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DEC 23 2013

SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

**APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS FOR SPARTANBURG COUNTY**

The Honorable Gordon G. Cooper, Master-in-Equity

CASE NO. 2009-CP-42-5129

KATHERYNA MULHOLLAND-MERTZ..... APPELLANT,

v.

**CORIE CREST HOMEOWNERS ASSOCIATION OF SPARTANBURG, INC.,
RICHARD T. BIGGS, KATHLEEN A. BIGGS, JAMES HANNAH, AND
ELIZABETH A. HANNAH.....RESPONDENTS.**

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN FINDING IT NOW HAD JURISDICTION TO HEAR THE RESPONDENTS' MOTION FOR AWARD OF ATTORNEY'S FEES AND COSTS EVEN THOUGH THERE IS STILL PENDING BEFORE THE SUPREME COURT OF SOUTH CAROLINA A WRIT OF CERTIORARI TO REVIEW THE OPINION OF THE COURT OF APPEALS?

2. DID THE TRIAL COURT ERR WHEN IT FOUND THAT RESPONDENTS WERE ENTITLED TO A JUDGMENT OF TWENTY THOUSAND TWO HUNDRED FORTY SEVEN DOLLARS AND 47/100 (\$20,247.47), WHICH INCLUDED ATTORNEY'S FEES, AND COSTS FOR LEGAL SERVICES RENDERED AND COSTS EXPENDED IN REPRESENTATION OF FORMER CO-DEFENDANT JOSEPH P. DENICOLA?

3. DID THE TRIAL COURT ERR WHEN IT FOUND THAT RESPONDENTS WERE ENTITLED TO JUDGMENT OF TWENTY THOUSAND TWO HUNDRED FORTY SEVEN DOLLARS AND 47/100 (\$20,247.47), WHICH INCLUDED ATTORNEY'S FEES AND COURT COSTS FOR LEGAL SERVICES RENDERED AND EXPENSES INCURRED IN THEIR MOTION FOR SUMMARY JUDGMENT, WHICH WAS DENIED, AND IN APPELLANT'S MOTION FOR TEMPORARY RESTRAINING ORDER, WHICH WAS GRANTED?

STATEMENT OF THE CASE

On September 17, 2009, Katheryna Mulholland-Mertz ("Appellant") brought an action against Richard T. Biggs, Kathleen A. Biggs, James Hannah, Elizabeth Hannah as property owners within Corie Crest Subdivision and Corie Crest Homeowners' Association, Inc. ("Respondents"), to seek a temporary and permanent injunction to remove certain structures or buildings in violation of the Declaration of Protective Covenants, Conditions, Restrictions and Easements of Corie Crest Subdivision ("Restrictions") and further restrain Respondent Corie Crest Homeowners' Association, Inc. from approving similar structures in the future. A Joseph P. Denicola was also named as a Defendant who the Appellant claimed violated the Restrictions by erecting a storage building on his property.

A motion for temporary restraining order filed by the Appellant and a motion for summary judgment filed by the Respondents were subsequently heard together before Circuit Judge J. Derham Cole, who subsequently granted the Appellant a temporary restraining order to prevent similar structures from within Corie Crest Subdivision and denied the Respondents their motion for summary judgment on June 15, 2010.

On February 18, 2011, the Appellant and former co-Defendant Joseph P. Denicola entered into a Stipulation of Dismissal with Prejudice as to Defendant Joseph P. Denicola Only ("Stipulation of Dismissal") on all causes of action filed by each party. Mr. Denicola agreed to remove his storage building from his property. The Appellant and Mr. Denicola expressly agreed in the Stipulation of Dismissal that each party would be responsible for payment of their own attorney's fees.

A final hearing was held on August 24 and August 25, 2011 before the Honorable Gordon G. Cooper, Master-in-Equity for Spartanburg County, who subsequently issued an order on September 9, 2011, granting Respondents' motion to dismiss Appellant's case pursuant to Rule 41(b) of the South Carolina Rules of Civil Procedure (SCRCP). In the Order, the trial judge stated a subsequent hearing would be scheduled for a Respondents' request for attorney's fees pursuant to Section 42(D) of the Restrictions.

On September 22, 2011, Appellant filed a motion to amend the prior order of the Court and a motion for new trial pursuant to Rule 52(b) SCRCP. Exception XII of each motion submitted argument that a hearing for award of legal fees and costs would be premature until full adjudication of the merits.

The Master-in-Equity then issued an order denying Appellant's post-trial motions on March 8, 2012.

Respondents' motion for attorney's fees and court costs was scheduled to be heard on March 22, 2012. Respondents and Appellant were present at that hearing with their respective counsel. Attorney Josh Thompson was substitute counsel for trial attorney A. Todd Darwin of the Holcombe Bomar, P.A. law firm. The Master-in-Equity then declared with no objection from the attorneys for Respondents that he no longer had jurisdiction over the case due to a notice of appeal filed with the Clerk of Court for Spartanburg County and the Court of Appeals for South Carolina. [Transcript of Motions, March 22, 2012, p. 2].

The Appellant did pursue her appeal to the Court of Appeals and oral arguments were heard on May 6, 2013. On May 22, 2013, the Court of Appeals affirmed the

decision of the lower court. Appellant then filed a petition for rehearing with this Court which was denied in its Order filed on June 19, 2013. [Appellate Case No. 2012-209866].

Appellant timely filed her petition for writ of certiorari to the Supreme Court of South Carolina which is now pending for a grant or denial of her writ. [Supreme Court Case No. 2013-001534].

Respondents then rescheduled a hearing for their motion for award of attorney's fees before the Master-in-Equity.

Appellant then filed a motion dismissing Respondents' motion for award of attorney's fees and court costs without prejudice since the writ of certiorari was still pending before the Supreme Court and that any award of legal fees and costs would be premature until final disposition of Appellant's appeal.

Oral arguments were heard on Appellant's motion to dismiss on August 19, 2013 and subsequently an Order was issued denying Appellant's motion on August 26, 2013.

On August 29, 2013, a hearing on award of attorney's fees was held before the Master-in-Equity. Introduced into the record was an affidavit of attorney's fees with itemization sheets of legal services rendered and costs expended by Respondents' attorney and his legal staff , which totaled twenty thousand two hundred forty-seven dollars and 47/100 (\$20,247.47). On October 24, 2013, the lower court issued an order granting judgment against Appellant in the full amount of twenty thousand two hundred forty-seven dollars and 47/100 (\$20,247.47).

Appellant timely filed her motion for reconsideration of the order of the Master-in-

Equity dated August 26, 2013 pursuant to Rule 52(b) and Rule 59(e) SCRCP, which included an exception, *inter alia*, that did not require her to appeal the propriety of awarding legal fees in the primary appeal because the Master-in-Equity had previously ruled that it did not have jurisdiction to hear that issue until final disposition of that appeal.

Appellant timely filed her motion for reconsideration of the prior order of the lower court filed October 25, 2013 pursuant to Rule 52(b) SCRCP and Rule 59(e) SCRCP, claiming error to include legal fees and costs rendered on behalf of former co-Defendant Joseph P. Denicola and for Respondents' unsuccessful motions for summary judgment and temporary restraining order when the Master-in-Equity granted judgment in the full amount sought by Respondents.

On November 13, 2013, the Master-in-Equity denied Appellant's motion to reconsider his prior order of the court filed August 29, 2013 and his prior order of the court filed October 25, 2013.

On November 20, 2013, Appellant served her notice of appeal upon the Respondents which was received by this Court on December 2, 2013.

ARGUMENTS

- I. THE MASTER-IN-EQUITY COMMITTED ERROR WHEN IT REVERSED THE PRIOR RULING OF THE MARCH 22, 2012 HEARING DECLARING THAT JURISDICTION WAS NO LONGER VESTED IN HIS COURT SINCE THE CASE WAS NOW ON APPEAL.

On March 22, 2012, a motion for award of attorney's fees and costs was scheduled to be heard before the trial court. At the time of this hearing, notice of appeal had been served upon Respondents and filed with the Court of Appeals arising out of a prior hearing held on February 23, 2012, denying post-trial motions filed by the Appellant.

The trial judge immediately declared his court no longer had jurisdiction in the case. The court solicited any argument to the contrary which was met with no objection from counsel for Respondents. The court further agreed with counsel for Appellant that if her appeal was not favorable then the only issue left would be the award of attorney's fees. [Transcript of Proceedings, March 22, 2012, p.2].

After Appellant filed her petition for writ of certiorari to the Supreme Court of South Carolina, which is still pending, Respondents refiled their motion for award of attorney's fees and costs. Appellant filed her motion to dismiss Respondents' motion since there has been no final disposition of her appeal.

Appellant's motion to dismiss was heard on August 19, 2013 and the lower court issued its order recognizing the primary appeal is still pending, however the issue of attorney's fees was not appealed; therefore, his court now had jurisdiction to grant judgment in this case. The Master-in-Equity makes reference to Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997).

The circumstances of this appeal are fundamentally different from the facts in Jackson v. Speed, *supra*. In Jackson v. Speed, *supra*, the jury returned a verdict in favor of the Jacksons for actual and punitive damages. After the verdict, trial judge instructed the Jacksons to submit documentation in five (5) days to support their amount of attorney's fees and file their motion for costs and fees with itemized statements which was done on May 17, 1994. The appellants in this case filed *pro se* notices of appeal in June 1994. However, those appellants filed motions for continuances followed with subsequent verbal motions for additional continuances regarding the issue of attorney's fees and costs. Finally, the trial judge in Jackson, *supra*, ruled no further continuances would be granted and he proceeded forward with the Jacksons' motion to determine costs and attorney's fees. [Jackson, *supra*, p. 755].

In this case under appeal, the trial judge found he did not have jurisdiction to hear the motion for attorney's fees and costs after the notice of appeal. Counsel for Respondents did not argue to the contrary. Counsel for Appellant concurred in the lower court's position with line of reasoning that should the final disposition of the primary appeal result in a remand or reversal, then Respondents would not be deemed the "prevailing party" under Section 42(D) of the Restrictions and such issue would need to be preserved again by the trial court. [Emphasis by undersigned. In the event the appeal was final and favorable to the Respondents, then the motion to the Master-in-Equity for attorney's fees would be appropriate and ripe for the Master-in-Equity to hear that remaining issue. [Section 42(d), Restrictions].

The appellate court in Jackson, *supra*, made argument that Rule 54(d) SCRCP prevented the trial judge from holding the hearing for attorney's fees. In this case, the Master-in-Equity found he did not have jurisdiction to hear Respondents' motion for attorney's fees and costs and did so without argument from the parties to the contrary. [Transcript of Proceedings, March 22, 2012, p. 2].

Appellant did not waive her right to appeal the propriety of awarding attorney's fees. In her motion to amend findings of fact and conclusions of law and her motion for new trial filed on September 22, 2011, Exception XII in each motion argued any hearing for award of legal fees would be premature until there was a full adjudication upon the merits of the case. Since the Master-in-Equity granted dismissal of appellant's case under Rule 41(b) SCRCP motion and did not require evidence and testimony from the Respondents, any subsequent hearing that granted attorney's fees and costs after the order denying Appellants post-trial motions would have been an issue under the appeal, which is now pending with the writ to the Supreme Court.

As a direct result of the Master-in-Equity's decision not to hold a hearing on Respondents' motion for attorney's fees and costs, claiming lack of jurisdiction, appellant reasoned and had a legitimate basis to believe that the issue of attorney's fees and costs would not have to be addressed, briefed or argued before the Court of Appeals or the Supreme Court.

Since there is a writ of certiorari pending before the Supreme Court and the facts and the findings of trial court in Jackson, *supra*, and this case are not applicable or relevant to each other, the trial judge committed error when he found that his court

reclaimed jurisdiction over the issue of attorney's fees because it was not affected by the appeal.

Appellant was not required to raise the issue of attorney's fees on appeal if that issue was never heard and determined by the lower court. The appellant did have sound reason to rely upon and believe that the issues of attorney's fees would be revisited in the lower court once the Supreme Court made a final decision on her writ of certiorari.

II. THE TRIAL JUDGE COMMITTED ERROR IN GRANTING JUDGMENT TO THE RESPONDENTS FOR LEGAL FEES AND COSTS THAT INCLUDED REPRESENTATION OF FORMER CO-DEFENDANT JOSEPH P. DENICOLA.

Appellant filed her temporary and permanent injunction complaint on September 17, 2009 which named a Joseph P. Denicola along with the Respondents.

On February 18, 2011, appellant and Mr. Denicola entered into a Stipulation of Dismissal as to all causes of action brought by each other in this action. It was further agreed and stipulated that both parties would be responsible for payment of their own attorney's fees. [Stipulation of Dismissal with Prejudice as to Defendant Joseph P. Denicola Only].

Counsel for Respondents (Mr. Darwin) submitted his affidavit of attorney's fees along with his itemized statement of legal fees and costs totaling twenty thousand two hundred forty-seven dollars and 47/100 (\$20,247.47) at the motion hearing heard on August 29, 2013.

Mr. Darwin did concede at that hearing that Mr. Denicola and the Appellant would be responsible for their own legal fees and costs. [Transcript of Proceedings, August 29,

2013, pp.1-2]. Mr. Darwin further stated that the billings were so old that he could not delete any references to Mr. Denicola's fees and costs because of a program in his office. [Transcript of Proceedings, August 29, 2013, p. 3, lines 1-2]. Mr. Darwin did not object to delete any fees in reference to Mr. Denicola. [Transcript of Proceedings, August 29, 2013, p. 3, lines 2-4]. The Court also saw a couple of references to services for Mr. Denicola. [Transcript of Proceedings, August 29, 2013, p. 3, line 24]. Mr. Darwin makes references to conferences and telephone conferences with Mr. Denicola on October 22, 2009, October 26, 2009, October 27, 2009 and October 29, 2009. [Transcript of Proceedings, August 29, 2013, p. 4, lines 4-7]. Mr. Darwin also agreed that preparation of the Stipulation of Dismissal on February 14, 2011 was done for Mr. Denicola and the same should be taken out. [Transcript of Proceedings, August 29, 2013, p. 4, lines 11-15].

Even though it was made clear to the Master-in-Equity that charges listed for legal services made on behalf of Mr. Denicola should not have been inserted in Mr. Darwin's affidavit and were contrary to the Stipulation of Dismissal signed by the parties, the judge, nevertheless, granted judgment to Respondents in the full amount sought in Mr. Darwin's fee affidavit.

The Master committed error when he disregarded the Stipulation of Dismissal and granted judgment for Respondents in the sum of twenty thousand two hundred forty-seven dollars and 47/100 (\$20,247.47) that included fees for legal services rendered on behalf of Mr. Denicola.

III. THE TRIAL JUDGE COMMITTED ERROR WHEN HE FOUND THAT RESPONDENTS WERE ENTITLED TO JUDGMENT FOR THE FULL AMOUNT SOUGHT IN THE AFFIDAVIT OF ATTORNEY'S FEES FILED BY THEIR COUNSEL EVEN THOUGH THEY WERE NOT THE PREVAILING PARTY IN PRETRIAL MOTIONS FOR SUMMARY JUDGMENT AND TEMPORARY RESTRAINING ORDER.

Under Section 42(D) of the Restrictions, the last sentence states that the "prevailing party" shall be entitled to reasonable attorney's fees against the other party. [Emphasis by undersigned]. The award of attorney's fees and court costs should be limited to the beneficial results obtained in that case. Cedar Creek Properties v. Cantelou Associates, Inc., 320 S.C. 483, 465 S.E.2d 774 (Ct. App. 1995).

Respondents filed a motion for summary judgment to dismiss Appellant's case and Appellant filed a motion for temporary restraining order. On May 14, 2010, Circuit Judge J. Derham Cole heard oral arguments of counsel. On June 15, 2010, after consideration of the record, Judge Cole denied the motion for summary judgment filed by Respondents and granted the motion for temporary restraining order for the Appellant.

In his affidavit for legal fees, Mr. Darwin submitted an itemized description of legal services with the amount of time in preparation for the motion for summary judgment and motion for temporary restraining order and oral argument at the hearing.

These specific dates of legal services rendered and time spent for these motions were detailed on October 21, 2009, October 29, 2009, November 5, 2009, April 14, 2010, May 4, 2010, May 10, 2010, May 11, 2010, May 12, 2010, May 13, 2010 and May 14, 2010. On November 5, 2009, Mr. Darwin paid a motion fee of twenty-five dollars (\$25.00) with the Clerk of Court for Spartanburg County in support of his motion for

summary judgment.

Appellant argues that time spent and charges incurred for the above times are clearly segregated from other dates of services rendered by Mr. Darwin. It is further clear that Respondents did not prevail in their motion for summary judgment nor in dismissing Appellant's motion for temporary restraining order.

If a party is not the prevailing party or prevails only partially, the factor of beneficial results accomplished will weigh in favor of reducing the fee, since time and labor devoted to issues he lost should not, in equity, be charged against the opposing party who prevailed on those issues. Prevatte v. Asbury Arms, 302 S.C. 413, 396 S.E.2d 642 (Ct. App. 1990).

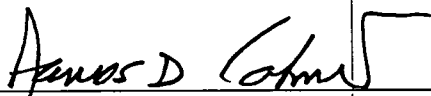
Therefore, it was error for the Master-in-Equity to grant judgment to the Respondents in the full amount of Mr. Darwin's fee affidavit.

CONCLUSION

For the specific reasons stated in Appellant's Arguments I, II and III, this Court should reverse the orders of the Master-in-Equity recited herein.

Respectfully submitted,

DECEMBER 18, 2013
GREENVILLE, SC



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**APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS FOR SPARTANBURG COUNTY**

The Honorable Gordon G. Cooper, Master-in-Equity

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KATHERYNA MULHOLLAND-MERTZ,..... APPELLANT,

v.

**CORIE CREST HOMEOWNERS ASSOCIATION OF SPARTANBURG,
INC., RICHARD T. BIGGS, KATHLEEN A. BIGGS, JAMES HANNAH,
AND ELIZABETH A. HANNAH,..... RESPONDENTS.**

**DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL**

Appellant Katheryna Mulholland-Mertz proposes the following to be included in the Record on Appeal:

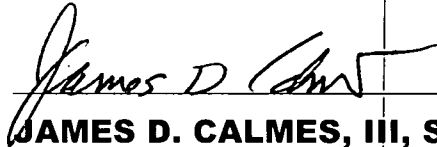
1. Order Denying Summary Judgment to the Defendants and Granting Temporary Restraining Order to Plaintiff filed on June 15, 2010;
2. Stipulation of Dismissal with Prejudice as to Defendant Joseph P. Denicola Only filed on February 18, 2011;
3. Order Granting Defendants' Rule 41(b) Motion to Dismiss filed on September 9, 2011 (Master-in-Equity);
4. Order Denying Plaintiff's Post-Trial Motions filed on March 8, 2012 (Master-in-Equity);

5. Order filed on August 29, 2013 (Master-in-Equity);
6. Order filed on October 25, 2013 (Master-in-Equity);
7. Order Denying Plaintiff's Motions filed on November 13, 2013 (Master-in-Equity);
8. Unpublished Opinion of the Appellate Court on May 22, 2013 [Case No. 2012-209866];
9. Opinion of the Appellate Court Denying Petition for Rehearing on June 19, 2013 [Case No. 2012-209866];
10. Petition for Writ of Certiorari filed on July 18, 2013 [Supreme Court Case No. 2013-001534];
11. Notice of Motion and Motion to Amend Findings of Facts and Conclusions of Law: Rule 52(b) SCRCP filed on September 22, 2011;
12. Notice of Motion and Motion for New Trial: Rule 52(b) SCRCP filed on September 22, 2011;
13. Motion for Award of Attorney's Fees with Affidavit of Attorney's fees filed on March 16, 2012;
14. Notice of Motion and Motion to Dismiss Motion for Award of Attorney's Fees filed on August 7, 2013;
15. Motion for Attorney's Fees with Affidavit of Attorney's Fees with Itemization Sheets filed on August 29, 2013;
16. Notice of Motion and Motion to Amend Findings of Facts and Conclusions of Law: Rule 52(b) and Rule 59(e) SCRCP filed on September 13, 2013;
17. Notice of Motion and Motion to Amend Findings of Facts and Conclusions of Law: Rule 52(b) and Rule 59(e) SCRCP filed on November 5, 2013;
18. Declaration of Protective Covenants, Conditions, Restrictions and Easements of Corie Crest Subdivision;
19. Transcript of Proceedings on March 22, 2012 on Respondents' Motion for Attorney's Fees;
20. Transcript of Proceedings on August 19, 2013 on Appellant's Motion to Dismiss;

21. Transcript of Proceedings on August 29, 2013 on Respondents' Motion for Attorney's Fees.

I certify that this designation contains no matter which is irrelevant to this appeal.

DECEMBER/8, 2013.



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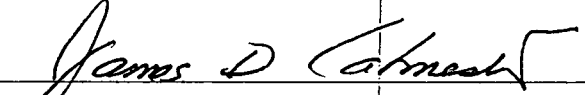
PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant and the Designation of Matter to Be Included in the Record on Appeal on Corie Crest Homeowners Association of Spartanburg, Inc., Richard T. Biggs, Kathleen A. Biggs, James Hannah, and Elizabeth A. Hannah by depositing in the United States Mail, with due and proper postage affixed thereto, on December 18, 2013, copies of the same addressed to their attorneys of record:

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DECEMBER/8, 2013


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