THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James O. Spence, Master-in-Equity

APPELLATE CASE NO.: 2017-1497

Team IA, Inc. . . . . .Appellant,

v.

Cicero Lucas. . . . . .Respondent.

REPLY BRIEF OF APPELLANT

Benjamin C. Bruner
BBruner@brunerpowell.com
Bruner, Powell, Wall & Mullins, LLC
P.O. Box 61110
Columbia, South Carolina 29260
(803) 252-7693
Attorneys for Team IA, Inc.

October 16, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional and Statutory Provisions

STATEMENT OF THE CASE

Respondent Cicero Lucas ("Lucas") filed Respondent's Initial Brief on October 6, 2017, received by Appellant Team IA, Inc. ("Team IA") on October 9, 2017. Team IA files the Reply to Respondent's Initial Brief. Team IA craves reference to the Statement of Facts set forth in its Initial Brief.

ARGUMENT

I. THE DOCTRINE OF MERGER DOES NOT APPLY.

Lucas argues the doctrine of merger bars Team IA's claim for post-judgment attorney's fees and costs. That argument amounts to claim preclusion currently embodied in the doctrine of *res judicata*.

The doctrine of merger, often discussed in conjunction with the doctrine of bar, is part of the law of *res judicata*. It applies to causes of action to bar re-litigation of the s*ame cause of action*, and extends only to facts in issue as they existed at the time the judgment was rendered. Under the rule of merger, a judgment does not annihilate a debt. The essential nature of the debt remains intact. Future contractual obligations survive entry of the judgment, and South Carolina courts have repeatedly enforced contract provisions after entry of judgment. *See, e.g., Sears v. Fowler*, 293 S.C. 43, 358 S.E.2d 574 (1987) and *Turner Coleman, Inc. v. Ohio Construction & Engineering, Inc.*, 272 S.C. 289, 251 S.E.2d 738 (1979). By their nature, post-judgment collection efforts happen after a judgment, so a claim for post-judgment fees and costs cannot arise until after entry of judgment.

Other jurisdictions applying the American Rule have refused to merge a contractual right to attorney's fees into a judgment when the fees are ancillary to the

primary cause of action. For example, in *Centerpoint Energy Servs. v. Halim*, the United States Court of Appeals for 7th Circuit held a litigant's contractual right to "all costs and expenses...including reasonable attorney's fees to collect amounts due and owing" provided for post-judgment attorney's fees and did not merge into the judgment. 743 F.3d 503, 2014 U.S. App. LEXIS 2947 (7th Cir. 2014). In reaching that decision, the court noted that merger would encourage judgment debtors resist efforts to collect a judgment upheld on appeal, and requiring creditors to ask the court to either leave a judgment open to allow an additional award of fees should they have to initiate supplemental proceedings "is not a satisfactory solution to the problems created by the merger rule." *Id.* at 509. See also *Moorhead v. Dodd*, 265 S.W.3d 201, 204-205 (Ky. 2008) (finding *res judicata* did not prevent a claim for attorney's fees that accrued after entry of the prior judgment; the court declined to impose an obligation on litigants "to reserve the issue of post-judgment and appellate attorney's fees costs, and expenses in every case where a statute or contract authorizes such charges, even though there may be no appeal"); *Poilevey v. Spivack*, 368 Ill. App. 3d 412, 857 N.E.2d 834 (2006) (the merger doctrine does not prevent a court from looking beyond a judgment to see upon what it is founded to give the judgment its just effect).

Here, Team IA does not seek to re-litigate Lucas's liability regarding the breach of the Employment Agreement. Nor does Team IA seeks to relitigate the trial court's holding that Lucas is liable for "any and all" fees Team IA incurs pursuant to the fee-shifting provision in the agreement. Rather, Team IA simply seeks to recover post-judgment attorney's fees incurred in collecting on the debt, which are ancillary to the primary cause of action. In its Order granting attorney's fees, the trial court's ruling was made in

accordance with the clear and unambiguous terms of the fee-shifting provision in the Employment Agreement. (Order on Post-Trial Motions at p. 28-29).

It is indisputable that the supplemental proceedings were brought to collect on the judgment rendered as a result of Respondent's breach of the Employment Agreement, as determined by a Lexington County jury. The supplemental proceedings, which became necessary only as a result of Lucas's refusal to pay or negotiate the judgment, do not constitute a new cause of action and are by nature proceedings to enforce Team IA's rights under the Employment Agreement.

Today, the judgment having not been satisfied, Team IA's right to recover its actual damages continues to exist. Similarly, as provided in the Employment Agreement, Team IA's right to recover additional attorney's fees and costs incurred after the Order on Post-Trial Motions continues to exist. The latter being future damages ancillary to the primary breach of contract action that did not merge into the Judgment, as the Judgment clearly provides Lucas is liable for "any and all" of Team IA's fees.

To uphold the Master-in-Equity's decision would require that this Court adopt new law, contrary to this State's long history of enforcing the terms of an agreement and allowing recovery of post-judgment attorney's fees and costs. Therefore, the Master-in-Equity's holding is contrary to South Carolina law. The Master therefore committed an error of law when he applied the doctrine of merger to bar Team IA's claim.

II. TEAM IA AND LUCAS AGREED LUCAS WOULD LIABLE FOR "ANY AND ALL" ATTORNEY'S FEES AND COSTS IN CONNECTION WITH THE ENFORCEMENT OF TEAM IA'S RIGHTS UNDER THE EMPLOYMENT AGREEMENT.

As discussed in Team IA's brief, the Master-in-Equity was bound to enforce the terms of fee-shifting provision in the Employment Agreement regardless of its folly. (*See* Appellant's Brief, Section I.)

Courts from other jurisdictions have enforced fee provisions similar to the one in this case. For example, in *Moorhead v. Dodd*, 265 S.W.3d 201, 204 (Ky. 2008), the Supreme Court of Kentucky held a guarantee agreement encompassed post-judgment attorney's fees pursuant to the following clause: "All fees, expenses, costs and charges of any nature whatsoever, including without limitation, reasonable attorney's fees of Sellers required to be paid by Sellers *in enforcing any of their rights and remedies under said Agreement or under this Guaranty*." (emphasis added). That holding is consistent with South Carolina jurisprudence.

What Lucas advocates is new law. He asks this Court to adopt an entirely new rule based upon *Monarc Constr., Inc. v. Aris Corp.*, 188 Md. App. 377, 981 A.2d 822 (2009), a case inconsistent with South Carolina law. This Court is not bound to follow decisions of other states, and Maryland is far stricter than South Carolina courts in applying the merger doctrine. As additional support, Lucas cites to *Allison v. John M. Biggs,* 121 Idaho 567, 826 P.2d 916 (1992) to demonstrate how a contract cannot serve as a basis for post-judgment attorney's fees because the doctrine of merger extinguishes contractual attorney's fees upon entry of the judgment. Notably, however, the plaintiff in that case was seeking attorney's fees pursuant to a statute and did not argue she possessed a contractual right to post-judgment attorney's fees. *Id.* at 569. *Allison* court

held the statute at issue did not authorize post-judgment attorney's fees and did not discuss any attorney's fee provision in the note, so it is impossible to determine the relevance of that analysis to the case at bar. *Id.*

It is well-established that parties are free to negotiate an enforceable fee-shifting provision as part of a contract. At no time have our appellate courts imposed the austere requirement Lucas asks this Court to impose that the parties specifically say "post-judgment." Rather, our courts have given effect to unqualified language that encompasses any and all possible events where fees may be incurred. Such language clearly shows the parties' intent and should be recognized. See e.g. *Muller v. Myrtle Beach Golf & Yacht Club*, 313 S.C. 412, 438 S.E.2d 248 (1993) (holding mechanic's lien statute authorizing "costs which may arise in enforcing or defending against the lien under this chapter, including a reasonable attorney's fee, may be recovered by the prevailing party" provided for post-judgment attorney's fees). It is not the Court's responsibility to blue pencil a contract because one party should have negotiated for better terms.

Here, Lucas and Team IA clearly intended the fee-shifting provision to be broad as an additional mechanism to deter Lucas from breaching the contract, while allowing Team IA to be made whole if he did. It is evident on its face that its purpose is to hold Lucas accountable for damages resulting from his breach and "any and all" attorney's fees, expenses and costs incurred" in enforcing Team IA's right to recover damages from Lucas to make Team IA whole, including fees incurred at trial, on appeal, and during post-judgment collection proceedings. Therefore, the Master-in-Equity erred in denying Team IA's right to recover post-judgment fees and costs.

III. THE PUBLIC POLICY CONSIDERATIONS IDENTIFIED BY LUCAS ARE NOT PROMOTED BY THE MASTER'S FINDINGS AND LUCAS' ARGUMENTS

Lucas included several public policy concerns in his proposed order which the Master adopted and signed. Specifically, the Master lists: (1) problems associated with compounding post-judgment interest where post-judgment attorney's fees are added to the total judgment amount on an annual or semi-annual basis; (2) whether the judge presiding over the supplemental proceedings has jurisdiction to alter or the original amount of the judgment; (3) the potential for creating a belief among judgment creditors that they have nothing to lose by frequently initiating rounds of supplemental proceedings; and (4) the judgment debtor's financial ability to retain counsel in each round of supplemental proceedings, meaning many attempts to recovery post-judgment fees may be uncontested. (Order on Motion to Reconsider.) None of these justifies denying Team IA's claim.

First, because S.C. Code Ann. § 34-41-20(B) provides only for interest to accrue on judgments from the date of entry, no award of post-judgment attorney's fees can draw interest retroactively. In practice—where a party has a statutory right to attorney's fees during supplemental proceedings—any fees awarded are a separate element of damages added to the judgment balance. They do not accrue interest because they are ancillary to the judgment.

Second, the Master's jurisdictional concerns are misplaced because what Team IA seeks is not an alteration or amendment to the judgment but rather an ancillary award over which the Master has jurisdiction pursuant to the Order of Reference.

Third, a rule allowing recovery for post-judgment fees and costs can, as any rule, be subject to abuse. However, there are safeguards in place. Each of the concerns identified by Lucas, particularly (3) and (4) above, are addressed by the factors set forth in *Jackson v. Speed*[1] and exist where a statutory right for post-judgment attorneys' fees applies. Any fee award is tempered by the qualification that it be reasonable under the circumstances. The Master has the discretion to determine whether a fee request contains unnecessary or unreasonably high fees.

Furthermore, supplemental proceedings are not indefinite and are only necessary if a judgment debtor fails to satisfy a judgment entered against it, a judgment that resulted from the debtor's breach. Supplemental proceedings end upon satisfaction or expiration of the judgment. Creditors are often forced to front the cost of litigating years of supplemental proceedings without ever being made whole because debtors will fraudulently transfer assets or engage in other deceptive tactics to avoid paying the judgment.

Indeed, in this case Lucas could have avoided the need for supplemental proceedings (and mitigated his liability for attorney's fees and costs related to the proceedings) by paying the judgment or, at minimum, by negotiating to deliver his non-exempt assets to Team IA to be applied to the judgment. Because he did not, Team IA was forced to pursue him to pay over $18,000 of non-exempt funds held in a checking account only after Team IA discovered the money during the November 3, 2016 supplemental proceeding. R. p. ___.

---

[1] Notably, the amount of fees incurred in consideration of the amount of money in dispute is not a factor set forth in *Jackson v. Speed,* 326 S.C. 289, 486 S.E.2d 750 (1997).

For these reasons, the public policy concerns Lucas argues and which the Master adopted do not exist, and they certainly do not justify denying Team IA's claim. Indeed, the Master's reliance on those concerns demonstrates the new requirements which Lucas argues should be imposed on contractual fee-shifting provisions.

IV. THE MASTER-IN-EQUITY'S HOLDING IS CONTRARY TO THE LAW OF THE CASE.

Finally, Lucas contends the law of the case doctrine does not apply because the appellate court never issued an opinion on the circuit court's order on post-trial motions. Resp. Initial Brief at p. ___. However, it is well established that rulings made by a trial court and not challenged on appeal become the law of the case. *Judy v. Martin*, 381 S.C. 455, 674 S.E.2d 151 (2009). Because the parties' agreed to dismiss the appeals, the Judgment entered by the trial court is, for all intents and purposes, an un-appealed ruling.

The Judgment included a block quotation incorporating the fee-shifting provision in its entirely. R. p. ___. The trial court held it was unambiguous, and then held Lucas liable for "any and all" of Team IA's reasonable fees and costs during the extended litigation. *Id.* The time for Lucas to contest the ambiguity of that provision was prior to entry of final judgment. Because Lucas did not contest the trial court's holding, it is now the law of the case that the attorney's fee provision is unambiguous. Moreover, it is the law of the case that Lucas is liable for any and all reasonable fees Team IA incurs in the enforcement of its rights.

Lucas also argues "the Master provided the parties an opportunity to introduce an evidence relevant to determining who drafted the Employment Agreement" at the March 29, 2017 hearing is incorrect. (Resp. Initial Brief at p. 21). According to Lucas, that was Team IA's opportunity to present extrinsic evidence regarding the parties' intent

surrounding the attorney's fee provision. *Id.* However, as discussed above, the trial judge had already held, "Based on the language of the fee-shifting provision, I must conclude that Lucas is liable for any and all reasonable attorney's fees, expenses, and court costs incurred in connection with the enforcement of Team IA rights." (Order on Post-Trial Motions at 29; R. p. ___.) What the Master allowed was for Lucas to re-litigate the enforceability of the fee-shifting provision after entry of judgment, and after the trial court rejected his arguments.

CONCLUSION

For the reasons stated above and in Appellant's Initial Brief, this Court should find Team IA has a right to recover attorney's fees and costs necessarily incurred in the collection of its judgment against Lucas, and it should reverse the Master's holding.

Benjamin C. Bruner
BBruner@brunerpowell.com
Bruner, Powell, Wall & Mullins, LLC
P.O. Box 61110
Columbia, South Carolina 29260
(803) 252-7693
Attorneys for Team IA, Inc.

October 16, 2017

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James O. Spence, Master-in-Equity

APPELLATE CASE NO.: 2017-1497

Team IA, Inc. . . . . .Appellant,

v.

Cicero Lucas. . . . . .Respondent.

PROOF OF SERVICE

I, Benjamin C. Bruner, counsel for the Appellant, certify that I served a copy of the attached **Reply Brief of Appellant** by depositing a copy of it in the U.S. Mail, postage prepaid, on October 16, 2017, addressed to Julio E. Mendoza, Jr., Esquire, Nexsen Pruet, LLC, Post Office Box 2426, Columbia, SC 29202.

October 16, 2017

Benjamin C. Bruner

BRUNER, POWELL, WALL & MULLINS, LLC

ATTORNEYS AND COUNSELORS AT LAW
1735 ST. JULIAN PLACE, SUITE 200
POST OFFICE BOX 61110
COLUMBIA, SOUTH CAROLINA 29260-1110
TELEPHONE 803-252-7693
FAX 803-254-5719
WWW.BRUNERPOWELL.COM

WARREN C. POWELL, JR., P.A.**
HENRY P. WALL
E. WADE MULLINS III, P.A.
BRIAN P. ROBINSON, P.A.
WESLEY D. PEEL, P.A.
JOEY R. FLOYD, P.A.
BENJAMIN C. BRUNER, P.A.

** Also Admitted in District of Columbia

JAMES L. BRUNER, P.A.
OF COUNSEL

ANN F. ALLISON
CAITLIN C. HEYWARD
ROBERT C. OSBORNE III

AUTHOR'S E-MAIL: bbruner@brunerpowell.com

October 16, 2017

VIA U.S. MAIL
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RE: Team IA, Inc. v. Cicero Lucas, et. al.
Appellate Case No.: 2017-001497
Bruner Powell File No.: 11-2795.100

Dear Ms. Kitchings:

Enclosed please find an original and one (1) copy of the Appellant's Initial Reply Brief and Proof of Service in the above referenced matter. Please file the original, clock-in the copy and return it to me in the envelope provided.

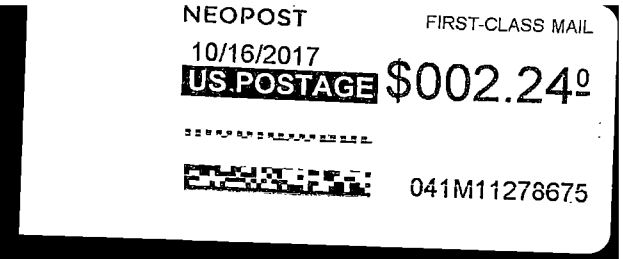
With my kindest regards, I am

Sincerely,

Benjamin C. Bruner

BCB/bs
Enclosures

CC: Julio E. Mendoza, Esq.



BRUNER, POWELL, WALL & MULLINS, LLC
1735 ST. JULIAN PLACE, SUITE 200
POST OFFICE BOX 61110
COLUMBIA, SC 29260

(CCH - 9-948.131)

The Honorable Jenny Abbott Kitchings
SC Court of Appeals Clerk of Court
P.O. Box 11629
Columbia, SC 29211