

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas
DeAndrea G. Benjamin, Circuit Court Judge

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Case No. 2014-CP-28-940
Appellate Case No. 2016-000804

SC Court of Appeals

Jean P. Derrick,

Respondent,

v.

Lisa C. Moore,

Appellant

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

Pursuant to Rule 208(b)(2) of the South Carolina Appellate Court Rules, Respondent submits the following alternative statement of the issues on appeal:

1. Did the circuit court correctly compel resolution of the attorney-client fee dispute through the Resolution of Fee Disputes Board, where Appellant consented to pursue such resolution?
2. Did the circuit court correctly find the South Carolina Uniform Arbitration Act, S.C. Code 15-48-10 *et seq.*, is not applicable to an attorney-client fee agreement?
3. Did the circuit court correctly decline to find Respondent waived the right to have the fee dispute resolved through the Resolution of Fee Disputes Board? (Appellant's Issue 1)
4. Did the circuit court have the authority to compel resolution of the attorney-client fee dispute through the Resolution of Fee Disputes Board, pursuant to the clear and unambiguous fee agreement? (Appellant's Issue 2)
5. Did the circuit court correctly find the fee dispute provision enforceable? (Appellant's Issue 3)

STATEMENT OF THE CASE¹

Respondent, Jean P. Derrick (hereafter, "Attorney"), filed this action on October 8, 2014, in the Kershaw County Court of Common Pleas, seeking judgment against the appellant, Lisa C. Moore (hereafter, "Client"), for outstanding attorney's fees and costs incurred in Attorney's representation of Client in family court litigation. R. pp. 27-39. Client filed an answer and counterclaim, asserting, among other allegations, that the fees charged were unreasonable and that the fees included charges for work that was not actually performed. R. pp. 40-46. Attorney filed a reply to the counterclaim. R. pp. 48-49. Because Client's pleadings raised the issue whether the attorney's fees were fair and proper, Attorney also filed a motion to compel Client to submit the fee dispute to the Resolution of Fee Disputes Board, in keeping with the terms of the fee agreement entered into by Attorney and Client at the outset of the representation. R. pp. 96-100.

Judge DeAndrea G. Benjamin held a hearing on the motion to compel on July 14, 2015. R. p. 51. On December 14, 2015, Judge Benjamin issued an order granting the motion to compel resolution of the fee dispute through the Board. R. p. 24. Client filed a motion for reconsideration pursuant to Rule 59(e) of the South Carolina Rules of Civil

¹ The statement of the case in appellant's opening brief does not comply with Rule 208(b)(1)(C) of the South Carolina Appellate Court Rules. It does not contain a history of the proceedings, as required by that rule. It contains contested matters – unfounded and unproven allegations – which the rule mandates shall not be included in the statement of the case. It contains the false assertion that the respondent (referred to in this brief as "Attorney") sought to have her initial action against the appellant (referred to as "Client") dismissed. That did not occur. It contains arguments, not supported by any authority, which are not appropriately included in the statement of the case. It contains false references to the fee dispute resolution process as "binding arbitration" and "mandatory arbitration." It also contains the conclusory and false assertion that the fee agreement entered into by the parties does not comply with Rule 416 of the South Carolina Appellate Court Rules, without citation to any provision of Rule 416 with which the appellant contends the fee agreement fails to comply. This Court should disregard the appellant's statement of the case in its entirety.

Procedure. R. pp. 103-05. Judge Benjamin held a hearing on the reconsideration motion on January 27, 2016. R. p. 68. On March 16, 2016, Judge Benjamin issued an order denying the motion for reconsideration. R. p. 26.

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY COMPELLED RESOLUTION OF THE ATTORNEY-CLIENT FEE DISPUTE THROUGH THE BAR'S RESOLUTION OF FEE DISPUTES BOARD.

Rule 416 of the South Carolina Appellate Court Rules created the Resolution of Fee Disputes Board of the South Carolina Bar (hereafter, "Board"), established the jurisdiction of the Board, and established procedures for the resolution of fee disputes between attorneys and clients. *See* Rule 416, SCACR, Rules 1-22. Rule 9 of Rule 416 vests exclusive jurisdiction in the Board where the client has consented to be bound by the final decision of the Board. *See* Rule 416, SCACR, Rule 9(c).

Attorney and Client entered into a written fee agreement in 2011 with respect to Attorney's representation of Client in a matter in the Family Court of Kershaw County. That agreement, signed by Client on April 19, 2011, contained two separate provisions setting forth that any dispute as to fees would be submitted by the dissatisfied party to the Board for resolution. R. pp. 99-100, ¶¶ 7, 8. Attorney's representation of Client in this case proceeded from April 2011 through April 2014, and the outcome of trial was favorable to Client.

In the family court's unappealed final order, the family court judge ordered the opposing party to pay a portion of Client's attorney's fees directly to Client. R. p. 20, ¶ P. The court found Attorney had "obtained beneficial results across the board" for Client. R. p. 14, ¶ 37. The family court further found the litigation was "relatively complex,"

involving full discovery, including depositions, and a two-day trial, even after the primary issue of custody was settled pre-trial. R. p. 15, ¶ 38. The court found Attorney's expenditure of 64 hours working on the case to be reasonable and found Attorney's professional standing to be excellent. *Id.* The court found Attorney has been a member of the South Carolina Bar for over 36 years. *Id.* The court found the case was well prepared and well tried. *Id.* The court found the beneficial results obtained by Attorney for Client were good. *Id.* The court found Attorney's hourly rate of \$300 was "customary in this community for legal services, and even on the low side for an attorney of her stature and experience." R. pp. 15-16, ¶ 38.

By order dated March 6, 2014, the family court awarded \$12,000 in attorney's fees and ordered the opposing party to pay \$6,000 of the fee award directly to Client within 90 days from the date of the order (June 4, 2014), and another \$6,000 of the fee award directly to Client within 120 days from the date of the order (July 4, 2014). R. p. 20, ¶ P. Notwithstanding Client's receipt of this fee award, her last payment to Attorney was made in May 2014, leaving an outstanding balance for attorney's fees and costs of \$10,484.40. R. pp. 30-39. In October 2014, Attorney brought this action seeking a judgment for the unpaid amount. *Id.*

In footnote 1 of Client's opening brief, she asserts that the fees Attorney seeks to collect exceed the fees awarded by the family court. This assertion is incorrect. The family court awarded fees of \$12,000. Attorney seeks judgment for a lesser sum, the outstanding balance of her total fees and costs, in the amount of \$10,484.40.

When Client filed a responsive pleading challenging the reasonableness of the fees charged by Attorney, Attorney invoked the provision of the fee agreement by which

Client consented to resolution of any fee dispute through the Board. The motion to compel was based on the clear and unambiguous language of the fee agreement, which Client freely and voluntarily entered into in April 2011, the benefit of which Client accepted throughout the ensuing three years of this contentious litigation.

In its order, the circuit court relied upon the plain language of the fee agreement to order that the fee dispute be resolved through the Board. The court stated:

In the fee agreement signed by Defendant, the agreement directly states that “any dispute concerning the fee due pursuant to this agreement shall be submitted by the dissatisfied party for a full, final resolution to the Resolution Fee Dispute Board of the South Carolina Bar, pursuant to Rule 416 of the South Carolina Appellate Court Rules.” Because the Defendant disputes the fee for numerous alleged reasons, this Court finds that it is proper to take these matters up with the Resolution Fee Dispute Board pursuant to the signed contract. The other counterclaims and potential legal malpractice claim may remain under the Circuit Court jurisdiction. The Plaintiff’s motion to compel resolution through the Fee Dispute Board is granted.

R. p. 24, *quoting* R. p. 2, ¶ 7.

The court’s conclusion was not in error. Client freely and voluntarily entered into the fee agreement and accepted its benefits. She consented in that agreement to submit any fee dispute to the Board. Because of that consent, the Board had exclusive jurisdiction of the dispute. *See* Rule 416, SCACR, Rule 9(c); *cf. Bailey v. Bailey*, 312 S.C. 454, 459, 441 S.E.2d 325, 327 (1994) (noting exclusive jurisdiction of Board under Rule 9). The court properly enforced the plain language of the unambiguous agreement and properly granted the motion to compel resolution through the mechanism provided by the contract, reserving all of Client’s counterclaims for further proceedings in the trial court. None of the arguments of Client, addressed below, undermines the correctness of the court’s ruling.

II. THE COURT CORRECTLY HELD THE SOUTH CAROLINA UNIFORM ARBITRATION ACT, S.C. CODE 15-48-10 *et seq.*, IS NOT APPLICABLE TO THE ATTORNEY-CLIENT FEE AGREEMENT.

At the hearing on the motion to compel submission of the fee dispute to the Board, Client for the first time asserted that the fee dispute resolution proceedings under Rule 416 constitute arbitration, and the thread running through all her arguments in the court below and in her appellate brief is the contention that Rule 416 proceedings are essentially arbitrations. In the court's order ruling on the Rule 59(e) motion, the court specifically found "the South Carolina Uniform Arbitration Act makes clear that the Act does not apply to 'a pre-agreement entered into when the relationship of the contracting parties is such that of a lawyer-client.'" *See* R. p. 26, *quoting* S.C. Code Ann. § 15-48-10(b)(3). Client has not appealed this ruling, and it is the law of the case.

An appellant is bound by any unappealed factual findings and conclusions of law, which are the law of the case. *See Byrd v. City of Hartsville*, 365 S.C. 650, 655, 620 S.E.2d 76, 78 (2005); *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997); *Walters v. Canal Ins. Co.*, 294 S.C. 150, 151, 363 S.E.2d 120, 121 (Ct.App. 1987). An unappealed ruling, whether right or wrong, is the law of the case. *See Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012); *Snow v. Smith*, 416 S.C. 72, 87 n.6, 784 S.E.2d 242, 249 n.6 (Ct.App. 2016). Here, Client did not appeal the court's finding that the Arbitration Act is not applicable to the fee agreement, and that ruling is binding as the law of the case.

In Client's answer and counterclaim, she did not plead any defense or counterclaim based on the attorney-client fee agreement being an arbitration agreement.

In fact, the answer's "second affirmative defense" quoted the agreement's fee dispute resolution provision and pled as a defense Attorney's failure "to satisfy this administrative remedy/condition precedent." See R. p. 41, ¶¶ 5, 6. No other allegation of Client's responsive pleading addressed the fee agreement or claimed that it was subject to the Uniform Arbitration Act or decisions in arbitration cases. Any un-pled defenses based on non-compliance with the Arbitration Act, asserted for the first time in the hearing of the motion to compel or later in these proceedings, were not properly before the court, and this Court should find those defenses waived. See Rule 220(c), SCACR (appellate court may affirm judgment of lower court on any ground appearing in the record on appeal); *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) (acknowledging appropriateness of affirming judgments on additional sustaining grounds).

However, regardless of any procedural default of this issue, the court's ruling that the Uniform Arbitration Act does not apply to the fee agreement entered into by Attorney and Client is correct on the merits. The section of the Arbitration Act quoted in the court's order expressly removes this attorney-client fee agreement from the purview of the Arbitration Act: "This Chapter however shall not apply to . . . any pre-agreement entered into when the relationship of the contracting parties is such that [sic] of lawyer-client" See S.C. Code Ann. § 15-48-10(b)(3). Rule 416 establishes a fee dispute resolution system that is separate and distinct from the provisions of the Arbitration Act, and attorney-client fee agreements are therefore expressly exempted from the Act. The court correctly ruled the Arbitration Act is inapplicable based on the plain language of

Section 15-48-10(b)(3), and all arguments of Client premised on provisions of the Arbitration Act or decisions addressing arbitration agreements are misplaced.

III. ATTORNEY DID NOT WAIVE THE RIGHT TO SEEK RESOLUTION OF THE FEE DISPUTE THROUGH THE RESOLUTION OF FEE DISPUTES BOARD.

Client contends Attorney waived the right to have the fee dispute resolved through the Board by filing suit for the outstanding balance. To the contrary, no waiver occurred. At the time Attorney filed the complaint, there was no fee dispute, and therefore there was nothing to be submitted to the Board for resolution. The language of the agreement called for the “dissatisfied party” to submit the dispute to the Board, and Attorney was not dissatisfied with the fees charged, since they were the true and accurate fees incurred in Attorney’s representation of Client. By definition, “[a] dispute exists when the parties to an employment agreement between lawyer and client have a genuine difference as to the fair and proper amount of a fee.” *See* Rule 416, SCACR, Rule 2. Believing her fee to be fair and proper, Attorney could not institute a fee dispute proceeding with the Board. The provisions of Rule 416 are not a substitute for an action for a money judgment. By bringing such an action for the outstanding fees owed to her, Attorney did not waive her right, pursuant to the clear terms of the parties’ agreement, to have the dispute resolved by the Board once that dispute arose. The court correctly enforced the plain language of the agreement, and this Court should affirm the court’s order compelling Client to submit the dispute to the Board.

Client’s reliance on case law addressing a party’s waiver of the right to enforce an arbitration agreement is misplaced. As discussed in Argument II, *supra*, the attorney-client fee agreement is not subject to the Arbitration Act. The provisions of Rule 416

create a fee dispute resolution system that is separate and distinct from arbitration proceedings, and decisions pertaining to waiver of arbitration provisions are simply not applicable to proceedings under Rule 416.

Significantly, the procedures of Rule 416 are not consistent with those of the Uniform Arbitration Act. There is no provision in any sub-part of Rule 416 for an attorney to apply to the Board for a money judgment for unpaid fees, where no dispute exists with the client as to the fairness or propriety of the fee charged. *See* Rule 416, SCACR, Rules 1-22. Unlike the Arbitration Act, there is no provision for the grant of an award. *Cf.* S.C. Code Ann. § 15-48-90. Unlike the Arbitration Act, there is no provision for confirmation of an award by the circuit court. *Cf.* S.C. Code Ann. § 15-48-120. Unlike the Arbitration Act, there is no provision for entry of a money judgment on the basis of confirmation of an award. *Cf.* S.C. Code Ann. § 15-48-150.

In this case, the only recourse Attorney had to collect outstanding fees that had not previously been disputed was to file a lawsuit. There was no avenue for her to pursue a judgment through the procedures of Rule 416. Upon Client's filing a response that disputed the amount of the fees, Attorney properly invoked the fee dispute resolution provision of the fee agreement. Her earlier action to collect the outstanding fees cannot be deemed a waiver of that provision.

Even if arbitration decisions were applicable in the context of Rule 416, which Attorney disputes, they do not support Client's claim that Attorney waived the right to compel resolution of the dispute through Rule 416. In one of the cases cited by Appellant, *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (2007), the Supreme Court outlined a multi-part test for determining if a party

waived its right to compel arbitration. Although Client cites *Rhodes* in her brief, she did not present any evidence or argue that any factor of the *Rhodes* test for waiver was met in this case.

Client principally relies on *Hyload, Inc. v. Pre-Engineered Products, Inc.*, 308 S.C. 277, 417 S.E.2d 622 (Ct.App. 1992), to argue that bringing a lawsuit constitutes a waiver. However, Client misquotes the sentence in *Hyload* to that effect, leaving out the qualifier “ordinarily.” *Hyload*, 308 S.C. at 280, 417 S.E.2d at 624. The principle stated in *Hyload* was *not* an absolute. In fact, *Hyload* acknowledged there is no set rule as to what constitutes a waiver of the right to arbitrate, and the question depends on the facts of each case. *Id.*; see *Rhodes*, 374 S.C. at 126, 647 S.E.2d at 251. Moreover, ““to establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration.”” *Rhodes*, 374 S.C. at 126, 647 S.E.2d at 251 (citation omitted). Here, there has been no allegation and certainly no showing that Client will be prejudiced or suffer any burden due to submission of the fee dispute to proceedings under Rule 416. In fact, the court’s order assures no prejudice will result, reserving all of Client’s counterclaims for decision in the court action. Under the authorities invoked by Client in her brief, she cannot establish that Attorney waived the dispute resolution provision of the fee agreement.

Moreover, *Hyload* is factually distinguishable from the situation presented here. In *Hyload*, the waiver of the right to enforce an arbitration provision was premised upon the party’s having acted inconsistently with the continued assertion of the right. In that case, *Hyload* and Pre-Engineered, corporate entities in a dispute arising from multiple agreements, brought actions against each other. *Hyload*, 308 S.C. at 278, 417 S.E.2d at

623. Upon being sued by Pre-Engineered, Hyload demanded arbitration pursuant to one of the agreements, and Pre-Engineered agreed to arbitrate and prepared the arbitration documents for Hyload's signature. Hyload, however, never signed the documents, instead commencing an action against Pre-Engineered. *Id.*, 308 S.C. at 279, 417 S.E.2d at 624. When Hyload sought dismissal of Pre-Engineered's action because the agreement required arbitration, the court found Hyload had waived its right to compel arbitration by refusing to execute the papers necessary to commence arbitration and electing instead to sue on the contract. *Id.*, 308 S.C. at 280, 417 S.E.2d at 624.

In this case, unlike *Hyload*, Attorney never acted inconsistently with the right under the fee agreement to have disputes as to the reasonableness, fairness, and propriety of Attorney's fee resolved by the Board. Under the procedures of Rule 416, Attorney had no recourse to the Board for collection of fees or entry of a judgment at the time she filed suit, because no dispute as to the fees then existed. Her only avenue for obtaining a judgment for outstanding fees was through the courts. Upon Client's filing of a responsive pleading raising a dispute as to the fees charged, Attorney for the first time learned client disputed the amount of her fees, and Attorney was within her right under the agreement to seek resolution through the Board. Her actions cannot be construed to be a waiver of that right.

IV. THE CIRCUIT COURT HAD THE AUTHORITY TO COMPEL RESOLUTION OF THE DISPUTE THROUGH THE BOARD.

Client asserts the court lacked legal authority to compel resolution of the fee dispute through the Board because Client did not consent to the jurisdiction of the Board after the dispute arose.

In her brief, the only authority she cites in support of this argument is Rule 10 of Rule 416, providing for how proceedings under Rule 416 are commenced – by application in the Office of the Bar and on forms provided by the Bar – and she complains that was not done in this case. This argument was not made at the hearing on the motion to compel. Client did not cite Rule 10 of Rule 416 in her argument at that hearing, instead invoking Rule 10 for the first time in her Rule 59(e) motion. A party cannot use a Rule 59(e) motion to advance an issue or argument the party could have raised to the circuit court prior to judgment. *Stevens & Wilkinson of South Carolina, Inc. v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014). Argument made for the first time in the Rule 59(e) motion is not preserved and may not be entertained by the appellate court. *Id.*; *Spreeuw v. Barker*, 385 S.C. 45, 69, 682 S.E.2d 843, 855 (Ct.App. 2009).

Moreover, the argument premised on Rule 10 in Client's Rule 59(e) motion was a different argument, a contention, based on certain language of Rule 10, that participation in Rule 416 proceedings must be voluntary and that consent could be withdrawn. R. p. 104. The court correctly found the "consent may be withdrawn" language of Rule 10 refers specifically to email correspondence among the Board, the client, and the lawyer, not to consent to taking the matter in front of the Board. R. p. 26. This ruling has not been challenged on appeal. The argument Client now asserts under Rule 10 is based on the methodology for commencing a proceeding under Rule 416. That argument, never asserted in the court below, either at the initial hearing or in the Rule 59(e) motion, and raised for the first time on appeal, is not preserved. *See Wilder Corp. v. Wilke*, 330 S.C.

71, 76, 497 S.E.2d 731, 733 (1998); *Easterling v. Burger King Corp.*, 416 S.C. 437, 453, 786 S.E.2d 443, 451 (Ct.App. 2016).

Client makes the sweeping assertion that nothing in the rules governing proceedings before the Board grants authority to the court to compel parties to file an application or submit a fee dispute to the Board based on an agreement that predates an actual fee dispute. But Client also can point to no authority that prohibits such action by the circuit court, because none exists. The circuit court may properly enforce a contract according to its plain meaning. Where Client freely and voluntarily agreed to be bound by the terms of the fee agreement, which included a provision for resolution of fee disputes before the Board, the circuit court had the authority under contract law to enforce that agreement by compelling Client's participation in the dispute resolution process to which she agreed.

V. THE CIRCUIT COURT CORRECTLY FOUND THE FEE DISPUTE PROVISION ENFORCEABLE.

In a disingenuous argument, Client asserts the court erred in compelling submission of the fee dispute to the Board "because pre-agreed arbitration clauses between lawyers and clients are not enforceable under S.C. Code Ann. § 15-48-10(b)(3)." This argument misconstrues Section 15-48-10(b)(3). Section 15-48-10(b)(3) provides that the Uniform Arbitration Act is not applicable to a pre-agreement entered into by a lawyer and a client. Argument III of Client's brief concedes the Arbitration Act is not applicable to this agreement, but nonetheless invokes the Act's provisions to challenge the agreement. Because the Act does not apply, it has no bearing on the enforceability of the fee agreement's dispute resolution provision.

The Supreme Court and Bar established a separate and distinct system for resolution of fee disputes arising between a lawyer and a client, where the client consents. *See* Rule 416, SCACR. That system is the one invoked by the clear and unambiguous language of the parties' agreement, voluntarily entered into by Client. Because the fee agreement was exempt from the applicability of the Arbitration Act, it is not subject to any provision of the Act, and it cannot be deemed unenforceable based on an alleged violation of a term of the Act. The court properly enforced the terms of the fee agreement and properly granted the motion to compel resolution of the dispute through the procedures of Rule 416.

CONCLUSION

For the foregoing reasons, this Court should affirm the orders of the circuit court.

Respectfully submitted,



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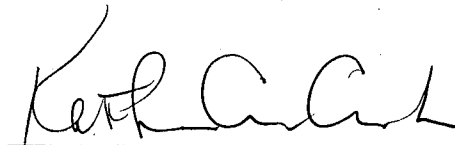
Lisa C. Moore,

Appellant

CERTIFICATE OF COUNSEL

Counsel hereby certifies that the final brief of respondent complies with Rule 211(b) of the South Carolina Appellate Court Rules.

Counsel further certifies that the final brief of respondent complies with the Order of the Supreme Court of South Carolina, *Re Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings*, 407 S.C. 607, 757 S.E.2d 421 (April 15, 2014).



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