees in their entirety based on conclusions that it had made at an earlier hearing. In that earlier hearing, the court had stated:

> I wasn't shocked by the hourly rate. But I was surprised that it was a $32,000[1] . . . bill to come here and tell me about contracts and things he does every day. It seemed when I looked at your scientific experts who really have the knowledge and the substance of what was the essence of this dispute, that [Martin] may have charged an excessive rate. It was a large — $32,000 was a lot of money to just discuss something that he does every day. It was quite shocking, I'll put it that way.
>
> . . . .
>
> . . . I looked at his bills. It was a little beyond believable. I'm going to try to be generous and kind, but I was shocked. And I'll be honest with you when I looked at the seven factors there should have been something — particularly in light of the 40 percent haircut that the main firm took. It was really — it was not appropriate.
>
> . . . .
>
> . . . [His hours] were delineated. Possibly not believable, but delineated.

Id. at 336-37. All the other expert witness fees, according to the trial court, "seemed very reasonable." *Id.* at 338. When asked what an appropriate fee would have been for Martin, the trial court responded: "Something less than that. . . . But I remember looking at that when it first came through and saying this is a little high." *Id.* The trial court offered no explanation for excluding all of DeClark's Valbridge fees, but it did note in its rejection of DeClark's CBRE fees that the invoice lacked sufficient details "to show what exactly was done." *Id.* at 412. Finally, as

[1] The bill provided in the record states a balance due of $30,172.07. *See* J.A. at 60.

for the requested prejudgment interest on litigation expenses paid by Sumner pre-*Sumner I*, the trial court only stated that "[t]here will be no interest awarded on the fees." *Id.* at 411. The trial court entered a final order incorporating these reasons articulated at the hearing.

II.

On appeal, Sumner challenges the trial court's decision to not award any litigation expenses post-*Sumner I*, any fees and costs billed by two testifying experts, or any prejudgment interest on litigation expenses that Sumner paid prior to our decision in *Sumner I*. We address each of these challenges in turn.

A.

Under settled principles, we review "a trial court's refusal to award attorney's fees for abuse of discretion," which includes "basing its decision on an erroneous legal conclusion." *Commonwealth ex rel. Fair Hous. Bd. v. Windsor Plaza Condo. Ass'n*, 289 Va. 34, 66 (2014). "A prevailing party who seeks to recover attorneys' fees pursuant to a contractual provision such as the one before us has the burden to present a prima facie case that the requested fees are reasonable and that they were necessary." *West Square, L.L.C. v. Communication Techs., Inc.*, 274 Va. 425, 433 (2007). Abjuring an inflexible or mechanical formula, we have "identified several factors that are relevant to the determination of reasonableness," including "the time and effort expended . . . , the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate." *Id.* at 433-34 (citation omitted).

A trial court need not "consider all these factors in every situation." *Id.* at 434. "Under a contractual provision like the one at issue, however, a prevailing party 'is not entitled to recover

fees for work performed on unsuccessful claims.'" *Id.* (citation omitted). When assessing reasonable fees for an attorney's tasks,

> it is the court's duty to assess the necessity of those tasks, the time spent on them, and the rate charged "under the facts and circumstances of the particular case." This does not require the court to pore over pages and pages of billing records to evaluate the reasonableness of each line-item. But the court may neither shirk its duty to assess what amount of attorney's fees is reasonable in the specific case before it, nor award an amount so low that it fails to reimburse the prevailing party for the costs necessary to effectively litigate the claim that —after all — *it prevailed on*.

Lambert v. Sea Oats Condo. Ass'n, 293 Va. 245, 257-58 (2017) (emphasis in original) (footnote and citation omitted). "In a case where the prevailing party is entitled to an award of attorney's fees, the reasonableness of the award it seeks becomes an issue to be adjudicated in the case." *Denton v. Browntown Valley Assocs., Inc.*, 294 Va. 76, 90 (2017). "The attorney's fees that the prevailing party incurs while litigating the issue of attorney's fees are no different from those it incurs while litigating any other issue on which it prevails." *Id.*

The principle of awarding reasonable fees only associated with successful claims applies with equal force to requests for costs and other expenses. *See West Square, L.L.C.*, 274 Va. at 435-36. When costs are awarded under a contractual provision giving reasonable litigation expenses to a prevailing party, however, strict construction of the contractual provision is not required as it is for a statute permitting an award of costs. *Landsdowne Dev. Co. v. Xerox Realty Corp.*, 257 Va. 392, 403 (1999). Even so, litigation expenses must be related to "actual legal work" and be "direct costs of litigation." *Id.*

B.

Applying these principles, we hold that the trial court abused its discretion when it excluded all post-*Sumner I* fees and costs by concluding that they were "simply not related *at all*

to the prevailing party's suit" and by declining to make any determination of "whether they were reasonable or not," J.A. at 412 (emphasis added). This ruling appears to be unqualified and absolute, and in that sense, it cannot be correct. A prevailing party is still a party, is still prevailing, and is still in the same suit when seeking an award of fees and costs following a judgment declaring that party to be prevailing. *See, e.g.*, *Denton*, 294 Va. at 90-91 (collecting cases). *See generally* Kent Sinclair, Sinclair on Virginia Remedies § 1-8[A], at 9-10 (5th ed. Supp. 2021). In this case, however, the adjudicative process of determining reasonableness at any level of specificity was not engaged in by the trial court. As we understand the court's reasoning, the "prevailing party's suit," J.A. at 412, ended when we issued our *Sumner I* remand order. Not so. The suit continues to this day. The trial court thus erred and upon remand should consider the reasonableness of the fees and costs requested by Sumner that it incurred post-*Sumner I*.

C.

We next address the trial court's decision to reject in full Sumner's request for reimbursement of its expert witness fees for Martin and DeClark. With one exception,[2] we hold that the court erred in rejecting these fee requests and should on remand reconsider the requests under the governing reasonableness standard.

The trial court rejected Martin's fee request as "excessive," "shocking," "inappropriate," and "a little high," while also determining that a proper fee award should be "[s]omething less than" what was submitted to the court. *Id.* at 336-38. The court did not address whether Martin's work as an expert was irrelevant or unnecessary to Sumner's case, nor did the court

[2] We find no error in the trial court's decision to deny DeClark's CBRE fees. The invoice submitted provided a weak basis to review the precise nature of DeClark's work in this capacity. The invoice did list "Narrative Appraisal Report" as the subject, *see* J.A. at 52, but that report was not admitted at trial and found to be irrelevant, *see id.* at 218-26.

make any effort to determine what might be a reasonable amount to award for Martin's work. Instead, the court simply denied the fee request in toto. The court reached a similar conclusion regarding DeClark's Valbridge fees. Without comment, the court denied this fee request despite stating that all other expert fees submitted by Sumner, aside from Martin's fees, "seemed very reasonable." *Id.* at 338. In both of these matters, we hold that the court abused its discretion in summarily denying in full the fee requests without determining whether a lesser-included amount would be "reasonable" under the contractual fee-shifting provision, *id.* at 204.

D.

Finally, Sumner asserts that the trial court abused its discretion in declining to award prejudgment interest on Sumner's litigation expenses paid prior to our decision in *Sumner I* because it "gave no reason for its denial, and no equitable reason exists for denying [prejudgment interest]." Appellant's Br. at 30.[3] We disagree.

Code § 8.01-382 states that "[i]n any . . . action at law or suit in equity," a court "may provide for interest on any principal sum awarded, or any part thereof, and fix the period at which the interest shall commence." This statute "provides for the *discretionary* award of prejudgment interest," and "[p]rejudgment interest is normally designed to make the plaintiff whole and is part of the actual damages sought to be recovered." *Dairyland Ins. v. Douthat*, 248 Va. 627, 631 (1994) (emphasis in original) (citation omitted). As a general rule, "prejudgment

[3] Venture argues that Sumner cannot recover prejudgment interest because Sumner failed to make its request in either its complaint or in its initial motion requesting an entry of a final order and an award of litigation expenses under the parties' purchase agreement. *See* Appellee's Br. at 16-17. *See generally* Sinclair, *supra*, § 3-8[A], at 3-77 to -78; Kent Sinclair & Leigh B. Middleditch, Jr., Virginia Civil Procedure § 3.16, at 403 (7th ed. 2020). Sumner argues in rebuttal that this procedural bar does not apply because Venture did not object to its prejudgment-interest request on these grounds but instead litigated the merits of the request. *See generally Landcraft Co. v. Kincaid*, 220 Va. 865, 870 (1980). Given our holding, however, we need not address these arguments.

interest is not allowed on unliquidated damages in dispute between the parties." *Advanced Marine Enters., Inc. v. PRC Inc.*, 256 Va. 106, 126 (1998); *see also Skretvedt v. Kouri*, 248 Va. 26, 36 (1994). But the rule is not absolute. In exceptional circumstances, a trial court has discretion to make such an award. *See Beale v. King*, 204 Va. 443, 447-48 (1963). As Professor Sinclair succinctly summarizes the point, the general rule disallows such an award, "but the element of discretion remains." Sinclair, *supra*, § 3-8[A], at 3-76 to -78 (footnote omitted).

Here, the contractual fee-shifting provision does not specifically address a recovery of prejudgment interest by the prevailing party. Nor does Code § 8.01-382 "mandate the award of prejudgment interest." Sinclair & Middleditch, *supra* note 3, § 3.16, at 403. As for Sumner's contention that the trial court "arbitrarily" declined to award prejudgment interest because the court provided no reason for its decision, *see* Appellant's Br. at 30, 32, it is well settled that "[a]bsent a statutory mandate, . . . a trial court is not required to give findings of fact and conclusions of law," *Fitzgerald v. Commonwealth*, 223 Va. 615, 627 (1982). "[A]ll trial court rulings come to an appellate court with a presumption of correctness," and we will not reverse the trial court's ruling "unless the only reasonable interpretation thereof requires invalidation." *Riggins v. O'Brien*, 263 Va. 444, 448 (2002).

With respect to pre-*Sumner I* litigation expenses,[4] the trial court applied the general rule disfavoring an award of prejudgment interest on unliquidated claims. We do not fault the trial court for ending its analysis at that level of generality. The balance of equities does not

[4] Sumner points out that Venture no longer disputed "Sumner's entitlement to recover litigation expenses" after we issued *Sumner I*. Appellant's Br. at 32. While this observation may be true, an expense is unliquidated if it has some "conjectural or speculative" quality in light of a claim by the opposing party that the "amount of the charges was incorrect." *Columbia Heights Section 3, Inc. v. Griffith-Consumers Co.*, 205 Va. 43, 48 (1964). Throughout the present litigation, Venture disputed the reasonableness of the amount of Sumner's pre-*Sumner I* expenses.

indisputably tip in Sumner's favor to take this case out of the general rule that "[a]ttorney fees due to the plaintiff in the litigation are normally not liquidated and no prejudgment interest is added to such fees." 1 Dan B. Dobbs, Law of Remedies § 3.6(1), at 336 (2d ed. 1993). We thus see no reason to direct the trial court to reconsider this issue on remand.

III.

In sum, the trial court abused its discretion in declining to award any of Sumner's litigation expenses incurred post-*Sumner I* and any of Martin's fees or DeClark's Valbridge fees. The trial court, however, did not abuse its discretion in declining to award any of DeClark's CBRE fees or any prejudgment interest on an unliquidated claim for litigation expenses. For these reasons, we affirm the judgment in part, reverse in part, and remand this case for a determination of reasonable and necessary fees consistent with this order, including any reasonable litigation expenses that Sumner incurs in this appeal and the subsequent remand proceedings.

This order shall be certified to the Circuit Court of Stafford County.

A Copy,

Teste:

Clerk