

RECEIVED

Jul 10 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2022-001727
Civil Action Case No. 2014-CP-40-07037

Century Capital Group, LLC, **Appellant**,

v.

Midtown Development Group, LLC; Richland Joint Venture Group, LLC; Windsor
Richland Mall, LP; and BRC Richland, LLC, Defendants,

Of whom Windsor Richland Mall, LP is the **Respondent**.

INITIAL BRIEF OF APPELLANT

D. Ryan McCabe, Jr., SC Bar No. 16977
MCCABE, TROTTER & BEVERLY, P.C.
4500 Fort Jackson Blvd., Suite 250
Columbia, SC 29209
Phone: (803) 724-5000 Fax: (803) 724-5001
Email: ryan.mccabe@mccabetrotter.com
Attorney for Appellant

Other counsel of record:

Ruth A. Levy
1230 Main Street, Suite 330
Columbia, South Carolina 29201
(803) 567-4613
Attorney for Respondent

John G. Tamasitis
1230 Main Street, Suite 330
Columbia, South Carolina 29201
(803) 567-4613
Attorney for Respondent

Table of Contents

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL.....1

STATEMENT OF THE CASE.....2

STATEMENT OF FACTS3

STANDARD OF REVIEW5

ARGUMENT.....6

I. The trial court erred in awarding attorney’s fees where Windsor lacked contractual privity and standing to avail itself to the attorney’s fees provision of the REA.....6

II. The trial court erred by awarding attorney’s fees under the REA where the original action was one for contribution pursuant to the South Carolina Uniform Contribution Among Tortfeasors Act.7

III. The trial court erred in awarding attorney’s fees where the trial court lacked jurisdiction.9

IV. The trial court erred in awarding attorney’s fees where Windsor failed to plead for attorney’s fees or to assert a compulsory counterclaim in its answer.11

V. The trial court erred in awarding attorney’s fees where Windsor’s motion was procedurally barred under the limitations prescribed by the South Carolina Rules of Civil Procedure14

CONCLUSION15

TABLE OF AUHORITIES

Cases

<u>Harris-Jenkins v. Nissan Car Mart, Inc.</u> , 348 S.C. 171, 176, 557 S.E.2d 708, 710 (Ct. App. 2001).....	5, 14
<u>Laser Supply & Servs., Inc. v. Orchard Park Assocs.</u> , 382 S.C. 326, 340, 676 S.E.2d 139, 147 (Ct. App. 2009).....	5
<u>Blumberg v. Nealco</u> , 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993).....	5
<u>Fontaine v. Peitz</u> , 291 S.C. 536, 354 S.E.2d 565 (1987).....	5
<u>Capital Group, LLC v. Midtown Development Group, LLC</u> , Op. No. 2018-UP-249 (S.C. Ct. App. filed June 13, 2018).....	8
<u>Baron Data Sys., Inc. v. Loter</u> , 297 S.C. 382, 383, 377 S.E.2d 296, 297 (1989).....	8
<u>Hardaway Concrete Co. v. Hall Construction Corp.</u> , 374 S.C. 216, 230, 647 S.E.2d 488, 495 (Ct. App. 2007).....	8
<u>Rutland v. Holler, Dennis, Corbett, Ormond & Garner</u> (Law Firm), 371 S.C. 91, 96, 637 S.E.2d 316, 319 (Ct.App.2006).....	9, 10
<u>Martin v. Paradise Cove Marina, Inc.</u> , 348 S.C. 379, 385, 559 S.E.2d 348, 351–52 (Ct.App.2001).....	9
<u>Muller v. Myrtle Beach Golf & Yacht Club</u> , 313 S.C. 412, 438 S.E.2d 248 (1993).....	9, 10
<u>Langham-Hill Petroleum Inc. v. S. Fuels Co.</u> , 813 F.2d 1327, 1331 (4 th Cir. 1987).....	10, 11
<u>White v. New Hampshire Department of Employment Security</u> , 455 U.S. 445, 102 S.Ct. 1162 (1982).....	10, 11, 12, 13
<u>Glass v. Glass</u> , 276 S.C. 625, 628, 281 S.E.2d 221, 222 (1981).....	11
<u>Gainey v. Gainey</u> , 279 S.C. 68, 70, 301 S.E.2d 763, 764 (1983).....	11
<u>Fraternal Order of Police v. S.C. Dep’t of Revenue</u> , 352 S.C. 420, 435, 574 S.E.2d 717, 725 (2002).....	12
<u>Baird v. Charleston Cty.</u> , 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999).....	14
<u>Belton v. State</u> , 339 S.C. 71, 73, 529 S.E.2d 4, 5 (2000).....	14

Statutes

S.C. Code Ann. § 15-38-10.....	5, 8, 9
--------------------------------	---------

Rules

Rule 59, SCRCP.....	12
Rule 13, SCRCP.....	13
Rule 54, SCRCP.....	14

STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court err in awarding attorney's fees where Windsor lacked contractual privity and standing to avail itself to the attorney's fees provision of the REA?**
- II. Did the trial court err by awarding attorney's fees under the REA where the original action was one for contribution pursuant to the South Carolina Uniform Contribution Among Tortfeasors Act?**
- III. Did the trial court err in awarding attorney's fees where the trial court lacked jurisdiction?**
- IV. Did the trial court err in awarding attorney's fees where Windsor failed to plead for attorney's fees or to assert a compulsory counterclaim in its answer?**
- V. Did the trial court err in awarding attorney's fees where Windsor's motion was procedurally barred under the time limitations prescribed by the South Carolina Rules of Civil Procedure?**

STATEMENT OF THE CASE

On November 10, 2014, Century Capital Group, LLC, (“Century”) filed a complaint in the Circuit Court of Richland County seeking contribution pursuant to the South Carolina Uniform Contribution Among Tortfeasors Act (the “Act”) against several defendants, including the Respondent, Windsor Richland Mall, L.P. (“Windsor”). The complaint was amended twice, once on November 12, 2014, and again by leave of the court on December 8, 2014 to add a paragraph that was inadvertently left out and to correct the request for relief. ((2) 2nd Am. Compl. “Complaint”). RJVG filed its motion for summary judgment on May 6, 2015 and Midtown and Windsor filed separate motions for summary judgment on May 11, 2015. ((6) Def. MSJ). BRC could not be served and did not participate in the action.

On July 30, 2015, a hearing was conducted before the Honorable L. Casey Manning on all three motions for summary judgment. On September 16 and 17, 2015, Judge Manning issued orders granting summary judgment as to all Defendants and dismissing, with prejudice, Century’s claim for contribution on the grounds that the Settlement Agreement did not delineate what portion of the sum paid by Century should be apportioned to each Defendant under a negligence theory, and that Century’s claim was barred by the statute of repose. ((7) Order granting MSJ).

On September 25, 2015, Century filed motions to alter or amend the September 16 and 17 Orders, which were subsequently denied by the trial court on February 23, 2016. On March 3, 2016, Century appealed the grant of summary judgment as to each Defendant and the denial of its Motion to Alter or Amend Summary Judgment. On June 13, 2018, the South Carolina Court of Appeals upheld Judge Manning’s Orders granting summary judgment. ((8) Ct. App. Opinion). In October of 2018, Century petitioned the South Carolina Supreme Court for writ of certiorari to appeal the decision of the South Carolina Court of Appeals. Century’s petition for writ was initially

granted, but on January 29, 2020, this Court dismissed its acceptance of the writ as improvidently granted and issued a remittitur, thereby leaving the decision of the South Carolina Court of Appeals unaltered. ((9) Supreme Court Remittitur).

On December 22, 2020, eleven months after this Court's remittitur, Windsor filed a motion for attorney's fees and costs. ((10) Def. Motion for Fees). On July 19, 2022, a hearing was conducted before the Honorable Alison R. Lee on Windsor's motion for attorney's fees ((13) Transcript). Century's counsel did not attend the hearing as a consequence of a calendaring error. However, Century was permitted to respond to Windsor's motion ((14) PL Memo in Opp.), whereafter Windsor filed a supplemental affidavit of attorney's fees ((16) Supp. Aff.). On September 22, 2022, the circuit court issued an Order granting Windsor's motion for attorney's fees and costs, awarding \$71,816.46 in fees and costs to Windsor. ((17) Order Granting Fees). On October 3, 2022, Century filed a motion to reconsider the September 22 Order ((18) Motion to Reconsider), and Windsor filed its response on October 21, 2022. ((19) Defendant's Response to Motion for Reconsideration). Century's Motion was subsequently denied on November 21, 2022. ((20) Order Denying Motion to Reconsider). This appeal follows.

STATEMENT OF FACTS

In 2002, Windsor purchased the property known as the Richland Fashion Mall and subdivided the property into four distinct parcels: (1) the TGI Friday Parcel; (2) the Bank Parcel; (3) the Verizon Parcel; and (4) the Midtown Parcel. At the same time, Windsor sold the Verizon Parcel to BRC Richland, LLC ("BRC"). On September 7, 2005, Windsor, as then owner of the Midtown Parcel, and BRC, as then-owner of the Verizon Parcel, entered into a Reciprocal Easement, Covenant, Operation and Restriction Agreement and Declaration (the "REA"). ((3) Complaint Ex. 1). Among other things, the REA created a duty on behalf of the owner of the

Midtown Parcel to perform and pay for maintenance and repairs to the Common Areas and to the HVAC system, roof system and structural components of the Verizon Parcel. ((2) Complaint ¶ 9). The property then changed hands in several transactions.

On September 12, 2005, after the REA took effect, BRC sold the Verizon Parcel to Spirit. ((2) Complaint ¶ 10). On November 4, 2005, Windsor sold the Midtown Parcel to Midtown Development Group, LLC (“MDG”). ((2) Complaint ¶ 11). On May 25, 2007, MDG deeded the Midtown Parcel to Richland Joint Venture Group, LLC (“Richland”). ((2) Complaint ¶ 12). On February 16, 2010, Richland sold 79% of its interest in the Midtown Parcel to Century and the remaining 21% interest in the Midtown Parcel to Investment Property Exchange Services. On February 17, 2010, Investment Property Exchange Services transferred this 21% interest in the Midtown Parcel to Century. ((2) Complaint ¶ 13). *These transactions put two intervening owners of the Midtown Parcel between Windsor and Century.*

On November 30, 2010, Spirit filed a lawsuit against Century, as owner of the Midtown Parcel, based primarily on allegations that Century failed to properly repair and maintain certain portions of the Richland Mall (Case No.: 2010-CP-40-8407). Spirit asserted that Century was liable for the actions of the prior owners of the Midtown Parcel. Century had possession of the Midtown Parcel for approximately nine months when Spirit brought suit. ((2) Complaint ¶ 13).

In an effort to resolve the costly and protracted litigation with Spirit, Century agreed to settle the underlying lawsuit’s claims relating to repair and maintenance of the Mall for One Million Four Hundred Fifty Thousand and No/100 Dollars (\$1,450,000.00). The Settlement Agreement expressly extinguished liability and discharged all claims against Century and its predecessors in interest in the Midtown Parcel. The Agreement provides in part:

The parties agree that the \$1,450,000 payment is provided for the release and extinguishment of any pre-June 30, 2013 liability related to the

maintenance and repair of the Spirit parcel and the remaining consideration provided by [Century] under this Settlement Agreement is provided for the pre-June 30, 2013 settlement of the CAM, accounting and other claims asserted by Spirit.

((6) Def. MSJ, at 3)

Century brought a claim for contribution, pursuant to the South Carolina Uniform Contribution Among Tortfeasors Act, S.C. Code Ann. § 15-38-10, *et seq.*, against Windsor for its pro rata share of the liability to Spirit for defective construction and repairs on the basis that Windsor's actions and/or inactions, as a successive owner of the Midtown Parcel, contributed to Spirit's damages. ((2) Complaint ¶¶ 14-22). Century had no grounds to sue Windsor under a breach of contract theory because Windsor owned the Midtown Parcel prior to Century purchasing the Midtown Parcel and the REA did not contain a survivorship provision.

STANDARD OF REVIEW

“In South Carolina, the authority to award attorney's fees can come only from a statute or be provided for in the language of a contract. There is no common law right to recover attorney's fees.” Harris-Jenkins v. Nissan Car Mart, Inc., 348 S.C. 171, 176, 557 S.E.2d 708, 710 (Ct. App. 2001). The review of attorney fees awarded pursuant to a contract or statute is governed by an abuse of discretion standard. See, Laser Supply & Servs., Inc. v. Orchard Park Assocs., 382 S.C. 326, 340, 676 S.E.2d 139, 147 (Ct. App. 2009); Blumberg v. Nealco, 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993). “[A]n abuse of discretion occurs when there is an error of law or a factual conclusion that is without evidentiary support.” Fontaine v. Peitz, 291 S.C. 536, 354 S.E.2d 565 (1987).

ARGUMENT

I. The trial court erred in awarding attorney's fees where Windsor lacked contractual privity and standing to avail itself to the attorney's fees provision of the REA.

The REA is composed of restrictive covenants and easements that create rights and obligations for the owners of certain parcels. Specifically, the REA requires the owner of the Midtown Parcel to perform specified maintenance on common areas including the roof over the main mall property. It is undisputed that Century and Windsor have both been owners of the Midtown Parcel, but at different times. During their respective period of ownership of the Midtown Parcel, the parties each had an obligation to maintain and repair certain portions of the Mall, including the Verizon Parcel. ((2) Complaint ¶ 9) Century alleged in its suit for contribution that Windsor, while owner of the Midtown Parcel, made defective and negligent repairs to the Mall, and that Century paid Windsor's pro-rata share of liability through their settlement agreement with Spirit. ((2) Complaint ¶¶ 15,21.) The basis of Century's contribution claim against Windsor was that Windsor, while owner of the Midtown Parcel, made defective and negligent repairs for which Century was sued and extinguished through a settlement agreement. ((2) Complaint ¶ 15). In no way do these allegations imply or rely on privity of contract between Century and Windsor.

Article VII of the REA, entitled "EFFECT AND DURATION," makes it clear that the terms of the REA "run with the land" and "inure to the benefit of and [are] binding upon the Parcels and the owners thereof..." ((3) Complaint Ex. 1 at 12). Additionally, there is no survivorship clause under the REA. Each current parcel owner has specific rights and obligations under the REA that are solely derived from their ownership in said parcel. There are two intervening owners of the Midtown Parcel between Windsor and Century. ((2) Complaint ¶¶ 7-13). Windsor sold the Midtown Parcel to Midtown Development Group, LLC as evidenced by deed recorded on November 4, 2005 recorded in the Richland County Register of Deeds ("ROD"), Book R1118 at

page 2107. ((2) Complaint ¶ 11). Midtown Development Group, LLC sold the Midtown Parcel to Richland Joint Venture Group, LLC by deed recorded on May 25, 2007, in the Richland County ROD, Book R1317 at page 1439. ((2) Complaint ¶ 12). Finally, Century purchased the Midtown Parcel by deeds recorded on February 16, 2010, and February 17, 2010, well over four years after Windsor's conveyance to Midtown Development Group, LLC. ((2) Complaint ¶ 13).

Upon conveyance of its ownership in the Midtown Parcel, Windsor ceased to be a party to, or beneficiary of, the REA with respect to the Midtown Parcel. Applying the doctrine of Merger, Windsor's right to seek contractual remedies under the REA were conveyed to Midtown Development Group, LLC in 2005 when Windsor conveyed its ownership of the Midtown Parcel. ((18) Motion to Reconsider at 2). As the current owners of the Midtown and Verizon Parcels, only the current owners of these two parcels have the contractual privity to seek remedies under the REA.

How can Century be liable to Windsor for attorney's fees under the REA if Century had no recourse under the REA against Windsor? The trial court's award of attorney's fees misconstrues the underlying action as one arising under the REA, rather than the contribution action it actually was. Therefore, Windsor cannot avail itself to a contractual attorney's fee provision in a contribution action not arising under the REA contract.

II. The trial court erred by awarding attorney's fees under the REA where the original action was one for contribution pursuant to the South Carolina Uniform Contribution Among Tortfeasors Act.

Judge Lee's Order awarding attorneys' fees and costs improperly recharacterized the nature of Century's suit as "arising under the REA." ((1) Order on Appeal at 2). Century's solitary cause of action against Windsor was for contribution. ((2) Complaint ¶ 21). Windsor opens its attack on Century's claim for contribution in its motion for summary judgment by stating, "[t]he sole cause of action in the immediate action is for contribution, pursuant to the South Carolina Uniform

Contribution among Tortfeasors Act, Section 15-38-10 et. seq. Code of Laws” ((6) Def. MSJ at 3). Windsor supplied a multitude of potential reasons why the contribution claim should fail, but the only rationale that relied on the REA was related to the Statute of Repose, and it was used merely to establish a starting point to demonstrate an eight-year period of time not the terms of the REA. ((6) Def. MSJ at 7).

In issuing his Orders granting summary judgment to the several defendants, Judge Manning correctly characterized the nature of the action as “one for contribution pursuant to the South Carolina Uniform Contribution Among Tortfeasors Act regarding the \$1,450,000.00 payment Century made to Spirit under the terms of their Settlement Agreement.” ((7) Order Granting MSJ at 5). Additionally, the South Carolina Court of Appeals described the action as being brought “pursuant to South Carolina’s Contribution among Tortfeasors Act.” Century Capital Group, LLC v. Midtown Development Group, LLC, Op. No. 2018-UP-249 (S.C. Ct. App. filed June 13, 2018). ((8) Ct. App. Opinion at 1). In contrast, Judge Lee’s Order granting attorneys’ fees restates the action as one “seeking contribution arising out of a Reciprocal Easement, Covenant, Operation and Restriction Agreement and Declaration executed between Century and the Defendants herein.” ((1) Order on Appeal at 2).

Whether Century’s claim against Windsor was brought under statute or the REA is pivotal, since attorney’s fees are not recoverable unless authorized pursuant to statute or a contract. See Baron Data Sys., Inc. v. Loter, 297 S.C. 382, 383, 377 S.E.2d 296, 297 (1989); Hardaway Concrete Co. v. Hall Construction Corp., 374 S.C. 216, 230, 647 S.E.2d 488, 495 (Ct. App. 2007). Because there is no attorney’s fee provision in the Act, Century’s, Judge Manning’s, and Windsor’s understanding and characterization of the case as one for contribution arising under Section 15-38-10 of the South Carolina Code of Laws should preclude Windsor from recovering a grant of

attorney's fees. ((2) Complaint ¶¶ 14-22); ((7) Order Granting MSJ at 5); ((6) Def. MSJ at 3-6, 7-10). Century concedes that the REA creates certain duties and obligations for the owners of the parcels in question. However, the contribution claim against Windsor did not arise under the REA, but instead arose under the South Carolina Uniform Contribution among Tortfeasors Act. Therefore, Judge Lee's Order granting Windsor's Motion for attorney's fees improperly and necessarily recharacterized (and mischaracterized) the action as arising under the REA, despite the lack of contractual privity. ((1) Order on Appeal at 2). Without such a recharacterization, there is no avenue for recovery.

Century did not execute the REA. Windsor did not hold an interest in the Midtown Parcel at any time during the litigation and has not since 2005. ((18) Motion to Reconsider at 7-8). Century's second amended complaint summarizes the action and describes Windsor's liability as arising from it being "joint tortfeasors with the Plaintiff [who] are legally liable to contribute their pro-rate share of liability for the claims, which Plaintiff has settled, in that the Plaintiff has paid more than its pro-rata share of the common liability, pursuant to the South Carolina Uniform Contribution among Tortfeasors Act, Section 15-38-10 *et. seq.*, S.C. Code (1976, as amended)."

III. The trial court erred in awarding attorney's fees where the trial court lacked jurisdiction.

"The established case law is that a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed." Rutland v. Holler, Dennis, Corbett, Ormond & Garner (Law Firm), 371 S.C. 91, 96, 637 S.E.2d 316, 319 (Ct.App.2006). "[O]nce the remittitur is issued from an appellate court the circuit court acquires jurisdiction to enforce the judgment and take any action consistent with the appellate court's ruling." Martin v. Paradise Cove Marina, Inc., 348 S.C. 379, 385, 559 S.E.2d 348, 351-52 (Ct.App.2001) (citing Muller v. Myrtle Beach Golf & Yacht Club, 313 S.C. 412, 438 S.E.2d 248 (1993)).

Windsor should not be granted attorney's fees because the Circuit Court lost jurisdiction over the matters involved in this case after the time for filing post-trial motions expired. ((14) Plaintiff's Memo in Opposition at 4). Windsor was granted summary judgment by an Order dated September 17, 2015. ((7) Order Granting MSJ). The Order disposed of Century's contribution claim, the only claim involved in this matter, and left nothing more to be decided. (Id.) The South Carolina Court of Appeals affirmed the grant of summary judgment in Unpublished Opinion No. 2018-UP-249 filed on June 13, 2019. ((8) Ct. App. Opinion). After initially granting Century's petition and issuing a writ of certiorari to review the Court of Appeals' decision, the Supreme Court of South Carolina dismissed the writ as improvidently granted and issued remittitur on January 29, 2020. ((9) Remittitur). Once the Supreme Court issued remittitur, this Court acquired only so much jurisdiction over this case as is needed to enforce a judgment. Judgment here is limited to dismissal of the action and the parties hereto.

Windsor asserted that Century's position misconstrues the law ((15) Defendant's Response Memo at 3), however it is Windsor that misconstrued the central facts upon which this issue turns. It is true that Rutland and Muller are cases where the recovery of attorney's fees were authorized by statute. Consequently, these are applicable cases based on Century's position, which has always been and remains, that its contribution action against Windsor was brought under the Act, not the REA. Windsor cited Langham-Hill Petroleum Inc. v. S. Fuels Co., 813 F.2d 1327, 1331 (4th Cir. 1987) for the proposition that the trial court retains jurisdiction over the parties even after an action is no longer pending for the purpose of collateral circumstances. ((15) Defendant's Response Memo at 5). The Langham Court adopted its reasoning from the U.S. Supreme Court case White v. New Hampshire Department of Employment Security, 455 U.S. 445, 102 S.Ct. 1162 (1982). Notably, in White, the request for attorney's fees was made four and one-half months after a

judgment was entered and only after the issue of attorney's fees was deemed to be collateral to the main cause of action based on 42 U.S.C. § 1988 permitting attorney's fees to the "prevailing party" only. *Id.* at 451, 102 S.Ct. at 1166. Not only was no such determination ever made in this case, but the analysis is moot since there is no similar language found in the Act.

Additionally, the Court in White noted that "[t]he discretion of the trial judge will support denial of fees in cases in which a post-judgment motion unfairly surprises or prejudices the affected party." Langham, 813 F.2d at 1331 (citing White, 455 U.S. at 454, 102 S.Ct. at 1168). In contrast to White, Windsor's first request for fees occurred more than eleven months after a remittitur from this Court and over six years after filing the underlying action. ((10) Defendant's Motion for Fees). The effect of such a late request was precisely surprise and prejudice to Century, especially in light of the fact Windsor never before pled for such relief in the underlying action. Therefore, whether or not the reasoning in White is adopted, the award of attorney's fees in this case should have been denied based on the unfair surprise and prejudice that resulted from a motion for fees over eleven months after remittitur from this Court.

IV. The trial court erred in awarding attorney's fees where Windsor failed to plead for attorney's fees or assert a compulsory counterclaim in its answer.

More than six years after this action commenced, and more than eleven months after a remittitur from this Court, Windsor sought attorneys' fees for the first time. ((10) Defendant's Motion for Fees). "A judgment or decree, whether in law or equity, must conform to both the pleadings and the proofs and be in accordance with the theory of action on which the pleadings are framed and the case was tried." Glass v. Glass, 276 S.C. 625, 628, 281 S.E.2d 221, 222 (1981). "Normally, a party may not receive relief which was not requested in the pleadings." Gainey v. Gainey, 279 S.C. 68, 70, 301 S.E.2d 763, 764 (1983). Certain issues not plead may become part of the case by implied consent; however, "[i]n order to be tried by implied consent, the issue must

have been discussed extensively at trial. Fraternal Order of Police v. S.C. Dep't of Revenue, 352 S.C. 420, 435, 574 S.E.2d 717, 725 (2002).

In the lower court, Windsor relied on the U.S. Supreme Court Case White v. New Hampshire Department of Employment Security, 455 U.S. 445, 102 S.Ct. 1162 (1982), for the proposition that its request for attorney's fees did not need to be brought as a compulsory counterclaim because motions for costs and attorney's fees which are available to the "prevailing party" are "collateral and independent." See White, 455 U.S. at 449, 102 S.Ct. at 1165. ((15) Defendant's Response Memo at 5). However, the facts of White are distinguishable from the case at bar and Windsor's reliance is misplaced.

In White, the Supreme Court was tasked with answering whether a post-judgment request for attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, is a motion to alter or amend the judgment, subject to the 10-day timeliness standard of Rule 59(e) of the FRCP. The Court held that it was not, reasoning that Rule 59(e) is usually invoked to support reconsideration of matters contained within a decision on the merits, in contrast to a § 1988 request for attorney's fees, which raises issues collateral to the main cause of action. 455 U.S. at 452, 102 S.Ct. at 1166. The Court stated that since § 1988 provides for an award only to the "prevailing party", there cannot be an inquiry on entitlement until one party has prevailed. Id. Further, "[r]egardless of when attorney's fees are requested, the court's decision of entitlement to fees will therefore require an inquiry separate from the decision on the merits." Id. Here, Windsor argued in one breath that it is entitled to attorney's fees under contract (the REA) but in another breath cites as support a case that bases its holding on the specific language of a statute. ((15) Defendant's Response Memo at 5). If the award of attorney's fees in this case was based on the REA, as

Windsor asserts, its claim would not be collateral to the main cause of action and should have been properly pled in Windsor's answer.

With this context, Windsor's reliance on White is misplaced. The facts of White are confined to claims that are deemed collateral and they do nothing to negate the need for attorney's fees to be pled as compulsory counterclaims in other types of cases. In its post-appeal motion for attorney's fees and costs, Windsor has continuously relied on the REA as a basis for recovery. Windsor should have put Century on notice of its intent to seek attorney's fees when answering the complaint. Windsor was required to assert as a compulsory counterclaim "any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." Rule 13(a), SCRPC. ((14) Plaintiff's Memo in Oppo. at 6). Thus, any basis or claim Windsor had for recovering its attorney's fees in this matter should have been raised in its responsive pleadings. However, Windsor's Answer neither asserts any right to attorney's fees under the REA nor requests recovery of attorney's fees as a form of relief. Rather, for the first time in this action, Windsor states in its Motion that it "is entitled to its reasonable attorneys' fees and costs under Article IX, Section B of the REA." ((10) Defendant's Motion for Fees ¶ 18). Windsor's failure to plead any claim or right to recover its attorneys' fees in its Answer constitutes a waiver of the same. To hold otherwise would have grave implications for the South Carolina Bar. Without such notice, how can attorneys properly advise their clients of the potential exposure in any given proceeding to enable clients to make informed decisions about how to proceed?

V. The trial court erred in awarding attorney’s fees where Windsor’s motion was procedurally barred under the limitations prescribed by the South Carolina Rules of Civil Procedure.

Cases must come to an end at some point. Pursuant to the South Carolina Rules of Civil Procedure, Windsor was required to raise the issue of attorneys’ fees and costs after the grant of summary judgment on September 17, 2015. “Summary judgment is an adjudication on the merits of the case....” Baird v. Charleston Cty., 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999). SCRPC Rule 54(d) states, “[a] motion for costs...may be filed by the prevailing party within 10 days of the receipt of written notice of the entry of final judgment.” “Costs,” as used in SCRPC Rule 54(d), includes attorneys’ fees when attorneys’ fees are authorized by statute. See Harris-Jenkins v. Nissan Car Mart, Inc., 348 S.C. 171, 177, 557 S.E.2d 708, 711 (Ct. App. 2001) (“Rule 54, SCRPC (allows imposing attorney’s fees as costs when authorized by statute)”). Rule 54(e)(1) likewise allows attorney’s fees to be taxed as costs if attorney’s fees are allowed by statute or rule. See Belton v. State, 339 S.C. 71, 73, 529 S.E.2d 4, 5 (2000) (citing SCRPC Rule 54(e)(1)). Windsor Richland Mall, L.P. does not meet this standard as 1) it prevailed prior to appeal, 2) did not plead or demand attorney’s fees at any phase of this litigation until eleven months after this Court’s remittitur, and 3) did not move for attorney’s fees within 10 days as required under Rule 54(d). Windsor did not seek attorney’s fees or costs within 10 days of either entry of summary judgment, or even remitter if one argues that the time was tolled by the appeal.

CONCLUSION

For all the foregoing reasons, this Court should reverse the order of the Circuit Court Judge awarding attorney's fees to Windsor.

Respectfully submitted,

July 3, 2023

Columbia, SC

s/ D. Ryan McCabe, Jr.

D. Ryan McCabe, Jr., SC Bar No. 16977
MCCABE, TROTTER & BEVERLY, P.C.
4500 Fort Jackson Blvd., Suite 250
Columbia, SC 29209
Phone: (803) 724-5000 Fax: (803) 724-5001
Email: ryan.mccabe@mccabetrotter.com
Attorney for Appellant