

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

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Appellate Case No. 2022-001727

Case No. 2014-CP-40-07037

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**RECEIVED**

**Oct 30 2023**

**SC Court of Appeals**

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 Respondent.

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INITIAL BRIEF OF RESPONDENT

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## **STATEMENT OF ISSUES ON APPEAL**

- I. Whether the trial court abused its discretion in awarding attorney's fees where Windsor lacked contractual privity and standing to avail itself of the attorney's fees provision in the REA.
- II. Whether the trial court abused its discretion in 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. Whether the trial court abused its discretion in awarding attorney's fees because the trial court lacked jurisdiction.
- IV. Whether the trial court abused its discretion in awarding attorney's fees where Windsor failed to plead for attorney's fees or assert a compulsory counterclaim in its answer.
- V. Whether the trial court abused its discretion in awarding attorney's fees because Windsor's motion for attorney's fees was procedurally barred under the time limitations prescribed by the South Carolina Rules of Civil Procedure.

## STATEMENT OF THE CASE

In 2002, Windsor Richland Mall, LP (“Windsor”) purchased the property known as the Richland Fashion Mall, subsequently subdividing the property into four parcels: (1) the TGI Fridays Parcel; (2) the Bank Parcel; (3) the Verizon Parcel; and (4) the Midtown Parcel. At the same time Windsor subdivided the property, it sold the Verizon Parcel to BRC Richland, LLC (BRC). (7 Order granting MSJ, pg. 2).

On September 7, 2005, Windsor, which at that time owned the Midtown Parcel, and BRC, as the then-owner of the Verizon Parcel, entered into a Reciprocal Easement, Covenant, Operation, and Restriction Agreement and Declaration (the “REA”). (3 the REA, pg. 1). The REA, among other obligations, created a contractual 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 until November 30, 2010. (3 the REA, pg. 13).

On September 12, 2005, BRC sold the Verizon Parcel to Spirit SPE Columbia, LLC (“Spirit”). (7 order granting MSJ, pg. 2).

On November 4, 2005, Windsor sold the Midtown Parcel to Midtown Development Group, LLC (“Midtown”). (7 order granting MSJ, pg. 2). On May 25, 2007, Midtown deeded the Midtown Parcel to Richland Joint Venture Group, LLC (Richland). (7 order granting MSJ, pg. 2). On February 16, 2010, Richland sold seventy-nine percent (79%) of its interest in the Midtown Parcel to Century Capital Group, LLC (“Century”) and the remaining twenty-one percent (21%) to Investment Property Exchange Services. (7 Order granting MSJ, pg. 2). The next day, Investment Property Exchange Services transferred its twenty-one percent (21%) in the Midtown Parcel to Century. (7 order granting MSJ, pg. 2-3).

On November 30, 2010, Spirit filed a lawsuit against Century as the owner of the Midtown Parcel. (7 order granting MSJ, pg. 3). The litigation between Spirit and Century involved seventeen causes of action, including breach of the REA, negligence, unfair trade practices, and fraud. (7 order granting MSJ, pg. 3). Spirit based its lawsuit on allegations that Century had failed to maintain and repair portions of Richland Mall that Century was contractually obligated to maintain under the REA and that Century improperly overbilled Spirit for the repairs that were undertaken on the Verizon Parcel. (7 order granting MSJ, pg. 3).

In November 2013, Century and Spirit settled their litigation and entered into a Settlement Agreement and Mutual Release (the “Settlement Agreement”). (7 order granting MSJ, pg. 3). The Settlement Agreement, among other things, provided that Century would pay Spirit \$1,450,000.

In part, the Settlement Agreement states:

The parties [Century and Spirit] 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 [Verizon 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.

(7 order granting MSJ, pg. 3). Other than this paragraph, the Settlement Agreement in no way identified the reason for the \$1,450,000 payment or suggested that Century and Spirit agreed as to how the \$1,450,000 was to be allocated among Spirit’s claims. (7 order granting MSJ, pg. 3). The Settlement Agreement neither explained if the payment was pursuant to the breach of contract claims, the negligence claims, or any of the other claims Spirit brought against Century. (7 order granting MSJ, pg. 3). Further, the Settlement Agreement does not explain how the payment was to be allocated for any particular maintenance or repair failure. (7 order granting MSJ, pg. 3).

On November 10, 2014, Century filed a summons and complaint in Richland County, which Century subsequently amended on November 12, 2014, and again on December 8, 2014.

(2. 2d Am. Compl., pg. 2). In its complaint, Century sought contribution allegedly under the South Carolina Uniform Contribution Among Tortfeasors Act<sup>1</sup> (the “Act”), from Windsor, Midtown, Richland, and BRC (collectively, “Defendants”) for their pro rata share of liability as alleged joint tortfeasors for the claims Century settled with Spirit. (2. 2d Am. Compl., pg. 4-5). However, Century also sought contribution in part for alleged acts that do not fall under the Act, such as Windsor’s alleged negligence in maintaining and repairing the Verizon Parcel, common areas, roof, and HVAC system. (2 2d Amended Compl., pg. 4-5).

On May 11, 2015, Defendants each separately moved for summary judgment. (6 Windsor MSJ, pg. 1 (coversheet)). In its motion, Windsor argued in part that Century could not recover on a contribution claim because the Settlement Agreement upon which Century sought contribution gave no indication as to how the amount Century paid for the release was divided, if at all, among the claims brought or injuries suffered by Spirit. (6 Windsor MSJ, pg. 3-6).

On July 30, 2015, the Honorable L. Casey Manning held a hearing on Defendants’ motions for summary judgment. (7 Order granting MSJ, pg. 1). On September 17, 2015, Judge Manning issued an order granting summary judgment in each Defendant’s favor, finding that the Settlement Agreement did not indicate what portion of the settlement amount paid by Century was subject to contribution by the defendants and that Century’s claim was barred by the Statute of Repose. (7 Order granting MSJ, pg. 1, 5-13).

On September 25, 2015, Century filed a Rule 59(e), SCRCPP, motion to alter or amend the orders granting summary judgment. Judge Manning denied Century’s motion on February 23, 2016. (Sept. 25, 2015 Rule 50(e) Motion; Feb. 23, 2016 Form 4 Order). On March 3, 2016, Century filed notices of appeal regarding the orders granting summary judgment and the denial of

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<sup>1</sup> S.C. Code Ann. §§ 15-38-10 to -70 (2005 & Supp. 2022).

its Rule 59(e), SCRCPP, motion. (March 3, 2016 notice of appeal). On June 13, 2018, this Court affirmed the trial court's orders. *See Century Cap. Grp., LLC v. Midtown Dev. Grp., LLC*, Op. No. 2018-UP-249 (S.C. Ct. App. filed on June 13, 2018). In October 2018, Century petitioned the South Carolina Supreme Court for a writ of certiorari, which the Supreme Court granted before dismissing as improvidently granted on January 29, 2020. *See Century Cap. Grp., LLC v. Midtown Dev. Grp., LLC*, Op. No. 2020-MO-003 (S.C. Sup. Ct. filed on January 29, 2020). The Supreme Court issued its remittitur the same day. (9 Remittitur).

On December 22, 2020, Windsor filed a motion for attorney's fees and costs, as expressly provided for in the REA, with the circuit court along with an affidavit listing attorney's fees and costs of \$63,146.42. (10 Windsor Motion for Fees, pg. 1; 12 Affidavit of Ruth A. Levy, pg. 2).

On attorney's fees, the REA specifically states:

In the event of litigation by reason of this Agreement, the prevailing party in such litigation shall be entitled to recover reasonable attorneys' fees actually incurred in the addition to all other expenses incurred by such litigation.

(3 the REA, pg. 13). In its memorandum of support for its motion, Windsor argued the complexity and time intensiveness of the case and the legal services rendered were entirely due to Century's actions because Century filed the contribution action and appealed the case when the circuit court granted summary judgment. (11 Memo in support of attorney's fees, pg. 4-5). Windsor obtained summary judgment in the underlying action and defended that grant of summary judgment through the appellate process to the South Carolina Supreme Court. (7 order granting MSJ; 11 memo in support of attorney's fees, pg. 4-5). Windsor asserted it should not bear the burden and expense of defending against Century's years of litigation when it prevailed in litigation by way of the REA. (11 memo in support of attorney's fees, pg. 4-5).

On July 19, 2022, the Honorable Allison R. Lee held a hearing on Windsor's motion for attorney's fees. Century's counsel did not attend. (13 Motion Tr., pg 1). Judge Lee allowed Century to file a memorandum in opposition to Windsor's motion after the hearing but before the court ruled, which Century filed on July 20, 2022. (13 Attorney's fees hearing transcript, pg. 1; 14 Century Memo, pg. 1). In its memorandum in opposition, Century argued (1) the circuit court lacked jurisdiction to grant attorney's fees because Windsor did not file its motion before the time for filing post-trial motions expired; and (2) Windsor was procedurally barred from recovering attorney's fees because it failed to plead a basis for such recovery in its answer and was thus the law of the case. (14 memo in opposition to attorney's fees, pg. 4-7). Windsor subsequently filed a reply to Century's memorandum along with a supplemental affidavit updating its attorney's fees and costs to \$75,814.46. (15 Windsor Reply; 16 Supp. Aff., pg. 2).

On September 22, 2022, Judge Lee issued an order granting Windsor's motion for attorney's fees. (17 Order granting fees, pg. 1). In its order awarding attorney's fees, the circuit court, citing *Raynor v. Byers*,<sup>2</sup> stated the REA expressly provided for attorney's fees and Rule 54, SCRCF, allowed for the award of attorney's fees when authorized by statute *or by contract*. (17 order awarding attorney's fees pg. 2-3). The circuit court found that Windsor was not required to assert a counterclaim for attorney's fees because any entitlement to such fees would only arise if Windsor prevailed in defending against Century's action. (17 Order awarding fees, pg. 3). Thus, until Century's contribution action was adjudicated, Windsor was not entitled to attorney's fees. (17 order awarding fees, pg. 3). The circuit court, after conducting an analysis on the factors

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<sup>2</sup> 422 S.C. 128, 131, 810 S.E.2d 430, 432 (Ct. App. 2017) (stating the authority to award attorney's fees can only come from a statute *or as provided in the language of a contract*).

underlying attorney's fees, awarded Windsor \$71,816.46 in attorney's fees. (17 order awarding fees, pg. 4-5).

On October 3, 2022, Century filed a Rule 59(e) and Rule 60(b)(4), SCRCPP, motion for reconsideration of and relief from the circuit court's order awarding attorney's fees. (18 Century Reconsideration & Relief Motion, pg. 1). In its motion, Century asserted new arguments, some of which include that (1) Windsor lacked contractual privity and standing, which prevented Windsor from being able to seek attorney's fees under the REA; (2) the attorney's fees provision is expressly limited to contractual disputes under the REA; (3) Windsor waived any claim for attorney's fees; (4) the circuit court conducted an unauthorized review and reversal of an order from the underlying contribution action; and (5) Century was denied due process because Windsor did not file its motion for attorney's fees until six years after the circuit court granted summary judgment. (18 Century Reconsideration & Relief Motion, pg. 2-9). On November 21, 2022, the circuit court denied Century's motion for reconsideration and relief in a Form 4 order. (20 Form 4 Denial).

On December 8, 2022, Century filed a notice of appeal regarding the circuit court's order granting attorney fees. This appeal followed.

Century filed two motions for extension of time to file its initial brief with this Court, both of which were granted. This Court's order granting Century's second motion for extension listed Century's deadline to file and serve its initial brief as July 3, 2023. Century served its initial brief on Windsor on July 3, 2023, but failed to properly file its brief with this Court until July 10, 2023. Windsor filed a motion to dismiss under Rule 208(a)(4) of the South Carolina Appellate Court Rules, which provides for dismissal of an appeal when an appellant fails to properly file and serve his initial brief within the time prescribed. On September 29, 2023, this Court denied Windsor's motion to dismiss.

## 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 is governed by an abuse of discretion standard." *Laser Supply & Servs., Inc. v. Orchard Park Assocs.*, 382 S.C. 326, 340, 676 S.E.2d 139, 147 (Ct. App. 2009). "An abuse of discretion occurs when the [trial court's] ruling is based upon an error of law or, when based upon factual conclusions, is without evidentiary support." *Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987).

"When an attorney's services and the value of those services are determined by the trier of fact, an appeal will not prevail if the findings of fact are supported by any competent evidence." *Laser Supply & Servs., Inc. v. Orchard Park Assocs.*, 382 S.C. 326, 340-41, 676 S.E.2d 139, 147 (Ct. App. 2009).

## ARGUMENT

### **I. The circuit court did not abuse its discretion in awarding attorney's fees because Windsor had standing and contractual privity to avail itself of the attorney's fees provision in the REA.**

This argument is not properly preserved for this Court's review. Century raised this argument for the first time in its Rule 59(e), SCRCF, Motion for Reconsideration of and Relief from Attorney's Fees. *See Poch v. Bayshore Concrete Prod./S.C., Inc.*, 386 S.C. 13, 31, 686 S.E.2d 689, 699 (Ct. App. 2009) ("A party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not."), *aff'd as modified*, 405 S.C. 359, 747 S.E.2d 757 (2013); *Dixon v. Dixon*, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005) (holding that an issue raised for the first time in a Rule 59, SCRCF, motion is not preserved for appellate review); *Kiawah Prop. Owners Grp. v. Public Serv. Comm'n*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (stating an issue raised for the first time in a motion to reconsider is not preserved for appellate review). Additionally, Century's failure to make use of available arguments and defenses does not amount to a mistake, surprise, inadvertence, or excusable neglect contemplated under Rule 60(b) for relief from judgment. *See Greenville Income Partners v. Holman*, 308 S.C. 105, 107, 417 S.E.2d 107, 108 (Ct. App. 1992) (stating that a party's failure to make use of available defenses does not amount to "the kind of mistake, surprise, inadvertence, and excusable neglect contemplated by Rule 60(b)").

Should this Court find this issue preserved for review, Windsor did not lack privity or standing and properly moved for attorney's fees under the REA. In its Second Amended Complaint, Century invoked the REA as a mechanism that formed the basis of its action for contribution against Windsor and the other Defendants. (2<sup>nd</sup> Amended Complaint ¶ 9). Century provided the REA as an exhibit to its Second Amended Complaint to establish that the REA required Windsor "to perform and pay for all maintenance and repairs to the Common Areas and

perform all maintenance and repair to the HVAC system, roof system and structural components of the Verizon Parcel.” (2 2d Amended Complaint ¶ 9). Parties are bound by their pleadings and cannot subsequently take a position contradictory to their pleadings. *See Postal v. Mann*, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992) (“It is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise. The allegations, statements, or admissions contained in a pleading are conclusive as against the pleader and a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are taken as true against the pleader for the purpose of the action.”). Thus, Century cannot argue that Windsor does not have privity or standing under the REA when Century itself alleged the REA provided an avenue for contribution.

In its order awarding attorney’s fees, the circuit court was correct in its assessment of the applicability of the REA and the justification for awarding such fees and costs to Windsor. Century brought an action for contribution based on the existence and terms of the REA, which runs with the land. (2 2d Amended Complaint, pg. 4-5; 17 Order awarding atty fees at 3). The REA includes a provision stating a prevailing party in litigation by reason of the REA is entitled to reasonable attorney’s fees. (3 the REA, pg. 13; 17 order awarding atty fees at 2). Windsor became entitled to recover its attorney’s fees and costs from Century after it successfully defended against Century’s claims under the REA. (17 Order awarding attorney’s fees at 3).

**II. The circuit court properly awarded attorney’s fees under the REA because in the original contribution action, Century alleged Windsor negligently maintained and repaired the Verizon Parcel under the terms of the REA.**

Like Appellant’s first argument, this argument is not properly preserved for this Court’s review. Century raised this argument for the first time in its Rule 59(e), SCRCF, Motion for Reconsideration of and Relief from Attorney’s Fees. (18 Motion to reconsider atty fees at 7-8) *See Poch*, 386 S.C. at 31, 686 S.E.2d at 699 (“A party cannot use a motion to reconsider, alter or

amend a judgment to present an issue that could have been raised prior to the judgment but was not.”), *aff’d as modified*, 405 S.C. 359, 747 S.E.2d 757 (2013); *Dixon*, 362 S.C. at 399, 608 S.E.2d at 854 (holding that an issue raised for the first time in a Rule 59, SCRCPP, motion is not preserved for appellate review); *Kiawah Prop. Owners Grp.*, 359 S.C. at 113, 597 S.E.2d at 149 (stating an issue raised for the first time in a motion to reconsider is not preserved for appellate review). Additionally, Century’s failure to make use of available arguments and defenses does not amount to a mistake, surprise, inadvertence, or excusable neglect contemplated under Rule 60(b) for relief from judgment. *See Greenville Income Partners*, 308 S.C. at 107, 417 S.E.2d at 108 (Ct. App. 1992) (stating that a party’s failure to make use of available defenses does not amount to “the kind of mistake, surprise, inadvertence, and excusable neglect contemplated by Rule 60(b)”).

Should the Court decide this issue is preserved for review, the circuit court did not abuse its discretion in awarding Windsor attorney’s fees under the REA. Century sued Windsor (along with the other Defendants) for contribution, alleging that Windsor and the other Defendants negligently maintained and repaired the Verizon Parcel, common areas, roof, and HVAC system, which Windsor and the other Defendants were required to maintain and repair during their respective ownerships *under the terms of the REA*. (2 2d Amended Complaint ¶¶ 9, 15). Therefore, the circuit court’s order granting attorney’s fees did not mis- or re-characterize the action as arising under the REA instead of under the Act because the action for contribution was “litigation by reason of [the REA]” as contemplated in the REA. (3 the REA, pg. 13).

Further, the trial court’s order granting summary judgment in Windsor’s favor in the underlying case specifically stated that Century failed to present any evidence of how funds from Century’s settlement with Spirit were to be apportioned between Spirit’s claims sounding in tort and those sounding in contract, much less how the settlement funds should be apportioned among

Defendants. (7 Order granting MSJ, pg. 3). Therefore, even though the trial court in the underlying contribution action and this Court on appeal both examined Century's claims for contribution in light of the Act, Windsor is not barred from recovering attorney's fees under the REA because the underlying contribution action was based in part on Century's allegations that Windsor was negligent in maintaining and repairing the Verizon Parcel under the terms of the REA.

### **III. The circuit court had jurisdiction to award attorney's fees as contemplated in the REA.**

The general rule for the recovery of attorney's fees is that such fees are not recoverable unless authorized by statute or under a contract. *See Baron Data Sys., Inc. v. Loter*, 297 S.C. 382, 383, 377 S.E.2d 296, 297 (1989) ("The general rule is that attorney's fees are not recoverable unless authorized by contract or statute."). This Court has reiterated that when attorney's fees are authorized *by statute*, a lower court loses jurisdiction to hear a motion for attorney's fees after the prescribed time for post-trial motions has elapsed. *See Rutland v. Holler, Dennis, Corbett, Ormond & Garner*, 371 S.C. 91, 96, 637 S.E.2d 316, 319 (Ct. App. 2006) (stating that a trial court lost jurisdiction over a case when the time to file post-trial motions had elapsed in a case involving post-trial sanctions under the South Carolina Frivolous Civil Proceedings Sanctions Act).

However, in this case, attorney's fees were authorized by contract—the REA—instead of under a statute. Therefore, an award of attorney's fees cannot be reversed unless the circuit court abused its discretion in awarding the fees. *See Laser Supply & Servs., Inc.*, 382 S.C. at 340, 676 S.E.2d at 147 ("The review of attorney fees awarded pursuant to a contract is governed by an abuse of discretion standard."); *Fontaine*, 291 S.C. at 538, 354 S.E.2d at 566 ("An abuse of discretion occurs when the [trial court's] ruling is based upon an error of law or, when based upon factual conclusions, is without evidentiary support."). The REA specifically allowed the prevailing party in "litigation by reason of [the REA]" to collect reasonable attorney's fees and did not place a time

limit on when a prevailing party must file a motion for such fees. (3 the REA, pg. 13). Further, in *Cooter & Gell v. Hartmarx Corp.*, the United States Supreme Court made clear that:

It is well established that a . . . court may consider collateral issues after an action is no longer pending. For example, [trial] courts may award costs after an action is dismissed for want of jurisdiction. *See* 28 U.S.C. § 1919. This Court has indicated that motions for costs or attorney’s fees are “independent proceeding[s] supplemental to the original proceeding and not a request for a modification of the original decree.” *Sprague v. Ticonic National Bank*, 307 U.S. 161, 170 (1939). Thus, even “years after the entry of a judgment on the merits” a . . . court could consider an award of counsel fees. *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445, 451, n. 13 (1982).

496 U.S. 384, 395-96 (1990). Thus, the United States Supreme Court has recognized that circumstances allow for the consideration of a motion for attorney’s fees by a trial court beyond the post-trial motions period.

Therefore, it is immaterial that Windsor’s motion for attorney’s fees was made eleven months after the South Carolina Supreme Court issued its remittitur. *See Muller v. Myrtle Beach Golf & Yacht Club*, 313 S.C. 412, 414-15, 438 S.E.2d 248, 250 (1993) (holding that the circuit court acquires jurisdiction to enforce an appellate judgment and “take any action consistent with” an appellate judgment after the remittitur is sent down from an appellate court). The circuit court acquired jurisdiction to enforce appellate judgments and any actions consistent therewith, including motions for attorney’s fees authorized to the prevailing party in litigation by reason of a contract, after the appellate court issued its remittitur.

**IV. The circuit court properly awarded attorney’s fees despite Windsor not pleading for attorney’s fees or asserting a counterclaim in its answer because such pleadings and counterclaims were not necessary to successfully recover attorney’s fees.**

Under the terms of the REA, only a prevailing party could recover attorney’s fees. (3 the REA, pg. 13). As such, Windsor was not required to assert a counterclaim for attorney’s fees or pray for such fees in its answer as it was not a prevailing party at the time it filed its answer.

The United States Supreme Court held in *White v. New Hampshire Department of Employment Security* that motions for costs and attorney’s fees available only to a “prevailing party” are collateral and independent claims. *See White*, 455 U.S. 445, 451-52 (1982) (“Regardless 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—an inquiry that cannot even commence until one party has ‘prevailed.’”). Motions—or indeed claims—for attorney’s fees available only to prevailing parties cannot fall within the scope of Rule 13(a) of the South Carolina Rules of Civil Procedure relating to mandatory counterclaims as no party has prevailed during the pleading stage. *See* Rule 13(a), SCRPC (“A pleading shall state as a counterclaim any claim *which at the time of serving* the pleading the pleader has against any opposing party . . . .”) (emphasis added). Further, the mere fact that Windsor could recover attorney’s fees if it prevailed in an action by reason of the REA was not a defense to Century’s contribution claims, and it was not relevant to the merits of Century’s case. Therefore, Windsor was not required to raise the issue of attorney’s fees until the merits were decided with finality upon the issuance of the South Carolina Supreme Court’s remittitur. Thus, the circuit court did not abuse its discretion in awarding Windsor attorney’s fees despite Windsor not pleading for such fees or asserting a counterclaim for such fees.

As it relates to this argument, the fact that *White* involves a motion for attorney’s fees authorized under a federal statute instead of a contract is immaterial. The Supreme Court’s analysis in *White* regarding attorney’s fees limited to prevailing parties under the Civil Rights Attorney’s Fees Act of 1976<sup>3</sup> is just as instructive for awards of attorney’s fees limited to prevailing parties arising under contracts. The defining aspect of the analysis as it relates to this

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<sup>3</sup> 42 U.S.C. § 1988(b).

argument is attorney's fees *limited to prevailing parties*, not the manner in which attorney's fees are authorized.

**V. The circuit court did not abuse its discretion in awarding attorney's fees because such fees were not barred under the South Carolina Rules of Civil Procedure.**

Rule 54(d) of the South Carolina Rules of Civil Procedure 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." South Carolina courts have interpreted "costs" in Rule 54(d) to include attorney's fees when 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) (stating that Rule 54 "allows imposing attorney's fees as costs when authorized by statute"). Presumably, the time limit contained in Rule 54 regarding attorney's fees authorized by statute is to prevent unfair surprises or prejudices to the non-prevailing party. See *generally White*, 455 U.S. at 454 ("Section 1988 authorizes the award of attorney's fees 'in [the] discretion' of the court. We believe that this discretion will support a denial of fees in cases in which a post[-]judgment motion unfairly surprises or prejudices the affected party." (first alteration in original)).

By contrast, Windsor's entitlement to attorney's fees, as the prevailing party in the underlying action by reason of the REA, was clearly acknowledged and contemplated as set forth in the REA. The parties envisioned that in the event of litigation arising out of the REA, reasonable attorney's fees and costs incurred would be recovered by the prevailing party. See *Chan v. Thompson*, 302 S.C. 285, 289, 395 S.E.2d 731, 734 (Ct. App. 1990) ("The cardinal rule of contract interpretation is to ascertain and give effect to the intention of the parties."). Century brought its claim for contribution, alleging that Windsor and the other Defendants negligently maintained and repaired the Verizon Parcel, common areas, roof, and HVAC system, which Windsor and the other Defendants were required to maintain and repair *under the terms of the REA*. (2 2d Amended

Complaint ¶¶ 9, 15). Windsor is entitled to enforce the provisions of the REA relating to attorney's fees as the prevailing party in an action under the REA. Therefore, the circuit court did not abuse its discretion in awarding Windsor attorney's fees under the REA even though Windsor filed its motion eleven months after the remittitur was issued in the underlying contribution action.

### **CONCLUSION**

Based on the foregoing, the circuit court did not abuse its discretion in awarding attorney's fees to Windsor, and its order awarding attorney's fees to Windsor should be affirmed.

Respectfully submitted,

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