THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Ralph Stroman, Special Referee
Case No. 2004-CP-26-3498

Carey Graham and Rodney A. Chardukian

Respondents,

v.

Malcolm M. Babb, Brenda R. Babb, Cable Plus of Carolina, Inc., South Bay Lakes Cable Partnership, Southbridge Cable Television, LLC, Renaissance Enterprises, Inc., Now Known as Condo Services, Inc.,

Defendants,

Of Whom

Brenda R. Babb and Renaissance Enterprises, Inc, Now Known as Condo Services, Inc.,

are

Appellants,

INITIAL BRIEF OF APPELLANTS

RECEIVED
SEP 19 2013
SC Court of Appeals

William Isaac Diggs
1700 Oak Street, Suite D
Myrtle Beach, SC 29577
843-626-5123

ATTORNEY FOR APPELLANT RENAISSANE ENTERPRISES, INC., NOW KNOWN AS CONDO SERVICES, INC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

STATEMENT OF ISSUES ON APPEAL

I.

Did the trial court commit error when it denied Appellants' request for declaratory judgment and relief regarding Respondents' construction of the contract for collection of attorneys fees?

II.

Did the trial court err when it rejected Appellants' argument that the 40% respondents' claim should be paid to their counsel in perpetuity constitutes both an unreasonable construction of the Agreement and Judge Cothran's order on the grounds that a contingency fee is not deemed to last forever and rules clearly contemplate that a contingent matter will be concluded?

SATEMENT OF THE CASE

On May 17, 2011, the Honorable Ferrell Cothran, Judge, entered judgment against these Appellants in the amount of $776,604.55, in actual damages and $200,000.00 punitive damages. That order was affirmed on appeal in Unpublished Opinion No. 2013-UP-037, submitted December 4, 2012, and filed February 6, 2013. A petition for writ was filed on that matter and is presently pending in the South Carolina Supreme Court and has not been ruled upon at this time. Since the entry of that order, however, respondents have begun supplementary proceedings in an attempt to collect on the judgment. On February 14, 2013, a hearing was held in supplementary proceedings before the Honorable Ralph P. Stroman, Special Referee.

Prior to that hearing, Appellants filed this motion for *Declaratory Judgment for Interpretation of Supplemental Agreement and Contract by Brenda R. Babb and Renaissance Enterprises, Inc. N/K/A Condo Services, Inc.* on February 1, 2013. Appellants sought a construction of an attorneys' fee contract and the interpretation given it by the Respondents. Appellants' motion came on for hearing on February 14, 2013, before the Honorable Ralph P. Stroman, Special Referee, during the supplementary proceedings. On March 14, 2013, Special Referee Stroman entered his *Order Denying Motion of Defendants Babb & Condo.* On March 25, 2013, Appellants timely filed the Appellants' motion for reconsideration. Special Referee Stroman entered his Order Denying Motion to Reconsider and Injunction (Supplemental Proceeding) on May 28, 2013. This appeal follows.

STANDARD OF REVIEW

In order to determine the appropriate standard of review to apply in an appeal from a declaratory judgment action, this court must look to the nature of the underlying action. *Barnacle Broad., Inc. v. Baker Broad, Inc.*, 343 S.C. 140, 146, 538 S.E.2d 672, 675 (Ct.App. 2000). Here, Appellants seek a construction of an attorneys' fee contract and respondents' interpretation of it as shown in practice; accordingly, this is an action at law. *See id.* (applying the action at law standard of review to declaratory judgment action involving the interpretation of a contract). Because this is an action at law tried without a jury, the appellate court's "standard of review extends only to the correction of errors of law." *Electro Lab of Aiken v. Sharp Const*, 357 S.C. 363, 367, 593 S.E.2d 170, 172 (Ct. App. 2004). "The trial judge's findings of fact will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." *Id.*

To state a cause of action under South Carolina's Declaratory Judgment Act, a party must demonstrate a justiciable controversy. *Graham v. State Farm Mut. Auto. Ins. Co.*, 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995). "A justiciable controversy exists when a concrete issue is present, there is a definite assertion of legal rights and a positive legal duty which is denied by the adverse party." *Id.* Thus, "[a]ny person interested under a . . . written contract . . . may have determined any question of construction or validity arising under the . . . contract . . . and obtain a declaration of rights, status or other legal relations thereunder." S.C. Code Ann. § 15-53-30 (2005). *Consignment Sales v. Tucker Oil Co.*, 391 S.C. 266 , 273-74, 705 S.E.2d 73 (Ct.App. 2010)

ARGUMENT I

The trial court committed error when it denied Appellants' request for declaratory judgment and relief regarding Respondents' construction of the contract for collection of attorneys fees.

Appellants filed a motion for declaratory relief seeking to have the Court determine whether the attorney's fees ***presently being collected*** by respondents' counsel is in keeping with the Final Order entered in this case by the Honorable R. Ferrell Cothran, Jr., Judge, on May 17, 2011, entitled *Judgment Against Defendants Brenda R. Babb and Renaissance Enterprises, Inc., now known as Condo Services, Inc.*

Summary of Argument

Respondents' practice of paying attorneys fees from monies collected on behalf of the cable companies at issue requires Appellant Babb to pay respondents' attorney contrary to the holding of Judge Cothran's May 17, 2001, judgment, discussed infra. Additionally, in practice, respondents' claim that their attorney is entitled to 40% of revenues generated by the cable entities (identified infra) in perpetuity after June 30, 2010. Appellants submit this collection of fees is excessive and contrary to the fee agreement approved by Judge Cothran in his order entering judgment against the Appellants. Appellants asked the lower court to grant their request for declaratory judgment and hold that respondents' collection of attorney's fees as presently practiced (1) violates Judge Cothran's prohibition against requiring Appellants to pay attorneys fees in this case, and (2) further allows respondents' counsel to collect attorneys fees in excess of that provided by the *supplemental contingency fee agreement* [the Agreement] and which are unreasonable. The Special Refereed committed error when it failed to do

so. We asked the Special Referee and now this Court to hold that monies collected as revenues from the cable television services at issue in this case should be disbursed in accordance with percentage of ownership with 34.18 percent going to satisfy the outstanding judgment in this case as that is the percentage of ownership of Appellant, Brenda R. Babb.

Background

On May 17, 2011, the Honorable R. Ferrell Cothran, Jr., Judge, entered his order for *Judgment Against Defendants Brenda R. Babb and Renaissance Enterprises, Inc., now known as Condo Services, Inc.* This order for judgment followed plaintiffs filing of civil action 2004-CP-26-3498, on June 24, 2004, against, *inter alia*, Babb and Condo which sought an injunction, an accounting, and damages for breach of contract relating to ownership rights in cable television contracts.[1] Judge Cothran entered judgment against these Appellants, jointly and severally, in the total amount of Seven Hundred Seventy Six Thousand Six Hundred and Four ($776,604.55) and 55/100ths Dollars in actual damages for the period of time from July 1, 2003, through June 30, 2010.[2] Punitive damages were allowed in the amount of Two Hundred Thousand and no/100 ($200,000.00) Dollars, with 50% of this amount going to Southbridge Cable Television, LLC; and 50% going to South Bay Lakes Cable Television, A South Carolina General Partnership. In that order

[1] The cable companies involved in this litigation were: Cable Plus of Carolina, Inc.; Southbridge Cable Television, LLC; and South Bay Lakes Cable Television, A South Carolina General Partnership. The ownership interests of the entities are outlined in Exhibit A of the Judgment which was incorporated by reference by Judge Cothran. Southbridge Cable Television, LLC is owned 50% by Appellant Brenda R. Babb and 50% by Respondent Graham. South Bay Lakes Cable Partnership is owned 50% by Cable Plus, Inc. and 50% by Respondent, Chardukian. Cable Plus of Carolina, Inc., is owned 50% by Respondent Graham and 50% by Appellant, Brenda R. Babb.

[2] Judgment was entered in favor of South Bay Lakes Cable Partnership in the amount of $491,321.24; and in favor of Southbridge Cable Television, LLC in the amount of $285,283.20.

Judge Cothran approved the attorneys' fee agreement submitted by plaintiffs for court approval. The order read in pertinent part:

> I find as a matter of fact and conclusion of law that no statute or contract between the parties permits the awarding of attorney's fees against Babb and Condo. This does not end the inquiry. The South Carolina corporate statutes and Court Rules provide for the institution of derivative actions for redress when entities are harmed through the wrongful acts of a shareholder, officer, director, partner or member. The basis of the action is that the wrongful actor would never allow the action to be brought against the wrongdoer.
>
> The Plaintiffs have requested that this Court approve the Supplemental Contingency Fee Agreement, attached as Exhibit "B," That the Plaintiffs signed in their individual capacity and in their representative capacities in the derivative action. I find that the fee agreement is reasonable and fair, and that it was necessary to protect the interests of the Entities. The ***corporate code and the equitable powers of this Court*** require that the individual Plaintiffs be indemnified for costs and expenses advanced on behalf of the Entities, especially where the results were beneficial. Any expenses for the Receiver in this case shall be charged against the recovery. The Plaintiffs have paid $10,000.00 in attorney's fees as a retainer, which was advanced to promote the Plaintiffs' case. The $10,000.00 retainer was expended years ago as a result of countless hearings, two appeals, receiverships, and multiple discovery hearings. Thus, Graham and Chardukian, in their individual capacities, are to be reimbursed for their initial retainer in the amount of $10,000.00, and shall be paid from the proceeds of any recovery.

Judgment Order at pages 7-8, emphasis added. Thereafter, Judge Cothran held, *inter alia,*

> (4) That the Plaintiffs Supplemental Contingency Fee Agreement attached hereto as Exhibit B is approved and shall constitute a lien against any recovery in this case and any future recovery or revenues of Cable Plus, South Bay Lakes Cable Partnership and South bridge Cable [sic], as discussed earlier, ***and shall be paid by such entities when income is received by the Receiver or Graham.***

Judgment Order at page 12 of 13, emphasis added. Respondents argue that the foregoing language allows them to collect monies on a monthly basis from the cable companies and (1) immediately pay over to their counsel forty (40%) percent thereof, (2) then pay over the remaining sixty percent to the three owners pursuant to their respective ownership interests,[3] (3) then again, pay 40% *of that* amount to plaintiffs' counsel, and then, (4) pay the remaining portion of Mrs. Babb's earnings to reduce the judgment amount.

Thereafter, even when the judgment has been satisfied, respondents argue that their counsel shall still be entitled to 40% of all future earnings had by the cable companies in perpetuity, or in other words, counsel's fees shall not be subject to termination. Respondents rely on the following language found in "Section Two" in the Agreement to support this position:

> Client agrees to pay unto attorney a contingent fee equal to one third of any amount received in this case up through trial of this case and 40% of the total recovery, if the matter is appealed by the Defendants. ***This amount includes any settlement for past and future revenues that the Client shall be entitled to receive from the cable television rights*** which are the subject of the pending action.

Emphasis added. Appellants, Babb and Condo, argue that this procedure violates Judge Cothran's prohibition against requiring them to pay attorneys fees to respondents, and further argue that the 40% payment in perpetuity is unreasonable and constitutes a transference of 40% ownership of the companies at issue to respondents' counsel and constitutes an unreasonable fee. Appellants argue that the above practice is the result of the respondents' misconstruing both the Agreement and Judge Cothran's order. Appellants argue that the order entered by Judge Cothran contemplates that payment of

[3] The owners' interests are as follows: 34.18% to Mrs. Babb; 34.18% to Mr. Graham; and 31.64% to Mr. Chardukian. This is a distillation of the interests stated in footnote "1" supra at page 8.

the monies being paid over to the respondents' counsel should cease when the work of the receiver is finished and when the judgment is satisfied by Appellants. The Special Referee was incorrect we respectfully submit in refusing to so hold. We ask this Court to review the Special Referee's order and to conclude that Appellants' interpretation of the order is more reasonable and properly represents what Judge Cothran intended in this action.

"Declaratory Judgment Motion"

Respondents challenge Appellants' use of the terms "Declaratory Judgment" in its motion for relief and the lower court (the Special Referee) rejected Appellants' right to use the procedure at this juncture. The lower court held that declaratory relief should have been sought earlier when the case was appealed and at that time Appellants did not challenge the supplemental contingency fee agreement. However, as noted, this could not have been done at that time. At the time of the appeal of Judge Cothran's order, respondents had *not yet started to pay attorneys fees from monies collected* by the receiver on behalf of the cable entities. And thus the issue had not arisen as of that time. Moreover, Appellants were not provided the information regarding collection of monies and payment of attorney's fees until respondents sent the Appellants their first annually required reconciliation statement on May 22, 2012. Thus, Appellants could not have pursued this relief at that time because the issue had not yet ripened for review. ("[A]n issue that is contingent, hypothetical, or abstract is not ripe for judicial review."); *Hitter v. McLeod*, 274 S.C. 616, 619, 266 S.E.2d 418, 420 (1980) (declining to rule on an issue that was not ripe for adjudication and noting it "presents [the court] with nothing more than, a vehicle for rendering an advisory opinion"). *Crews v. W.R. Crews, Inc*, 390 S.C.

15 , 27, 699 S.E.2d 189 (Ct.App. 2010). Appellants' notice of appeal was not mailed for filing until August 31, 2011. Thus the Appellants' have not waived this issue. They have sought relief with the filing of a motion in this supplementary proceeding entitled *Declaratory Judgment for Interpretation of Supplemental Agreement and Contract by Brenda R. Babb and Renaissance Enterprises, Inc. k/n/a Condo Services, Inc.* Plaintiffs object to the title of this motion. Appellants respectfully submit respondents' objection is without merit.

The purpose of the Declaratory Judgment Act is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations, and it is to be liberally construed and administered. See *Nelson v. Ozmint*, 390 S.C. 369,435, 702 S.E.2d 369 (2010), citing, *Town of Hilton Head Island v. Coalition of Expressway Opponents*, 307 S.C. 449, 415 S.E.2d 801 (1992) (the Supreme Court can render a declaratory judgment when a justiciable controversy setting legal rights of parties exists). "The Declaratory Judgment Act should be liberally construed to accomplish its intended purpose of affording a speedy and inexpensive method of deciding legal disputes and of settling legal rights and relationships, without awaiting a violation of the rights or a disturbance of the relationships." *Graham v. State Farm Mut. Auto. Ins. Co.,* 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995) (citing *Williams Furniture Corp. v. Southern Coatings & Chemical Co.*, 216 S.C. 1, 56 S.E.2d 576 (1949)); S.C. Code Ann. § 15-53-130 (1977). "To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy." *Graham*, 319 S.C. at 71, 459 S.E.2d at 845 (citing *Brown v. Wingard*, 285 S.C. 478, 330 S.E.2d 301 (1985)). "A justiciable controversy exists when a concrete issue is present, there is a definite assertion of legal rights and a positive legal

duty which is denied by the adverse party." *Graham*, at 71, 459 S.E.2d at 845 (citing *Power v. McNair*, 255 S.C. 150, 177 S.E.2d 551 (1970)). This requirement is satisfied by "[a]ny person interested under a deed . . . written contract or other writings constituting a contract or whose rights, status or other legal relations are affected by a contract or franchise may have determined any question of construction or validity arising under the instrument, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder." S.C. Code Ann. § 15-53-30 (1977); see also Rule 57, SCRCP. *Pond Place Partners v. Poole,* 351 S.C. 1, 16, 567 S.E.2d 881 (Ct. App. 2002).

S.C. Code Ann. § 15-53-20 reads:

> Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect. Such declarations shall have the force and effect of a final judgment or decree.

Certainly all of the requirements for declaratory relief are present in this case and Appellants would have been within their rights to bring such an action independent of this proceeding pursuant to the foregoing statutory authority. However, rather than doing so, Appellants have chosen to seek relief by filing a motion in this supplementary proceeding. Present before the trial court is the issue of what monies are available to satisfy a judgment. See S.C. Code Ann. § 15-39-310.[4]

---

[4] This statute allows the Court to require the debtor, "...to appear and answer concerning his property before such judge at a time and place specified in the order within the county to which the execution was issued. After the issuing of an execution against property and upon proof by affidavit of a party or otherwise, to the satisfaction of the court or a judge thereof, that any judgment debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment such court or judge may by an order require the judgment debtor to appear at a

Identification of such monies is at the core of this proceeding. See *Ex Parte Wilson*, 367 S.C. 7, 17, 625 S.E.2d 205 (2005) ("Supplementary proceedings also "furnish a means of reaching, in aid of the judgment, property beyond the reach of an ordinary execution, such as choses in action." *Lynn v. International Brotherhood of Firemen Oilers*, 228 S.C. 357, 362, 90 S.E.2d 204, 206 (1955)" at note 4. The trial court has jurisdiction to determine what monies are available, the nature of those monies, and to what extent they are available to satisfy respondents' judgment. Id. Clarification on this point is what is sought by Appellants' motion. Whether respondents are collecting monies appropriately, disbursing them according to the court order awarding judgment in this matter, and whether monies are being properly applied toward the satisfaction of the judgment and accounted for were issues properly before the trial court as having been raised by Appellants' motion.

Attorneys Fees

"A party cannot recover attorney's fees unless authorized by contract or statute. *Jackson v. Speed*, 326 S.C. 289, 307, 486 S.E.2d 750, 759 (1997); *see also Hegler v. Gulf Ins. Co.*, 270 S.C. 548, 549, 243 S.E.2d 443, 444 (1978) ("As a general rule, attorney's fees are not recoverable unless authorized by contract or statute.")." *Cullen v. McNeal*, 390 S.C. 470, 491, 702 S.E.2d 378 (Ct.App. 2010). This Court need not reach the question of whether attorneys' fees are recoverable in corporate derivative actions under S.C. Code Ann. § 33-7-400, because Judge Cothran denied attorneys fees in this action and respondents did not challenge that holding.

---

specified time and place to answer concerning the same. And such proceedings may thereupon be had for the application of the property of the judgment debtor towards the satisfaction of the judgment as are provided upon the return of an execution."

On the other hand, *Southbridge Cable Television, LLC* is a limited liability corporation. This entity could have claimed attorneys' fees pursuant to S.C. Code Ann. § 33-44-1104, which authorizes the award of reasonable costs and attorneys' fees to a plaintiff who prevails, in whole or in part, in a derivative action for an LLC. Such a claim for statutory attorneys' fees is an action at law resting within the sound discretion of the trial court. *Historic Charleston Holdings, LLC. v. Mallon*, 381 S.C. 417, 436, 673 S.E.2d 448 (2009). But respondents did not seek attorneys fees pursuant to this statute, rather they sought recovery under the theory, and Judge Cothran held, "The corporate code and the ***equitable powers of [the] Court*** require that the individual Plaintiffs be indemnified for costs and expenses advanced on behalf of the entities, especially where the results were beneficial." *Judgment Order* at page 7, emphasis added. The Court held that attorneys' fees being sought in this instance fall within the equity powers of the court.

South Bay Lakes Cable Television is a general partnership. Again, it is questionable whether a ***derivative*** action can even be brought on behalf of a general partnership. See e.g. *Young v. Bush*, 277 P.3d 916, 920-921 (COA 47, 2012) [5] The general rule is that a partner cannot maintain a suit to enforce a partnership claim if a majority of the partners do not agree to do so. *Lane v. Krein*, 297 S.C. 133, 375 S.E.2d

[5] The Colorado court noted, "In the corporate context, a derivative action is a mechanism by which shareholders can sue on behalf of a corporation when those in control of the corporation have opted not to pursue a claim belonging to it. *Curtis v. Nevens*, 31 P.3d 146, 151 (Colo. 2001); *Hirsch v. Jones Intercable, Inc.*, 984 P.2d 629, 633-34 (Colo.1999). Colorado statutes provide for derivative actions against business corporations, *see*§ 7-107-402, C.R.S.2011, and nonprofit corporations, *see*§ 7-126-401, C.R.S.2011, and they extend the same remedy to limited partners, whose derivative rights are much like those of shareholders. *See*§ 7-62-1001, C.R.S.2011; *Day*, 251 P.3d at 1228; *Hirsch*, 984 P.2d at 631; *see also Kline Hotel Partners v. Aircoa Equity Interests, Inc.*, 708 F.Supp. 1193, 1195 (D.Colo.1989) (***unlike shareholders and limited partners, general partners have no right under Colorado law to bring a derivative action on behalf of a general partnership)***". Emphasis added. 277 P.3d at 920-921

351, 352 (Ct. App. 1988) (general partner with minority interest could not sue on claim alleging conversion of partnership property where majority of general partners had not authorized suit).[6] Thus, this action is not a *derivative* action as it pertains to South Bay Lakes Cable Television, but a dispute between two general partners who disagreed as to what constituted a partnership asset and who owned that asset.[7] Thus, it was proper that attorneys' fees were not awarded in this matter as against these defendants because it is not a derivative action and no statute is applicable to allow for such a recovery. Yet, respondents seek, in practice, to get around this limitation and attempt to rely upon "the corporate code and the *equitable powers of [the] Court.*" The respondents are operating outside of the scope of both the Agreement and Judge Cothran's order and what is otherwise allowed by law.

Damages and Distribution of Future Proceeds

Appellants respectfully submit that this declaratory judgment motion also addresses the issue of respondents' actual damages for the period of time from July 1,

---

[6] *And See Coast v. Hunt Oil Co.*, 195 F.2d 870, 871 (5th Cir. 1952) (under Louisiana law, partner owning 49% interest in partnership could not maintain action on behalf of partnership where 51% interest owner refused to participate); *Hauer v. Bankers Trust New York Corp.*, 509 F.Supp. 168, 177 (E.D.Wis. 1981) (where majority of managing partners of real estate development partnership elected not to pursue any cause of action partnership might have had against its lender, former managing partner could not assert such claims on behalf of partnership against lender), *aff'd sub nom. Hauer v. BT Advisors, Inc.*, 671 F.2d 1020 (7th Cir. 1982); *see generally* Alan R. Bromberg, *Enforcement of Partnership Rights — Who Sues for the Partnership?*, 70 Neb. L.Rev. 1 (1991); Helen Hubbard, Comment, *Alternative Remedies in Minority Partners' Suit on Partnership Causes of Action*, 39 Sw. L.J. 1021 (1986).

[7] In a ***limited*** partnership, attorneys' fees may be awarded. *See* S.C. Code Ann. § 33-42-1810, entitled *Right of action.* This statute reads: "A ***limited partner*** may bring an action in the right of a limited partnership to recover a judgment in its favor if general partners with authority to do so have refused to bring the action or if an effort to cause those general partners to bring the action is not likely to succeed." Emphasis added. The Limited partnership statutes allow for the recovery of expenses and attorneys fees and the Court shall direct him to remit to the limited partnership "the remainder of those proceeds received by him." S.C. Code Ann. § 33-42-1840.

2003 through June 30, 2010, and attorneys' fees. Including punitive damages, the total amount of the judgment against the Appellants was $976.604.44. According to the Agreement, respondents' counsel is entitled to collect 40% of that amount, if collected. However, while the Agreement does say that the clients are responsible for payment of expenses, the Agreement is silent as to whether the contingent attorneys' fees shall be paid before expenses are paid or after expenses are paid. *See Rule 407* of the South Carolina Rules of Professional Conduct, Client-Lawyer Relationship, *Rule 1.5(c).* We submit that it would equitable that expenses be paid first and then the 40% contingency fee be paid. Additionally, this is where respondents apparently sought to introduce the idea of perpetual payment of attorneys' fees from the cable earnings. In order to generate ***immediate*** payment of attorneys' fees, respondents sought to pay their attorney the fees generated from future earnings, that is, earnings received beyond the period of time from July 1, 2003 through June 30, 2010.

We respectfully submit that respondents' attorney should be paid from this source of monies only as long as respondents are in agreement with that practice. But none of Mrs. Babb's 34.18% of the gross monthly proceeds may be used to pay that obligation had by respondents. Thirty-four and 18/100ths percent (34.18%) from all monies received after the date of June 30, 2010, must be used to pay down the amount of the outstanding judgment. Otherwise Judge Cothran's order preventing respondents from requiring Mrs. Babb to pay attorneys fees from her monies.

As of March, 2013, plaintiffs' counsel had collected $323,347.16, in attorneys' fees. Computations show the total amount he can collect is $391,060.22, or 40% of the $976.604.44, judgment. This leaves a balance of $67,713.06, which may be collected on

attorneys' fees. These figures may have to be revised if it is determined that attorneys' fees were paid before expenses were deducted from gross income by the entities.

Because of Judge Cothran's ruling that attorneys' fees were not to be paid by the respondents we submit the total payment from Time Warner for the period of time between July 1, 2003 through June 30, 2010, in the amount of $161,417.00, should be applied against the judgment. Additionally, all monies earned by the cable entities after June 30, 2012, should be disbursed in accordance with ownership interest percentages. Thus, 34.18% of all monies received should be credited against the outstanding balance of the judgment. So long as the judgment remains outstanding, the total monies received monthly by the cable entities should be divided 60% - 40%. The forty (40%) percent may go to respondents' attorney as fees earned in keeping with the Agreement. However, none of Mrs. Babbs' monies (that being 34.18% of the gross receipts) should be applied to the attorneys' fee payment because she is not to pay attorneys fees.

Essentially two balances must be monitored and reduced as judgment payments are made. The first occurs when Babb's net income is paid to her co-partners. Of course, one hundred percent of such payments reduce the judgment balance by like amount. The second balance is the liability of Babb's co-partners to their legal counsel. One hundred percent of such payments reduce their total liability of $390,641.78. These two payments and balances should not be co-mingled since neither transaction includes all entities comprising the partnership.

ARGUMENT II

The 40% plaintiffs' claim that should be paid to their counsel in perpetuity constitutes both an unreasonable construction of the Agreement and Judge Cothran's order because a contingency fee is not deemed to last forever and the rules clearly contemplate that a contingent matter will be concluded. Id.

Rule 1.5(c). Sub part "c" states

> **(c)** . . . A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer ***in the event of settlement, trial or appeal;*** litigation and other expenses to be deducted from the recovery; ***and whether such expenses are to be deducted before or after the contingent fee is calculated.*** The agreement must clearly notify the client of any expenses the client will be expected to pay. ***Upon conclusion of a contingent fee matter***, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

Emphasis added. Moreover, the fee as contemplated by respondents constitutes an excessive fee prohibited by Rule 407 of the South Carolina Rules of Professional Conduct, Client-Lawyer Relationship, Rule 1.5. Appellants submit that the 40% payment pursuant to the Agreement should conclude when the Receiver is no longer required in this case or when the judgment has been fully satisfied.

Appellants request an accounting be conducted by respondents which reallocates disbursement of monies as outlined above. An appropriate reduction in the judgment amount should be included with proper credits being calculated therein as set forth above.

CONCLUSION

For the foregoing reasons, Appellants would request that the lower court's order be remanded with instructions for the court to incorporate Appellants' positions in this matter.

Respectfully submitted,

William Isaac Diggs
1700 Oak Street, Suite D
Myrtle Beach, SC 25977
843-626-4243

ATTORNEY FOR THE APPELLANTS

This 17th day of September, 2013
Myrtle Beach, South Carolina