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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**.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court err in ordering attorney's fees where Windsor lacked privity and/or standing to assert the attorney's fees provision of the REA?**
- II. Did the trial court err by ordering 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 ordering attorney's fees where the trial court lacked jurisdiction.**
- IV. Did the trial court err in ordering attorney's fees where Windsor failed to assert a compulsory counterclaim in their answer?**
- V. Did the trial court err in ordering attorney's fees where Windsor's motion was procedurally barred under the time limitations prescribed by the SCRCPP?**

STATEMENT OF THE CASE

On November 10, 2014, Plaintiff 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. 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. (R. pp. 96-135). 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. (R. pp. 153-237). 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 regarding the three motions for summary judgment. On September 16 and 17, 2015, the Judge Manning issued orders granting summary judgment as to all Defendants and dismissing with prejudice Century’s claim for contribution on the grounds that there were no genuine issues of material fact, the Settlement Agreement does 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 is barred by the statute of repose. (R. pp. 10-24).

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. (R. pp. 28-31). 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, the South Carolina Supreme 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. (R. pp. 34-35).

On December 22, 2020, Windsor filed a motion for attorney's fees and costs. (R. pp. 254-259). A hearing was conducted before the Honorable Alison R. Lee on July 19, 2022, regarding Respondent's motion for attorney's fees (R. pp. 143-152). Appellant's counsel did not attend the hearing. Century was permitted to respond to Windsor's motion (R. pp. 318-324), whereafter Windsor's counsel filed a supplemental affidavit of attorney's fees (R. pp. 337-342). On September 23, 2022, the circuit court issued an Order granting Windsor's motion for attorney's fees and costs (R. pp. 4-9). On October 3, 2022, Century filed a motion to reconsider the September 22 Order (R. pp. 343-351), and Windsor filed their response on October 21, 2022. (R. pp. 352-358). Century's Motion was subsequently denied on November 22, 2022. (R. pp. 1-3).

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"). (R. pp. 359-393). Among other things, the REA 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. (R. pp. 97 ¶ 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. (R. pp. 97 ¶ 10). On November 4, 2005, Windsor sold the Midtown Parcel to Midtown Development Group, LLC (“MDG”). (R. pp. 97 ¶ 11). On May 25, 2007, MDG deeded the Midtown Parcel to Richland Joint Venture Group, LLC (“Richland”). (R. pp. 97 ¶ 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. (R. pp. 98 ¶ 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 adequately repair and maintain certain portions of the Richland Mall. The Richland Mall has a long history of construction defect and maintenance issues and has experienced persistent roof leaks since original construction. The parking deck was designed above occupied space and has a split-slab system of waterproofing, meaning the waterproofing membrane is sandwiched between two layers of concrete and endures regular vehicular and pedestrian traffic. Extensive reports dating back to the 1990’s indicate that the roof was defectively constructed based on a failure to install sufficient expansion joints and defective components in the waterproofing structure. In lieu of costly roof repairs, Mall ownership at the time began installing a system of ceiling pans to prevent water from intruding into the occupied space below and injecting the visible cracks in the concrete of the deck with epoxy.

Century acknowledges that at the time they purchased the Midtown Parcel from RJVG it had notice of the roof leaks; however, Century did not have indication that Spirit took issue with the maintenance plan in place since the origin of the leaks nor did Century agree to accept

responsibility for its predecessors' maintenance failures. Spirit, having owned the Verizon Parcel since 05', sued Century for years' worth of maintenance failures only nine months after Century took possession of the Midtown Parcel. (R. pp. 98 ¶ 13). Spirit's complaint sought relief under seventeen causes of action for damages related to maintenance and repair of the Mall Property, common area maintenance charges, and management of the Mall in general.

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 extinguishes liability and discharges all claims against Century and its predecessors in interest under the REA. 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.

(R. pp. 158)

Century brought a claim for contribution pursuant to the South Carolina Uniform Contribution Among Tortfeasors Act against the Respondent for their pro rata share of the liability to Spirit for negligent maintenance and repair on the basis that the actions and/or inactions of the Respondent, as a successive owner of the Midtown Parcel, necessarily united in causing Spirit's damages. (R. pp. 98-99 ¶¶ 14-22);

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 ordering attorney’s fees where Windsor lacked privity and/or standing to assert the attorney’s fees provision of the REA.

The REA is composed of restrictive covenants and easements that create rights and obligations as between the owners of certain parcels. Century and Windsor have both been owners of the Midtown Parcel. 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. (R. pp. 97 ¶ 9) Century alleged in its suit for contribution that Windsor, while owner of the Midtown Parcel, made negligent repairs to the Mall, and that Century paid Windsor’s pro-rata share of liability through their settlement agreement with Spirit. (R. pp. 98-99 ¶¶ 15,21.) The basis of Century’s contribution claim against Windsor was that Windsor, while owner of the Midtown Parcel, did not fulfill their obligations under the REA. (R. pp. 98 ¶ 15). In no way do these allegations imply or rely on privity 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...” (R. pp. 370). Additionally, there is no survivorship clause under the REA. (R. pp. 100-135). 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. (R. pp. 97-98 ¶¶ 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 ROD, Book R1118 at page 2107. (R. pp. 97 ¶ 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. (R. pp. 97 ¶ 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 MDG. (R. pp. 98 ¶ 13).

Upon conveyance of its ownership in the Midtown Parcel, Windsor ceased to be a party to, or beneficiary of, the REA. Applying the doctrine of Merger, Windsor’s right to seek contractual remedies under the REA were conveyed to MDG in 2005 when Windsor conveyed its ownership of the Midtown Parcel. (R. pp. 344). As the current owners of the Midtown and Verizon Parcels, Century and Spirit are the only two parties with the necessary ownership interest to seek remedies under the REA.

II. The trial court erred by ordering 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 granting Windsor’s Motion for attorneys’ fees and costs improperly recharacterized the nature of Century’s suit as “arising under the REA.” (R. pp. 5). Century’s solitary cause of action against Windsor was for contribution. (R. pp. 98-99 ¶ 21) Windsor opens

their attack on Century’s claim for contribution in their motion for summary judgment by stating, “The 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” (R. pp. 158). 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 to establish a starting point to demonstrate an eight-year period of time. (R. pp. 162).

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.” (R. pp. 14). 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). (R. pp. 29). 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.” (R. pp. 5).

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). Being that 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. (R. pp. 98-99 ¶¶ 14-22); (R. pp. 14); ((6) R. pp. 158-161, 162-165). Century concedes that the REA creates duties and obligations for the owners of the parcels in question, however, the contribution claim 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 the action as arising under the REA. (R. pp. 5). Without such a recharacterization there is no avenue for recovery.

Furthermore, 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. (R. pp. 349-350). 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-rate 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 ordering 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. (R. pp. 321). Windsor was granted summary judgment by an Order dated September 17, 2015. (R. pp. 10-24). 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. (R. pp. 28-31). 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. (R. pp. 34-35). Once the Supreme Court issued remittitur, this Court acquired only so much jurisdiction over this case as is needed to enforce judgment. Judgment here is limited to dismissal of the action and the parties hereto.

Windsor asserts that Century's position misconstrues the law (R. pp. 327), however it is Windsor who is misconstruing 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 cites 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. (R. pp. 329). 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). However, 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 the South Carolina Supreme Court. (R. pp. 254-259). The effect of such a late request was precisely surprise and prejudice to Century. 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 the South Carolina Supreme Court.

IV. The trial court erred in ordering attorney's fees where Windsor failed to assert a compulsory counterclaim in their answer.

More than six years after this action commenced, and more than eleven months after a remittitur from the South Carolina Supreme Court, Windsor sought attorneys' fees for the first time. (R. pp. 254-259). "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).

Again, Windsor relies 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. (R. pp. 329). 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 states 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 argues in one breath that it is entitled to attorney's fees under the REA but in another breath cites as support a case that bases its holding on the specific language of a statute. (R. pp. 329). 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 plead 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 plead as compulsory counter claims in other types of cases. Windsor has continuously relied on the REA as a basis for recovery. The REA does in fact contain an attorney's fee provision, and therefore, 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. (R. pp. 323). 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." (R. pp. 257 ¶ 18). Windsor's failure to plead any claim or right to recover its attorneys' fees in its Answer constitutes a waiver of the same.

V. The trial court erred in ordering attorney's fees where Windsor's motion was procedurally barred under the limitations prescribed by the SCRPC?

Cases must come to an end at some point, and 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 SCRCP 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, SCRCP (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 SCRCP 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, and 3) did not move for attorney’s fees within 10 days as required under Rule 54(d)

CONCLUSION

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

Respectfully submitted,

January 17, 2024

s/ D. Ryan McCabe, Jr.

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