

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

RECEIVED

NOV 14 2017

SC Court of Appeals

Team IA, Inc. Appellant,

v.

Cicero Lucas. Respondent.

RECORD ON APPEAL

Benjamin C. Bruner
BBruner@brunerpowell.com
Bruner, Powell, Wall & Mullins, LLC
P.O. Box 61110
Columbia, South Carolina 29260
803-252-7693
Attorney for Appellant

Julio E. Mendoza, Jr.
RMendoza@nexsenpruet.com
Nexsen Pruet, LLC
Post Office Drawer 2426
Columbia, SC 29202
803-540-2026
Attorney for Respondent

E-mail from Mendoza to Court, December 9, 2016 at 11:01 AM ²	239
E-mail from Mendoza to Court, December 9, 2016 at 3:34 PM.	250
E-mail from Bruner to Court, May 26, 2017.	261
E-mail from Mendoza to Court, May 26, 2017.	274
Certification of Appellant.	287

that the Record will include a slip sheet listing the authorities submitted to the Master-in-Equity in that e-mail.

² Id.

 COPY

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

Team IA, Inc.,

Petitioner,

vs.

Cicero Lucas,

Respondent.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2009-CP-32-1078

**ORDER DENYING TEAM IA, INC.'S
MOTION TO RECONSIDER, ALTER
OR AMEND**

FILED
CLERK OF COURT
LEXINGTON, SOUTH CAROLINA
2017 MAY 31 PM 1:08

2017 MAY 31 PM 1:08

FILED

INTRODUCTION AND PROCEDURAL POSTURE

Team IA, Inc. ("Plaintiff") initiated Supplemental Proceedings in this matter to collect on its underlying judgment against Cicero Lucas ("Defendant"). Plaintiff argues that it is entitled to "any and all" attorney's fees it incurs, including any fees and costs related to any trial, appeal, statutory Supplemental Proceedings, and bankruptcy proceedings. Defendant argues that Plaintiff is not entitled to post-judgment attorney's fees or costs arising from this separate Supplemental Proceeding action. The parties requested that the Court issue a ruling on whether Plaintiff may add its post-judgment attorney's fees to the underlying judgment. After hearing the parties' arguments, the Court entered its Order on December 22, 2016 (the "Order"), wherein it held Plaintiff had no legal right to add any of its post-judgment attorney's fees and expenses to the outstanding judgment amount.

Plaintiff filed and served its Motion to Reconsider, Alter or Amend the Order (the "Motion") on January 13, 2017, and Defendant filed its Response in Opposition to Team IA, Inc. Motion to Reconsider, Alter or Amend (the "Response") on March 6, 2017. The Court held a hearing on the Motion on March 29, 2017. Upon reviewing the record presented and considering the parties' arguments, the Court denies Plaintiff's Motion and finds no need to alter or amend its

Order filed on December 22, 2016.

STANDARD OF REVIEW

The purpose of Rule 59(e), SCRCP, whereby a party seeks to alter or amend a judgment, is for the trial judge to “reconsider matters properly encompassed in a decision on the merits.” *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992); *see also Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 23-24, 602 S.E.2d 772, 779-80 (2004). “A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.” *Elam*, 361 S.C. at 24, 602 S.E.2d at 780. A party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not. *See Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009); *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990).

ISSUES PRESENTED

1. Did the Court err in holding that the doctrine of merger precluded Plaintiff from relying on the attorney’s fees provision in the Employment Agreement as a basis to add its post-judgment attorney’s fees to the judgment?
2. Did the Court err in holding that the attorney’s fees provision in the Employment Agreement, which states that “. . . any and all reasonable attorney’s fees, expenses and court costs incurred in connection with the enforcement of Employer’s rights hereunder. . .” is capable of at least two interpretations and cannot provide for Plaintiff to recover post-judgment attorney’s fees?
3. Did the Court err in finding that certain practical and public policy concerns

support the Court's decision to deny Plaintiff's request for recovery of post-judgment attorney's fees?

ANALYSIS

1. The Doctrine of Merger

Regarding the first issue, Plaintiff argues that the Court erred in its Order by holding that the doctrine of merger provides that the specific terms of the Employment Agreement merged into the judgment and, therefore, precluded Plaintiff's post-judgment reliance upon Paragraph VII(G) of the Employment Agreement (the "Attorney's Fees Provision") to support its request for post-judgment attorney's fees. To support this argument, Plaintiff first contends the merger doctrine stated in *Ryan v. S. Mut. Bldg. & Loan Ass'n*, 50 S.C. 185, 27 S.E. 618, 619-20 (1897), as cited in the Order, was actually an example of claim preclusion rather than an example of merging contract terms into a judgment. Plaintiff argues that the principles of claim preclusion would not prohibit the addition of post-judgment attorney's fees to the judgment because that issue was not adjudicated by the Circuit Court. Plaintiff next argues that certain examples exist under South Carolina case law to support its argument that the doctrine of merger does not merge all terms of the contract into the judgment, such as the contract interest rate being allowed for calculating post-judgment interest instead of the default statutory rate. See *Turner Coleman, Inc. v. Ohio Constr. & Eng'g, Inc.*, 272 S.C. 289, 292, 251 S.E.2d 738, 740 (1979).

Conversely, Defendant argues that the Court correctly held this doctrine precludes Plaintiff from adding its post-judgment attorneys' fees to the judgment because all terms of the Employment Agreement related to damages recoverable against Defendant merged into the judgment amount. In response to Plaintiff's arguments, Defendant disagrees that the doctrine of merger stated in *Ryan* was merely a nineteenth century version of claim preclusion because claim

preclusion principles were already established by 1897, and the *Ryan* court would have used those terms instead of the doctrine of merger if they meant that. See, e.g. *Hart v. Bates*, 17 S.C. 35, 40 (S.C. 1882) (“The doctrine of ‘*res judicata*’ is very far-reaching and effective. It is founded on principles of the wisest policy, because the peace and order of society require that a matter once litigated should not again be drawn in question between the same parties or those claiming through them.”); *Hyatt v. McBurney*, 15 S.C. 393, 402 (S.C. 1881) (“To that decision, however, the appellants were not parties, and the court, in pronouncing judgment, expressly declared that it would not bind the appellants. This decision, therefore, is not *res judicata* as to them, and it has no binding force here.”). Defendant further argues that the Court’s Order also relies on much more recent case law support for the doctrine of merger from the Fourth Circuit Court of Appeals in 2012, Maryland in 2009, Idaho 1992 and Washington in 1990, which are much more factually akin to the facts at bar.

Regarding Plaintiff’s second argument that the doctrine of merger is inapplicable, Defendant contends that Plaintiff’s reliance on *Turner Coleman* and its progeny, which relate to allowance of the contract rate of interest in post-judgment interest calculations, clearly differs from an analysis of post-judgment attorney’s fees because post-judgment interest, in general, is allowed by statute, where post-judgment attorney’s fees are not. S.C. Code Ann. § 34-31-20 shows the legislature’s clear intent to provide judgment creditors with post-judgment interest accrual and provides for a default statutory rate to be published by the Supreme Court each year.¹ Attorneys’ fees are the exact opposite. The assumption under the well-settled American Rule is that each party must pay its own attorney’s fees and costs unless fee-shifting is authorized by

¹ S.C. Code Ann. § 34-31-20(B) states, “A money decree or judgment of a court enrolled or entered *must* draw interest according to law.” The statutory rate under this statute is applicable only in the absence of a written agreement between the parties setting a different rate of interest. *Turner Coleman, Inc. v. Ohio Construction & Engineering, Inc.*, 272 S.C. at 289, 251 S.E.2d at 741.

contract or statute. *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 759 (1997) (citing *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 427 S.E.2d 659 (1993)).

The Court does not find Plaintiff's arguments related to the doctrine of merger persuasive and, therefore, reiterates the conclusion stated in the Order that the doctrine of merger merged the terms of the Employment Agreement into the judgment, precluding Plaintiff from relying on the Attorney's Fees Provision.

2. The Language of the Attorney's Fees Provision in the Employment Agreement

A. The Attorney's Fees Provision is Ambiguous

Well established South Carolina law holds that if a contract is ambiguous, then evidence outside the contract may be examined to determine the intent of the parties. Here, there is no persuasive evidence to show (1) who drafted the contract nor (2) evidence of the parties intentions regarding the terms. As a doctrine of interpretation applied to general contract law, *contra proferentem* is a doctrine last resort. Therefore, when both parties have equal bargaining power, the court will first attempt to determine the parties' mutual intent by considering the terms of the agreement without resort to extrinsic evidence or construing the agreement against the drafter. If the parties' intent cannot be determined on the face of the agreement, the court will consider extrinsic evidence and construe the agreement against the drafter.

The parties do not dispute that the language of the Attorney's Fees Provision does not use the express term "post-judgment attorney's fees"; however, Plaintiff argues that the Court erred in finding the language of the Attorney's Fees Provision is insufficient to except the fees in this case from the American Rule. Paragraph VII(G) of the Employment Agreement states as follows:

Fees, Costs and Expenses: In the event Employer must enforce any of the rights herein granted to it through an attorney, Employee shall be liable for any and all

reasonable attorney's fees, expenses, and court costs incurred in connection with the enforcement of Employer's rights hereunder.

See the Order on Post-Trial Motions filed by the Circuit Court on November 24, 2015 (the "Order on Post-Trial Motions"), at page 29.

Plaintiff argues that "any and all" as used in the Attorney's Fees Provision means "everything" and should be interpreted as a completely unqualified right for Plaintiff's recovery of attorney's fees and expenses. Defendant contends that the attorney's fees recoverable by Plaintiff against Defendant through the Attorney's Fees Provision is limited, both in its wording (it references the Employment Agreement, and not a judgment) and by the doctrine of merger, and that the Attorney's Fees Provision should be interpreted to allow fees and expenses only if "incurred in connection with the enforcement of Employer's rights [under the Employment Agreement]," which right ended when the Employment Agreement merged into the judgment.

In the Order, the Court noted that the Attorney's Fees Provision is capable of two interpretations: (1) a broad, universal interpretation posited by Plaintiff; or (2) a narrower interpretation posited by Defendant that would allow recovery of "any and all" fees for such pre-judgment actions taken to enforce the Employment Agreement such as (a) pre-litigation mediation or demand letters; (b) injunctive action; (c) arbitration; (d) mediation at the trial level to enforce the contract; or (e) trial for money damages. The Circuit Court did not rule at the trial level on whether the Attorney's Fees Provision applied to post-judgment attorney's fees or on who drafted the Employment Agreement in its Order on Post-Trial Motions, or in any other written ruling. In its Order on Post-Trial Motions, the Circuit Court merely tracked the language of the Employment Agreement to find that Plaintiff was entitled to pre-judgment attorney's fees and expenses. See Order on Post-Trial Motions, page 28.

Plaintiff and Defendant presented no factual issues to the Court regarding Plaintiff's

Motion; the only issues are legal issues, one of which is how to interpret the Employment Agreement. "It is a question of law for the court whether the language of a contract is ambiguous. . . . An ambiguous contract is one that can be understood in more ways than just one or is unclear because it expresses its purposes in an indefinite manner." *Plantation A.D., LLC v. Gerald Builders of Conway, Inc.*, 386 S.C. 198, 205, 687 S.E.2d 714, 718 (Ct. App. 2009) (internal citations omitted).

Given (1) no evidence of who drafted the contract or (2) any extrinsic evidence of the parties' intention, it would seem prudent to follow state attorney fee policy. South Carolina follows the American Rule for attorney's fees. The Court must decide whether the Attorney's Fees Provision's language is sufficiently clear and unambiguous to except Plaintiff's request for post-judgment attorney's fees from the American Rule. The Court finds that it is not. As noted in the Order and above, the Attorney's Fees Provision can be read in a broad, universal manner or in a narrow manner. Therefore, the Attorney's Fees Provision "can be understood in more ways than just one" and it "is unclear because it expresses its purposes in an indefinite manner." *Id.* Put another way, reading the Attorney's Fees Provision in the practical and procedural context of how litigation takes place, Plaintiff asks the Court to interpret the Attorney's Fees Provision as providing Plaintiff with recovery of attorney's fees and expenses for any legal activity at any possible time, before litigation, during litigation, or years after litigation, while Defendant asks the Court to interpret the Attorney's Fees Provision to provide for recovery of attorney's fees and expenses until the Employment Agreement has been fully adjudicated, at which time a judgment is (was) entered for the amount determined due to Plaintiff. The Court finds Defendant's interpretation is correct.

B. "Horizontal" Application vs. "Vertical" Application of Provision

Although there are no disputed factual issues before the Court to allow for construction of the ambiguity in the Attorney's Fees Provision, the discrepancy between the parties' interpretations of the Attorney's Fees Provision can be viewed as whether the Attorney's Fees Provision applies only to "horizontal" procedural actions taken to enforce the Employment Agreement, as Defendant contends, or also to "vertical" procedural actions, as Plaintiff argues. The Court finds that the Attorney's Fees Provision applies only to "horizontal" actions taken by Plaintiff to enforce its rights under the Employment Agreement prior to entry of the judgment.

The parties agree that the Attorney's Fees Provision applies to "horizontal" actions that took place at the trial level before entry of the judgment. Examples of pre-judgment "horizontal" actions are where a defendant in a mortgage foreclosure action files a bankruptcy case, staying the state court action and sometimes requiring litigation in a bankruptcy forum before the matter is returned to state court, or a party removing a state court action to federal court based on diversity or a federal question jurisdiction. The Court views "horizontal" actions as pre-judgment actions while the case remains on the trial level. Conversely, "vertical" actions are those that typically involve appeals of final judgments, but also include supplemental proceedings on a judgment, as , which is an entirely separate, post-judgment statutory action that requires a new filing fee, a new order of reference, a new rule to show cause and potential for an entirely new set of written discovery and depositions. *See S.C. Code Ann. §§ 15-39-310 et seq.*

Plaintiff has not provided the Court with any legal authorities supporting its argument for allowing "vertical" attorney's fees *based on a contract*. The cases cited by Plaintiff and referenced below that allow "vertical" attorney's fees are where fees were allowed or mandated based on a statute. Plaintiff has cited no cases where "vertical" fees are allowed based on a contractual attorney's fees provision, and the Court is not aware of any such authorities.

In *Muller v. Myrtle Beach Golf & Yacht Club*, the party who sought recovery of attorney's fees for "vertical" actions on appeal relied on S.C. Code Ann. § 29-5-10, a section of the South Carolina mechanic's lien statutory scheme that allows a party to recover reasonable attorney's fees in enforcing or defending against the lien, up to the amount of the lien. *Muller v. Myrtle Beach Golf & Yacht Club*, 313 S.C. 412, 415, 438 S.E.2d 248, 250 (1993). In *Muller*, the moving party waived its right to recover appellate fees under Rule 222 South Carolina Appellate Court Rules, but the Court allowed recovery of appellate fees and costs under Section 29-5-10. *Id.* at 416, 438 S.E.2d at 250. In *McDowell v. S.C.D.S.S.*, the party who sought recovery of attorney's fees for "vertical" actions on appeal relied on S.C. Code Ann. § 15-77-300, a section of the statutory scheme related to lawsuits involving the state, its agencies and officials and the United States. *McDowell v. S.C.D.S.S.*, 304 S.C. 539, 541-42, 405 S.E.2d 830, 832 (1991). This statute allows a prevailing party to tax its reasonable attorney's fees against the appropriate agency if the court finds the state agency acted without substantial justification in pressing its claim and circumstances would not make recovery of such fees unjust. *Id.* In *McDowell*, the Court found that Supreme Court Rule 38 (the predecessor to SCACR 222) did not preempt an award of attorney's fees based upon this statute. *Id.* at 543, 405 S.E.2d at 833.

These cases are inapplicable to extend the ambiguous language of the Attorney's Fees Provision to Plaintiff's recovery of attorney's fees for "vertical" actions. A clear and unambiguous statute which specifically provides for the allowance of attorney's fees in certain situations differs greatly from the ambiguous "any and all" language at issue in this case. The specific wording of these fee-shifting statutes is presumed to be carefully tailored by the legislature with public policy of all litigants in mind, unlike the ambiguous language of the Attorney's Fees Provision between the parties in this case. See *Bass v. Isochem*, 365 S.C. 454,

470, 617 S.E.2d 369, 377 (Ct. App. 2005) (“Once the legislature has made a choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy.”). Unlike contract terms, statutory rights cannot merge into a judgment.

While Plaintiff argues it is not relevant that *Muller* and *McDowell* are based on statutes in an effort to have those cases support its position, Plaintiff argues the opposite approach in an effort to keep *Thornton v. Thornton* from weakening its position. There, the Supreme Court found that the family court erred in granting appellate attorney’s fees to a wife under S.C. Code Ann. § 20-7-420(2). *Thornton v. Thornton*, 328 S.C. 96, 113, 492 S.E.2d 86, 95 (1997). In *Thornton*, the Court held that a wife could not recover attorney’s fees incurred in the course of appellate representation from her husband based on the language of Rule 222, SCACR, despite the general allowance of recovery of fees and costs by the prevailing party under Section 20-7-420(2). *Id.* at 113-114, 492 S.E.2d at 95. Plaintiff argues that *Thornton* is inapplicable because the ruling is based on a fee-shifting statute instead of a contract; however, this argument contradicts Plaintiff’s arguments related to *Muller* and *McDowell* because those cases are based on fee-shifting statutes. Plaintiff’s arguments for allowing “vertical” attorney’s fees based on *Muller* and *McDowell* must fail.

C. The Attorney’s Fees Provision Is Ambiguous and Horizontal in Effect

In summary, because the Attorney’s Fees Provision is capable of multiple interpretations, such provision is ambiguous and the ambiguity contained therein does not extend Plaintiff’s ability to recover attorney’s fees to post-judgment, “vertical” actions that are incurred collecting the judgment amount and not “incurred in connection with the enforcement of [Plaintiff]’s rights hereunder.”² The Attorney’s Fees Provision does not apply to this Supplemental Proceedings

² As stated in the Order, the Court notes that post-judgment attorney’s fees have been allowed where the contract provision expressly provided for post-judgment attorney’s fees and expenses, e.g., *Arbor Lake, LLC v. Enterprise*

case.

3. Practical and Public Policy Concerns

Due to the novel nature and potentially far-reaching implications of Plaintiff's request for post-judgment attorney's fees in this Supplemental Proceedings case, the Court views several practical and public policy reasons as additional bases for denying Plaintiff's Motion.

The Court's first concern relates to problems associated with adding post-judgment attorney's fees, on a potentially annual or semi-annual basis, to a judgment amount and compounding post-judgment interest related thereto. A judgment has active energy, generally, for ten years in South Carolina. *See* S.C. Code Ann. § 15-39-30 (1976, as amended). A diligent creditor may seek to initiate supplemental proceedings once a year during the ten-year life of the judgment, with new filing fees and attorney's fees for each time the judgment creditor initiates supplemental proceedings. Instead of a new judgment being entered each time post-judgment attorney's fees are added, which would require the Court to go through the six-factors in *Jackson v. Speed* each time, the Court believes the proper and only choice in that scenario would be for each round of post-judgment attorney's fees to be added into and relate back to the original judgment amount. The Court believes this would lead to myriad problems associated with recalculating the compounding post-judgment interest that would have already occurred under S.C. Code Ann. § 34-31-20.

Next, the Court believes the only court that would have jurisdiction to alter the judgment amount would be the court that originally granted the judgment. The Court knows of no legal authority that allows a Master-in-Equity to alter a judgment entered by another tribunal. If a

Bank & Trust, 334 P.3d 344 (Kan. Ct. App. 2014), or where a statute specifically provides for post-judgment attorney's fees, e.g., Cal Civ. Pro. Code § 685.040 and Idaho Code Ann. § 12-120(5). In this case, the Attorney's Fees Provision does not expressly provide for post-judgment attorney's fees and expenses. Moreover, in South Carolina, there is neither a statute nor a rule providing that judgment creditors are entitled to receive post-judgment attorney's fees and expenses incurred in pursuing collection of a judgment.

judgment creditor originally obtained judgment in Indiana, domesticated that judgment under the Full Faith and Credit Clause to Lexington County, South Carolina, and obtained reference of the supplemental proceedings to the Master-in-Equity, this Court does not believe that the Master-in-Equity would have jurisdiction to alter that judgment amount. Supplemental proceedings are judgment collection proceedings, not judgment addition proceedings. *See* S.C. Code Ann. § 15-39-10 *et seq.*

Another concern related to the allowance of post-judgment attorney's fees is the potential for creating a belief among judgment creditors that they have nothing to lose by frequently initiating rounds of supplemental proceedings. Many contracts and promissory notes that come before this Court include general language entitling a judgment creditor to reasonable attorney's fees in collecting amounts owed under the contract or enforcing the creditor's rights under the contract. These clauses are similar to the Attorney's Fees Provision in this case. If the Court allowed Plaintiff to recover post-judgment attorney's fees based on the Attorney's Fees Provision, a flood of post-judgment attorney's fees requests may result, a situation the Court views as problematic and unwarranted as a practical matter.

Last, another practical concern is the judgment debtor's financial ability to retain counsel in each round of supplemental proceedings to contest a judgment creditor's motion for post-judgment attorney's fees, leading to the potential these motions will be uncontested.

Examining Plaintiff's request in the context of these realities in the post-judgment litigation world further lends support to Defendant's position that the Attorney's Fees Provision in this case applies only to pre-judgment attorney's fees and costs.

CONCLUSION

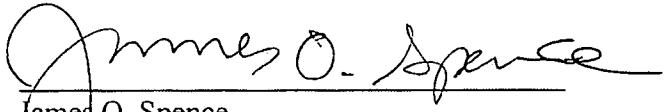
The Court denies Plaintiff's Motion and finds no need to alter or amend its Order filed on

December 22, 2016. First, the doctrine of merger applies to this matter because the specific terms of the Attorney's Fees Provision merged into the judgment at the time of entry. Second, the "any and all" language of the Attorney's Fees Provision is ambiguous because it is capable of multiple interpretations in the context of litigation and no case law exists applying such contractual language to "vertical," post-judgment actions. Last, there are several practical and public policy concerns with allowing post-judgment attorney's fees based on ambiguous contractual language. Plaintiff's request for post-judgment attorney's fees, expenses and costs is denied.

AND IT IS SO ORDERED.

May, 2017

Lexington, South Carolina


James O. Spence
Master-in-Equity for Lexington County



KITTY LINDLER

Court Reporter

(803) 206-0920

kathrynjlindler@windstream.net

P.O. Box 8182 • Columbia, SC 29202

FORM 4

**STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS**

**JUDGMENT IN A CIVIL CASE
CASE NUMBER 2009CP3201078**

TEAM IA INC Bryan Michael James Triplett		Cicero Lucas 5 Point Solutions LLC	George Lawson IV
---	--	---	-------------------------

PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

6/2/2017

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on **5/31/2017**, and a copy mailed first class or placed in the appropriate attorney's box on **6/2/2017**, to attorneys of record or to parties (when appearing pro se) as follows:

Robert Fredrick Goings PO Box 436 Columbia, SC 29202
Christian E. Boesl PO Box 12487 Columbia, SC 29211
Bryan Michael James Triplett PO Box 61110 Columbia, SC 29260
Benjamin C. Bruner PO Box 61110 Columbia, SC 29260-1110

W. Andrew Arnold 307 Pettigru St. Greenville, SC 29601
Jeremy Randall Summerlin 307 Pettigru Street Greenville, SC 29601
Julio E. Mendoza Jr. PO Drawer 2426 Columbia, SC 29202-2426

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Lisa M. Comer

Court Reporter

Lisa M. Comer - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRPC.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

COPY

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

FILED

IN THE COURT OF COMMON PLEAS

2015 DEC 22 P 2:28

TEAM IA v CICERO LUCAS

C/A No.: 2009-CP-32-01078

BETH A. CARRISG
CLERK OF COURT
LEXINGTON SC

Plaintiff initiated Supplemental Proceedings to collect on the underlying judgment.

Plaintiff argues that it is entitled to "Any and all" attorney fees awarded at trial, meaning any fees and costs related to any trial, appeal, statutory supplemental proceedings, and bankruptcy proceedings. Defendant argues that Plaintiff is not entitled to fees from a collection or Supplemental Proceeding action. The parties requested that the Court rule upon Team IA's right to add its post-judgment attorney's fees and expenses to the judgment. As set forth below, the Court holds that Team IA is not entitled to include its post-judgment attorney's fees and expenses in the outstanding indebtedness under the judgment.

BACKGROUND

Team IA brought action and obtained a judgment against Lucas for breach of an Employment Agreement (the "Employment Agreement"). Team IA obtained a jury verdict on March 27, 2015, after which the parties filed post-trial motions. The Circuit Court filed its Order on Post Trial Motions on November 24, 2015, and judgment was entered on December 1, 2015 (the "Judgment"). Pursuant to the Order on Post Trial Motions, the Judgment was entered for Team IA in the amount of \$278,137.34 for breach of contract damages, and in the amount of \$526,334.52 for attorney's fees, expenses and costs incurred by Team IA in enforcing its rights under the Employment Agreement, for a total judgment amount of \$804,471.86.

In awarding Team IA attorney's fees, expenses and costs as part of the Judgment, the Circuit Court stated, "In the Employment Agreement between Team IA, Inc. and Cicero Lucas, Lucas is responsible for the attorney's fees, costs, and expenses incurred in Team IA, Inc.

enforcing the terms of the Employment Agreement.” See Order on Post Trial Motions, page 28.

The Circuit Court cited Paragraph VII (G) of the Employment Agreement as providing:

Fees, Costs, and Expenses: In the event Employer must enforce any of the rights herein granted to it through an attorney, Employee shall be liable for any and all reasonable attorney’s fees, expenses, and court costs incurred in connection with the enforcement of Employer’s rights hereunder.

Id., page 29.

In the Order on Post Trial Motions, the Circuit Court awarded Team IA attorney’s fees, expenses and costs after consideration of the six factors identified in *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993), as applicable to a request for attorney’s fees and expenses. As noted above, the Circuit Court determined that Team IA was entitled to an award of \$526,334.52 for the legal expenses it incurred in enforcing its rights under the Employment Agreement. This amount constitutes over 65% of the total Judgment amount.

Team IA asserts that it is entitled to add attorney’s fees and expenses it incurs post-judgment in pursuing collection of the Judgment to the amount due upon the Judgment. Lucas asserts that Team IA is not entitled to add post-judgment attorney’s fees and expenses to the Judgment.

ANALYSIS

Team IA argues that it is entitled to post-judgment attorney’s fees and expenses based on (1) the Circuit Court’s ruling, as a matter of the law of the case, and (2) the same provision in the Employment Agreement cited by the Circuit Court, which is quoted above. Team IA also argues that the doctrine of merger does not apply to the contract provision for attorney’s fees and expenses. Lucas argues that the Circuit Court made no ruling on post-judgment attorney’s fees and expenses, and that the doctrine of merger provides that, upon entry of the Judgment, the Employment Agreement merged into the Judgment, the contract provision – which did not

expressly provide for post-judgment attorney's fees and expenses – was extinguished, and Team IA's remedy is upon the Judgment, not the contract. Lucas also argues that there is no statute or rule in South Carolina providing that a judgment creditor is entitled to post-judgment attorney's fees and expenses.

For the reasons discussed below, this Court finds that Team IA is not entitled to post-judgment attorney's fees and expenses.

1. The Claim for Post-Judgment Attorney's Fees and Expenses Is Not Supported by the Law of the Case.

The Circuit Court's Order on Post Trial Motions does not include a ruling upon, and makes no mention of, post-judgment attorney's fees and expenses. The language in the Order on Post Trial Motions cited by Team IA for its law of the case argument is as follows: "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. I find that the attorney's fees, costs, and expenses incurred by Team IA were reasonable and necessary." See Order on Post Trial Motions, page 29. The language immediately follows the quoted Paragraph VII (G) of the Employment Agreement (quoted above), and is stated in the context of reviewing Team IA's claimed attorney's fees and expenses for purposes of determining the amount of the Judgment. The Circuit Court then proceeds to apply the *Blumberg v. Nealco, Inc., supra.*, factors to determine the allowability of the claimed attorney's fees and expenses as part of the judgment to be entered.

There is no ruling on the allowability of post-judgment attorney's fees and expenses in the Order on Post Trial Motions, or upon the survival of the contract provision following entry of the Judgment. "The law of the case applies both to those issues explicitly decided and to those issues which were necessarily decided in the former case." *Sloan Construction Company, Inc. v.*

Southco Grassing, Inc., 395 S.C. 164, 170, 717 S.E.2d 603, 606 (2011) (quoting *Nelson v. Charleston & Western Carolina Railway Co.*, 231 S.C. 351, 357, 98 S.E.2d 798, 800 (1957).

The issue before the Circuit Court was the allowability and amount of attorney's fees, expenses and costs to be included in the judgment to be entered. No ruling, discussion or mention of the allowability of post-judgment attorney's fees and expenses is made in the Order on Post Trial Motions, and Team IA's claim for post-judgment attorney's fees and expenses is not deemed decided under the case of the law doctrine.

Further, the parties make no argument that the underlying trial order made a ruling about who drafted the contract the Plaintiff /Employer or the Defendant/ Employee. A broad universal reading of this clause could be inferred; however, a narrower version of the scope could construe the clause to mean any and all actions taken to enforce the agree would mean such attorney fees for such actions as (a) injunctive action (b) trial for money damages (c) arbitration or (d) mediation employed at trial level to enforce the contract.

Existing case law dictates that Plaintiff's argument is flawed when applied to (1) Appeals. RULE 222, SCACR allows for current statutory rate of \$1,000.00. The appellate courts do not hold a six factor hearing to determine reasonable amount of attorney fees for the appellate action. See also *Thornton V Thornton* 492 S.E. 2d 96 (1996) ruling that family court award of attorney fees should not include those fees incurred in the course of appellate representation, as costs on appeal shall be taxed only in the appellate court under Rule 222 SCACR.

The same logic applies to fees incurred in (2) Bankruptcy court. First, this court takes Judicial notice of various attorney fee clauses in notes in foreclosure actions. Some notes do not mention attorney fees in bankruptcy and other specifically have separate clauses for recovery of attorney fees to enforce note and mortgage in state court and a separate clause allowing recovery of attorney fees if case moves to Bankruptcy court. *Youngman, Trustee v. Fleet Bank, N.A.* (In

re *A&P Diversified Technologies Realty, Inc.*), 467 F.3d 337, 343 (3rd Cir. 2005) (merger of mortgage into the foreclosure judgment precluded mortgagee's claim for post-judgment attorney's fees in the bankruptcy case of the borrower).

Plaintiff argues that this court should follow same logic as in *Renaissance Enterprises, Inc. v. Ocean Resorts, Inc.*, 326 S.C. 460, 483 S.E.2d 796 (Ct.App. 1997). While admittedly not controlling since reversed on other grounds, Plaintiff notes that the ruling was on the basis of a contract provision stating that, "[i]f arbitration and/or litigation shall become necessary," the prevailing party would be entitled to recovery of "reasonable attorney's fees and all other costs of such arbitration and/or litigation." *Id.*, 326 S.C. at 469, 483 S.E.2d at 801.

The court ruled that supplemental proceedings were brought to collect on the debt, and thus these attorney fees should also be allowed pursuant to the contract.

However, several points must also be noted. First, this decision was reversed (on other grounds) by the South Carolina Supreme Court in *Renaissance Enterprises, Inc. v. Ocean Resorts, Inc.*, 334 S.C. 324, 513 S.E.2d 617 (1999), and thus it has no precedential effect. Second, the contract provision specifically references litigation "and all . . . costs of such . . . litigation." In finding the provision should include post-judgment fees, the Court of Appeals stated, in footnote 2, "Further the amount of fees awarded appears to be negligible in consideration of the amount of money in dispute and the fact that not all issues have been resolved in favor of Ocean Resorts." 326 S.C. at 469, 483 S.E.2d at 801. In this case, over 65% of the Judgment amount, \$526,334.52, is for attorney's fees and expenses incurred by Team IA in enforcing its rights under the Employment Agreement, and in light of the size and scope of that award, the addition of post-judgment fees and expenses cannot be deemed negligible. In this regard, allowing additional attorney's fees and expenses for post-judgment collection efforts would have the effect of compounded attorney's fees. The provision in the Employment

Agreement indicates no intent that it should be given this effect. Third, the doctrine of merger is not discussed, or even mentioned, in *Renaissance Enterprises, Inc. v. Ocean Resorts, Inc.*, *supra.*, raising the question of whether the non-prevailing party argued the merger doctrine. Without discussion, or even mention, of the merger doctrine it is not proper to assume that the Court of Appeals rejected the doctrine or found it inapplicable to the facts of that case.¹

Fourth, the practical application of this ruling could lead to unintended consequences. A judgment is good for ten (10) years. A creditor can bring any amount of supplemental proceedings during this ten year period. Assuming a prudent attorney would bring an action at least once a year during the ten year period, then the costs of the reference fee and reasonable attorney fees would be, presumably at least ten times, be added to the underlying judgment amount which would increase and continue to compound interest at the statutory judgment rate. For these reasons, the court finds the logic in *Renaissance Enterprises, Inc. v. Ocean Resorts, Inc.*, *supra.*, is distinguishable to this case.

2. The Doctrine of Merger Precludes Reliance Upon Paragraph VII (G) of The Employment Agreement.

Team IA's claim for post-judgment attorney's fees and expenses is premised upon application of Paragraph VII (G) of the Employment Agreement. The contract provision, by its literal wording, applies to attorney's fees, expenses and court costs "*incurred in connection with the enforcement of [Team IA's] rights hereunder.*" (emphasis added). See Order on Post Trial Motions, page 29, quoting Paragraph VII (G) of the Employment Agreement. However, the doctrine of merger precludes this claim. Team IA's post-judgment attorney's fees and expenses

¹ It is well settled that issues not preserved for appeal are deemed abandoned in the appeal and the appellate court need not rule upon them. See, e.g., *Degenhart v. Knights of Columbus*, 309 S.C. 114, 118, 420 S.E.2d 495, 497 (1992).

are incurred in enforcing rights as a judgment creditor, which rights were obtained as a result of the Judgment. Although an exception to the merger doctrine may exist if the contract expressly provides for *post-judgment* attorney's fees and expenses, Paragraph VII (G) does not state that Lucas is liable for post-judgment attorney's fees and costs incurred on account of, or in attempting to collect on, a judgment awarded to Team IA. Paragraph VII (G) states that it applies to enforcement of rights existing under the Employment Agreement.

Upon entry of the Judgment, Team IA's rights under the Employment Agreement merged into the Judgment; under the doctrine of merger, the original claim under the contract is extinguished, and Team IA's remedy is upon the Judgment. *See Ryan v. Southern Mutual Building & Loan Association*, 50 S.C. 185, 27 S.E. 618, 619-620 (1897) (merger of the contract into the judgment precluded a post-judgment claim that the contract was usurious); *Monarc Construction, Inc. v. Aris Corporation, et al.*, 188 Md.App. 377, 392-398, 981 A.2d 822, 831-834 (2009) (doctrine of merger precluded claim for post-judgment attorney's fees, in the absence of a contract provision expressly providing for post-judgment attorney's fees and expenses); *Allison v. John M. Biggs, Inc., et al.*, 121 Idaho 567, 568, 826 P.2d 916, 917 (1992) ("While I.C. § 12-120(3) provides for an award of attorney fees in a civil action to recover on a promissory note, it is also elementary that after judgment a cause of action based on a note is merged into the judgment thereby extinguishing the note as the basis for the post-judgment collection proceedings."); and *Woodcraft Construction, Inc. v. Hamilton*, 56 Wash.App 885, 887-888, 786 P.2d 307, 308 (1990) ("Here, as in *Caine*, the judgment based upon the promissory note extinguished the note and the debtor then became obligated on the judgment. The attorney fee provision in the note merged into the judgment and ceased to exist. Therefore, there was no contractual basis upon which to award attorney fees and costs to either party."). *See also Kanawha-Gauley Coal & Coke Company v. Pittston Minerals Group, Incorporated*, 501

Fed.Appx. 247, 254-255 (4th Cir. 2012) (“Without the necessary clear, unambiguous, and unequivocal language indicating the parties’ express intent to agree on a post-judgment interest rate,” the doctrine of merger eliminated the contract interest rate provision, and interest would not accrue on the judgment at the contract rate.).²

The merger doctrine has long been recognized in South Carolina, and was explained in the *Moore v. Holland*, 16 S.C. 15, 27 (1881), as follows: “A judgment of this sort involves two ideas, - the contract upon which it is rendered, and the judgment itself. The one is the act of the parties, the other is the act of the court. They are entirely separate and distinct.” *Accord, Ryan v. Southern Mutual Building & Loan Association*, 27 S.E. at 620.

The doctrine of merger is applicable to this case. The Employment Agreement provision does not expressly provide for post-judgment attorney’s fees and expenses, and South Carolina does not have a statute or rule providing that judgment creditors are entitled to post-judgment attorney’s fees and expenses. In this regard, the decision in *Dilling, Baker & Co. v. Foster*, 21 S.C. 334 (1884), is instructive in this matter. The decision was in the context of a receivership, and included the issue of the allowance of an attorney’s fee for the attorneys for the plaintiff. The Court found that the statute involved in the receivership matters did not provide for the allowance of attorney’s fees for a judgment creditor, and that no other basis existed for the attorney’s fee for the plaintiff. *Id.*, at 340. There was no authority supporting the award of an attorney’s fee to the plaintiff.

Likewise, in the present case, there is no statutory authority or rule providing for post-judgment attorney’s fees and expenses, and any claim made by Team IA based upon Paragraph

² The Court notes that post-judgment attorney’s fees have been allowed where the contract provision expressly provided for post-judgment attorney’s fees and expenses, e.g., *Arbor Lake, LLC v. Enterprise Bank & Trust*, 334 P.3d 344 (2014), or where a statute specifically provides for post-judgment attorney’s fees, e.g., Cal. Civ. Pro. Code § 685.040 and Idaho Code Ann. § 12-120(5). In South Carolina, there is neither a statute nor a rule providing that judgment creditors are entitled to receive post-judgment attorney’s fees and expenses incurred in pursuing collection of a judgment.

VII (G), which was extinguished by merger upon entry of the Judgment, is without valid basis. Team IA's claim must be denied.

3. No Statutory Basis for Post-Judgment Attorney's Fees and Expenses.

Team IA argues that the doctrine of merger is inapplicable because, in the same manner that interest may accrue on a judgment at the contract rate instead of the legal rate established for judgments, the contract provision for attorney's fees and expenses should survive the judgment. However, this argument overlooks the fact that the accrual of interest on a judgment is authorized and provided by statute, S.C. Code Ann. §34-31-20 (Supp. 2015). This statute states, "A money decree or judgment of a court enrolled or entered *must* draw interest according to law." S.C. Code Ann. §34-31-20(B) (emphasis added). The statutory rate under this statute is applicable only in the absence of a written agreement between the parties setting a different rate of interest. *Turner Coleman, Inc. v. Ohio Construction & Engineering, Inc.*, 272 S.C. 289, 293, 251 S.E.2d 738, 741 (1979). There is no comparable statutory provision in South Carolina providing for post-judgment attorney's fees and expenses on a judgment.

CONCLUSION

Both parties note that South Carolina follows the American attorney fee rule that each side pays its own attorney fees unless there is a fee shifting statute or contract. Here, there is no such fee shifting statute, the underlying language is capable of a broad or narrow reading, comparable attempts to expand award of attorney fees to bankruptcy or appellate actions has been rejected, and same analysis would seem to apply to Supplemental Proceedings, a separate legal action to collect a non-exempt assets. Team IA's remedy is upon its Judgment, not upon the Employment Agreement. The doctrine of merger applies to this case, to the effect that the claims under the Employment Agreement are merged into the Judgment and the contract provisions are extinguished. The attorney's fee and expense provision in the Employment Agreement does not

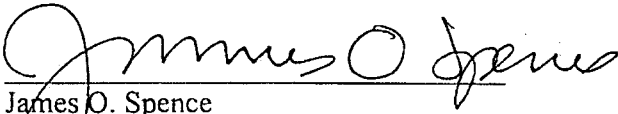
expressly include post-judgment attorney's fees and expenses, so as to survive merger into the Judgment, and it is now extinguished by merger into the Judgment. Team IA's request for post-judgment attorney's fees, expenses and costs is denied.

Therefore, it is ORDERED, ADJUDGED AND DECREED that Team IA is not entitled to include post-judgment attorney's fees and expenses as part of Lucas' indebtedness under the Judgment, and its claim for post-judgment attorney's fees and expenses is hereby denied.

AND IT IS SO ORDERED.

December 15, 2016

Lexington, South Carolina


James O. Spence
Master-in-Equity for Lexington County

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEASJUDGMENT IN A CIVIL CASE
CASE NUMBER 2009CP3201078TEAM IA INC
Bryan Michael James TriplettCicero Lucas
5 Point Solutions LLC

George Lawson IV

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.**E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.**

1/3/2017

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on **12/22/2016**, and a copy mailed first class or placed in the appropriate attorney's box on **1/3/2017**, to attorneys of record or to parties (when appearing pro se) as follows:

Robert Fredrick Goings, Esq.
PO Box 436
Columbia, SC 29202

W. Andrew Arnold, Esq.
307 Pettigru St.
Greenville, SC 29601

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Lisa Comer/ppb

Court Reporter

Lisa M. Comer - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

COPY

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

FILED

IN THE COURT OF COMMON PLEAS
FOR THE 11TH JUDICIAL CIRCUIT

Team 1A, Inc 2016 NOV -3 PM 12:04

Case Number: 2009-01078

Plaintiff (s)

BETH A. CANNON
CLERK OF COURT
LEXINGTON SC

SUPPLEMENTAL PROCEEDING ORDER

VS.

Cicero Lucas

Gina M. Smith Court Reporting, LLC

Defendant (s)

CSR • RPR • REAL-TIME COURT REPORTER

Court Reporter 

GINA M. JOHNSON

803-359-5705

117 Harmon Creek Ct. • Lexington, SC 29072

ginasmith11@gmail.com

PLAINTIFF ATTORNEY: B. Triplett

E-Mail: bttriplett@brunswickllc.com

DEF. ATTORNEY/PRO SE: _____

/Proc. Explained _____

E-Mail: g.mendoza@newportf.com

Order of Reference: 8-9-16

Notice of Hearing: PTC

BAILIFF: Dec

DEPUTY: Jessie

THE CASE WAS CALLED BY THE BAILIFF AND THE HEARING:

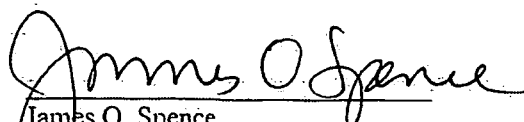
- ___ 1. Was not held because the defendant was not properly served. Plaintiff may reschedule upon request within 90 days or Supplemental Proceeding Dismissed.
- X 2. Was continued to allow for further discovery. Plaintiff ~~may reschedule upon request within 90 days or supplemental proceeding dismissed.~~ to request phone status conference on
ON before Nov 10, 2016.
- ___ 3. Evidence indicated the defendant was served, but did not appear. Plaintiff may submit proposed order regarding defendant's failure to appear.
- ___ 4. Was Held. Plaintiff will submit proposed (a) Settlement order or (b) Order regarding seizure of assets. Order to cite specific asset seizure and exemptions statute (Section 15-41-30) or case law. Order to be served on defendant(s) pursuant to rule.
5. Supplemental Proceeding dismissed and cancelled without prejudice. All Restraining orders and injunctions are hereby lifted, cancelled, voided and dismissed.

6. ORDER TO BE FILED/SCANNED AND EMAILED TO PARTIES and entered on CMS code 65.

NOV - 8 2016

7. _____

DATED: Nov. 3, 2016
Lexington, SC


James O. Spence
Lexington Master-In-Equity

ORIGINAL

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF LEXINGTON) CIVIL ACTION NO.: 2009-CP-32-01078

Team IA, Inc.,)
)
Petitioner,) **RULE TO SHOW CAUSE AND ORDER OF**
) **REFERENCE**
)
v.)
)
Cicero Lucas,)
)
Respondent.)
)

FILED
2016 AUG - 9 A 9:11
J. A. BARRIGG
CLERK OF COURT
LEXINGTON SC

Judgment having been rendered, an Execution issued, a *Nulla Bona* Return made to said Execution, the Petitioner having moved for an examination of the Respondent pursuant to the provisions of §15-39-310, *et seq.*, as amended; it is therefore,

WPA #1
ORDERED that **Cicero Lucas** APPEAR before **The Honorable James O. Spence, Master-In-Equity for Lexington County, 205 East Main Street, Suite 204 Lexington, South Carolina 29072, on the 3rd day of Nov., 2016, at 9:00 a.m./p.m.**, to be examined under oath concerning assets of Respondent; TO SHOW CAUSE why the above-named Respondent's property should not be applied towards satisfaction of the Judgment set out in the Petition; and TO SHOW CAUSE why a Receiver of the Respondent's property should not be appointed, pursuant to the provisions of § 15-39-430, *et seq.* South Carolina Code Ann. (Law. Co-op. 1976);

The Master-in-Equity will entertain and rule upon all motions necessary to dispose of this matter, to include but not limited to, motions to dismiss, motions to appoint Receiver, motions to continue the matter, and motions to sell all or certain property of judgment debtor in satisfaction of

the Petitioner's debt and has authority to enter a Final Order. Any appeal from the Master-in-Equity is directly to the Supreme Court.

IT IS FURTHER ORDERED that the Respondent is hereby restrained and enjoined from making any transaction or transfer or other disposition of property belonging to him which is not exempt from execution pending further Order of this Court.

YOU ARE FURTHER ORDERED PRODUCE A COPY OF THE FOLLOWING DOCUMENTS TO COUNSEL FOR PLAINTIFF/PETITIONER ON, OR BEFORE, FIVE (5) BUSINESS DAYS BEFORE THIS HEARING:

1. Bank statements for all bank accounts owned in whole or in part by Respondent for the past year.
2. Pay stubs for the past ^{THREE} ~~five (5)~~ years.
3. Federal and State Tax returns for the past ^{THREE} ~~five (5)~~ years.
4. Insurance Policies [home, automobile, real estate, etc...].
5. Records of any real estate owned, either in whole or in part.
6. Records of vehicles and boats.
7. Any inventories of personal property.
8. Copies of any contracts entitling you to payment of money.
9. Any personal financial statements prepared for any reasons either by your self or by any independent sources, with any applicable notes attached thereto from the past five (5) years and, if not reflected in such statements, a complete description of any and all contingent liabilities, including guarantees, by you.
10. Any and all year-end financial statements of any corporation, partnership, trust, or other business entity in which you hold directly or indirectly a 10% interest (balance sheet statements and statement of income and expenses) audited and unaudited for the last three years of the respective entities with any applicable notes attached thereto and any subsequently prepared financial reports or statements prepared by the entity or on its behalf for any reason.
11. Any and all documents and financial records that relate to, refer to, or describe, recount, or are in any way related to any transfer of or pledge, hypothecation, gift, assignment, or granting of a security interest in assets owned or controlled by you, made by you, or on your behalf in excess of One ~~Hundred~~ ^{THOUSAND} Dollars (\$100) in any single transaction from the past ~~five (5)~~ ^{TWO} years to the

FILED
2016 AUG -9 A 9:11
J. A. CARRIGG
CLERK OF COURT
LEWISBURG, SC

present, and any and all documents and financial records that relate to, refer to, to describe the disposition of proceeds, promissory notes, or other evidence of indebtedness or consideration received from such transfers, pledges, etc.

12. Any and all documents and financial records that relate to, refer to, or describe any and all transactions between you and members of your family.
13. Any and all documents and financial records, including appraisals which relate to, refer to, or describe or substantiate any valuation of assets disclosed in your financial statements/records produced under paragraph 11 above, and the manner of valuation or fixing of value of such assets, prepared either by you or by any third party or entity relating to these assets.
14. Any and all documents which relate to, or recount or describe any pending or potential claim against you or against any entity referenced in paragraph 10 above, whether or not currently in litigation, together with any and all documents which relate to, recount, or describe any judgments held against you or any entity referenced in paragraph 10.
15. Any and all documents which relate to, refer to, or describe any trust in which you are a beneficiary, including any financial statements of the aforesaid trust and the dispositive provisions of the trust as relates to you and members of your family.

#3 IF YOU DO NOT APPEAR IT MAY RESULT IN THE APPOINTMENT OF A RECEIVER AND AWARDING THE PLAINTIFF/PETITIONER SUCH OTHER AND FURTHER RELIEF AS MAY BE REQUESTED. YOU MAY ALSO BE HELD IN CONTEMPT OF COURT, WHICH COULD RESULT IN A FINE AND/OR JAIL SENTENCE.

AND IT IS SO ORDERED.

William P. Hardy
Presiding Circuit Court Judge, Lexington County

Lexington, South Carolina

AUG. 8, 2016

CLERK OF COURT
LEXINGTON C.

FILED
AUG 11 2016

The South Carolina Court of Appeals

Team IA, Inc., Respondent-Appellant,

v.

Cicero Lucas, George Lawson, IV, and 5 Point Solutions,
LLC, Appellants-Respondents.

AND

Cicero Lucas, George Lawson, IV, Third Party Plaintiffs,

v.

Brent Yarborough and Team IA, Inc., Third Party
Defendants.

Appellate Case No. 2015-002629

The Honorable Eugene C. Griffith, Jr.
Lexington County
Trial Court Case No. 2009CP3201078

ORDER

It appears to the satisfaction of the Court that both parties have agreed to the dismissal of this case in its entirety. Accordingly, this appeal is dismissed. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

FOR THE COURT

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

FILED

August 2, 2016

cc:

W. Andrew Arnold, Esquire
Robert Fredrick Goings, Esquire
Christian E. Boesl, Esquire
Lucas James Asper, Esquire

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2009 CP 32-01078

Team IA, Inc.

Cicero Lucas, George Lawson, IV and S
Point Solutions, LLCFILED
JCC-2 A 11:54

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Plaintiff

CLERK OF COURT
LEXINGTON, SC

Attorney for : ☒ Plaintiff Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk : _____

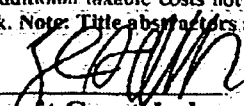
INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Team IA	Cicero Lucas	\$804,471.86
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.


Circuit Court Judge

2154

Judge Code

11/20/15

Date

A TRUE COPY

Page 1 of 2

Lex. Co. C.C.P., G.S. & E.C.

For Clerk of Court Office Use Only

This judgment was entered on the 2 day of Dec, 2015 and a copy mailed first class or placed in the appropriate attorney's box on this 2nd day of Dec, 2015 to attorneys of record or to parties (when appearing pro se) as follows:

Robert F. GoingsP.O. Box 436Columbia, SC 29202ATTORNEY(S) FOR THE PLAINTIFF(S)W. Andrew Arnold712 E. Washington StGreenville, SC 29601ATTORNEY(S) FOR THE DEFENDANT(S)CLERK OF COURT

Court Reporter:

FILED
DEC - 2 A 11:54
CLERK OF COURT
LEXINGTON, SC

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Team IA, Inc.,

Plaintiff,

vs.

Cicero Lucas, George Lawson, IV and 5 Point
Solutions, LLC,

Defendants.

Cicero Lucas and George Lawson, IV,

Third-Party Plaintiffs,

vs.

Brent Yarborough and Team IA, Inc.,

Third Party Defendants.

IN THE COURT OF COMMON PLEAS

ELEVENTH JUDICIAL CIRCUIT

CIVIL ACTION No: 2009-CP-32-1078

ORDER ON POST TRIAL MOTIONS

This matter came before the Court on post-trial motions filed by the parties following a jury trial that concluded on March 27, 2015. The following motions were filed: (1) Defendants' Motion for Judgment Notwithstanding the Verdict, New Trial and For Election of Remedies; (2) Plaintiff Team IA's Motion to Alter or Amend Judgment, Motion for Judgment Notwithstanding the Verdict, and Motion for New Trial and/or New Trial *Additur*; and (3) Plaintiff's Motion for Attorney's Fees, Expenses, and Costs against Defendant Cicero Lucas. On May 5, 2015, the Court held a hearing on these post-trial motions. After carefully considering the motions, supporting memoranda and documentation submitted to the Court, and the arguments of counsel, I hereby order as follows:

JCL 11/37

A TRUE COPY

Lex. Co. C.C.P., G.S. & E.C.

1. DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, NEW TRIAL AND FOR ELECTION OF REMEDIES¹

A. JNOV: Evidence of Lost Profits After the One-Year Restrictive Period

Lucas moved for Judgment Notwithstanding the Verdict (JNOV) on the contract claims for lost profits after the expiration of the one-year non-compete period. Lucas argued that lost profits after the one-year non-compete period were not the natural consequence of his alleged breach of contract, nor were such damages in the contemplation of the parties at time of contract formation. Lucas claimed that damages outside of projects that were obtained within the one-year period can not be recovered. Conversely, Team IA argued that Lucas actively competed and solicited its customers within the prohibited one-year period, and as a result, it has suffered damages because projects that would have been foreseeably awarded to Team IA were assigned to the Defendants. Team IA argued that Lucas' significant attempts of actively soliciting and competing during this one-year period not only resulted in projects awarded to the Defendants during the one-year period, but also for projects that continued to be awarded to Defendants instead of Team IA. For the reasons set forth below, this portion of Defendant Lucas' motion is denied in most part, but granted as to the apparent lost profits awarded by the jury that relate to the Fulton County Historical Reindexing project and the DeKalb County Historical Reindexing project. These were so remote in time that no reasonable juror could conclude these were in the contemplation of the parties nor foreseeable by Plaintiff nor Defendants.

Lost profits may be recovered in a breach of contract action under a three-prong test: First, profits must have been prevented or lost as a natural consequence of the breach of contract.

¹ The Court has addressed the arguments of the parties in as much as a comprehensive fashion as possible. However, the transcript and the record may reflect additional arguments preserved but not expressly dealt with here. In this regard, the Court notes the parties repeatedly pointed out that their intentions and agreement were that arguments made at summary judgment and again at trial were by stipulation preserved. The Court endorsed these attempts to move matters along after the court had repeatedly ruled on a number of issues, all of which had been thoroughly briefed, argued and ruled upon at multiple stages of the litigation.

The second requirement is foreseeability; a breaching party is liable for those damages, including lost profits, which may reasonably have been within the contemplation of the parties at the time the contract was made as a probable result of the breach. The crucial requirement in lost profits determinations is that they be established with reasonable certainty, for recovery cannot be had for profits that are conjectural or speculative. See *Drews Co. v. Ledwith-Wolfe Assocs.*, 296 S.C. 207, 213, 371 S.E.2d 532, 535-36 (1988) (internal citations omitted). Damages must either flow as a natural consequence of the breach or have been reasonably within the parties' contemplation at the time of the contract. *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 595, 493 S.E.2d 875, 880 (Ct. App. 1997); see *S.C. Fin. Corp. of Anderson v. West Side Fin. Co.*, 236 S.C. 109, 122, 113 S.E.2d 329, 335-36 (1960) (stating "profits that have been prevented or lost as the natural consequence of a breach of contract are recoverable as an item of damages in an action for such breach").

The Employment Agreement prohibited Lucas from engaging in acts of competition and solicitation in the one-year following his termination. The Agreement does not state that damages recovered are limited to the profits derived or losses sustained in that one year. It is logical to contemplate that the purpose of the restrictive covenants is to protect Team IA's customers and loss of profits during that one year, as well as in the future, that flow as a natural consequence of the breach. A reasonable jury could conclude that the language of the Employment Agreement and the evidence presented supports an award of lost profits that resulted after the one-year restrictive period and such lost profits were reasonably within the parties' contemplation at the time of the contract. The fact that damages in this case naturally flow into years following the one-year restriction is not "rewriting the agreement" or extending the term of the restrictive covenant as Lucas argues. A jury could conclude that the actions of

Lucas during the one-year restriction found to be in violation of the Employment Agreement formed the basis of the work that Defendants eventually performed in the subsequent years. There was evidence from which a reasonable jury could conclude that Lucas violated the agreement through intentionally soliciting and competing with Team IA customers within the one-year period, and Lucas is responsible for the damage and lost profit that he caused to Team IA.

Further, in viewing the evidence and its inferences in the light most favorable to the nonmoving party, Team IA presented testimony and exhibits to support the jury's finding of lost profits based on the three-prong test above. The Employment Agreement prohibits soliciting customers, not specific projects. As it relates to the Fulton County Microfilm Conversion, Fayette County Civil Case Conversion, DeKalb County Maintenance, and Richmond County Microfilm Conversion projects, the evidence demonstrated that 5 Point Solutions actually performed or started to perform these projects with Team IA customers within the one-year period. As it relates to the DeKalb County Microfilm Conversion, DeKalb County Image Submission, and Palmetto Health Scan and Index projects, there was evidence that Lucas actually began soliciting these projects with those Team IA customers during the one-year period; however, Defendants did not receive the contract or begin performing the work until after the restrictive period, although Lucas points out that three witnesses from Fulton and DeKalb Counties testified that Lucas did not solicit their respective projects and that decision makers approached 5 Points after deciding not to go forward with Team IA. Even though the totality of the evidence is in dispute whether these damages were the natural consequence of the breach or foreseeable and whether the jury was properly instructed on lost profits, this Court concludes that the jury verdict in regards to these projects, which found that the projects were the natural

consequence of the breach or were reasonably within the parties' contemplation at the time of the contract, is supported by the weight of the evidence. Therefore, JNOV is denied as to the jury verdict for lost profits related to the following projects: Fulton County Microfilm Conversion, Fayette County Civil Case Conversion, DeKalb County Maintenance, Richmond County Microfilm Conversion, DeKalb County Microfilm Conversion, DeKalb County Image Submission, and Palmetto Health Scan and Index projects.

However, I do grant JNOV as to the lost profits awarded by the jury for the Fulton County Historical Reindexing and the DeKalb County Historical Reindexing projects. I find that there is no evidence in the record that Lucas solicited or competed for these reindexing projects during the one-year restrictive period nor were such part of the natural consequence of any other solicitation or competition. The work for these reindexing projects began in 2012. Team IA asserted that evidence does exist to support an award of lost profits for these reindexing projects. Team IA argued that issues of foreseeability, causation, and damages are questions of fact for the jury, and that if evidence is in dispute, the Court should not invade the province of the jury. Team IA argued the principal of law that "the determination of damages by a jury is entitled to substantial deference." *Manios v. Nelson, Mullins, Riley & Scarborough, LLP*, 389 S.C. 126, 697 S.E.2d 644 (Ct. App. 2010). While this work did not begin in 2012, Team IA contended that Lucas solicited Fulton and DeKalb counties as customers of Five Point Solutions within the one-year period, and, without his efforts to take these customers, Team IA would have been awarded the reindexing work. Team IA argued the damages are supported by the testimony that Team IA was the approved vendor to perform the reindexing work, and prior to Lucas' termination, Team IA had performed prior reindexing projects for both Fulton and DeKalb. Brent Yarborough testified that he believed his company foreseeably would have received this work, but for Lucas

5
R-12

5/87

A TRUE COPY

Lex. Co. C.C.P., Q.S. & F.C.

taking Fulton and DeKalb counties as customers of Five Point Solutions. Further, Aviery Meeks, who testified that his boss and the decisionmaker, the Clerk of Court for Fulton County, initiated the original contact with Lucas and 5 Points after deciding not to move forward with Team IA, also testified that if Five Point Solutions had not properly performed the Fulton County Microfilm Conversion job in 2009-2010, then it would not have been considered for future work. Even though the totality of the evidence is in dispute if these damages were the natural consequence of the breach or foreseeable and that the jury was properly instructed on lost profits, I grant JNOV on the jury's finding of lost profits related to the Fulton County Historical Reindexing and the DeKalb County Historical Reindexing projects.

B. JNOV: The Non-Compete Provisions are Enforceable

Lucas moved for JNOV on the enforceability of the non-compete provision. The parties have stipulated that the determination of the enforceability of the non-compete is a matter for the Court. These arguments were presented and denied at summary judgment and on directed verdict. For those reasons, and as further set forth herein, the Court finds as a matter of law that the non-compete provisions of the Employment Agreement are enforceable as a matter of law.

The non-compete provision states that Lucas will not, during a 12-month period, compete against Team IA in South Carolina, North Carolina, Georgia, and Alabama. (Agreement ¶ V.B). Lucas *admitted* in his videotaped deposition that he violated the non-compete provision. The Court of Appeals in *Team IA, Inc. v. Lucas*, 395 S.C. 237, 247, 717 S.E.2d 103, 108 (Ct. App. 2012) reasoned that the four-state geographic restriction was not unenforceable as a matter of law, if the facts supported that Lucas was "able, during the term of his employment, to establish contact with [Team IA's] customers."

6
R-43 8/31 - 6/37

A TRUE COPY
R-43
Lex. Co. C.O.F., G.S. & F.C.

South Carolina has adopted a "reasonable test" for the enforceability of a covenant not to compete. Under this test, a non-compete will be enforced if shown to be:

1. necessary for the protection of the legitimate interest of the employer;
2. reasonably limited in its operation with respect to time and place;
3. not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood;
4. reasonable from the standpoint of sound public policy; and
5. supported by valuable consideration.

Rental Uniform Serv. of Florence, Inc. v. Dudley, 278 S.C. 674, 675-76, 301 S.E.2d 142, 143 (1983).

The non-compete is necessary for the protection of a legitimate business interest. South Carolina has held that protection of a company's assets, business practices, trade secrets, and customers are a clear legitimate interest. See *Standard Register*, 238 S.C. at 66, 119 S.E.2d at 539. Further, the non-compete is only limited to defined "Competing Services." See *Faces Boutique Ltd. v. Gibbs*, 318 S.C. 39, 455 S.E.2d 707 (Ct. App. 1995) (recognizing a company has a legitimate interest in protecting against direct competition). Lucas testified in his videotaped deposition that the non-compete is for the protection of a legitimate interest of Team IA. Thus, the first element of the reasonableness test is satisfied.

This non-compete provision is limited to only one year. South Carolina has enforced non-compete provisions that are two and three years. See *Dudley*, 278 S.C. 674, 301 S.E.2d 142. Lucas concedes in his videotaped deposition that the one-year non-compete "is not overly oppressive." (Lucas p. 235). Thus, the one-year term has been found as reasonable based on South Carolina precedent.

The non-compete provision is reasonably limited in respect to territory. The non-compete provision states that Lucas will not, during a 12-month period, compete against Team IA in South Carolina, North Carolina, Georgia, and Alabama. (Agreement ¶ V.B).

South Carolina law establishes that a restrictive covenant is enforceable "*in the territory*" in which the former employee has been performing his duties as a sales representative. *Standard Register*, 238 S.C. at 59, 119 S.E.2d at 535. In *Dudley*, the Supreme Court upheld a non-compete that provides "that upon termination of his employment. . . the [respondent] shall not, directly or indirectly, during a period of three years immediately following such termination, engage in the industrial laundry business ... in any capacity whatsoever in the area within said territory hereinabove referred to in which [respondent] *worked or to which he was assigned at any time during his employment with the Company*...". *Dudley*, 278 S.C. at 675-76, 301 S.E.2d at 143. "A geographic restriction is generally reasonable if the area covered by the restraint is limited to the territory in which the employee was able, during the term of his employment, to establish contact with his employer's customers." *Id.* In citing to *Dudley*, the Court of Appeals in this case held that "our decision is based on a genuine issue of material fact in dispute as to whether or not Lucas interacted with Team IA customers in South Carolina, North Carolina, Georgia, and Alabama during the term of his employment." *Lucas*, at 248, 717 S.E.2d at 108. The Court of Appeals in *Lucas* reasoned that geographic restrictions to non-compete provisions are enforceable in an "area in which [the employee] worked or to which he was *assigned at any time during his employment*." *Id.* (citing *Delmar Studios of the Carolinas v. Kinsey*, 233 S.C. 313, 104 S.E.2d 338 (1958) (emphasis added)).

This Court concludes that there was evidence that the restricted territory of South Carolina, North Carolina, Georgia, and Alabama contained in the Agreement is limited to Lucas'

A TRUE COPY

8

SEA 8/37

Lex. CO. C.C.P., G.S. & F.C.

assigned sales territory. This evidence includes Lucas's deposition testimony that territory of South Carolina, North Carolina, Georgia and Alabama "wasn't just arbitrarily put in [the Agreement]." At various times during Lucas tenure, Team IA had customers and employees in these four states, and Lucas (as one of the main salespersons for Team IA) interacted with Team IA customers in these states, although tax returns revealed no income generated in Alabama and South Carolina during Lucas last year of employment or the one year period that followed. Lucas' role was primarily to generate new customers and business for Team IA, in addition to supporting existing customers. Since Lucas had the opportunity and ability to interface with and sell to prospective customers in these states, the protection of prospective customers is a legitimate interest of Team IA. There was evidence that Lucas marketed and attempted to generate new customers and business for Team IA within these four states during his 5 year tenure. The evidence, including the testimony of Lucas, supports the finding that Lucas was able to establish contacts with Team IA's current customers and prospective customers in South Carolina, North Carolina, Georgia and Alabama during the term of employment. I find that Lucas at one time or another worked in and was assigned to these states, and therefore the four-state geographic limitation was not unreasonable on its face in the protection of Team IA's legitimate business interest.

Further, as to Alabama and North Carolina, I would note that Lucas did not perform any work in Alabama or North Carolina for 5 Point Solutions *after* he resigned from Team IA. Lucas never attempted to do any work in these two states after his employment with Team IA. The prohibition of Alabama and North Carolina is not overly-broad as applied to the facts of this case. These states had no impact on Lucas' ability to earn a livelihood. On the other hand, it should be noted here that Defendants argued that during the one year period following Lucas' termination

of employment that the nationwide non-compete was still the operative provision, and that an order of a court finding of over breadth was a condition precedent to the four state non-compete.

One of the overreaching considerations is whether the non-compete provision is "unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood." Here, Lucas admitted in his videotaped deposition presented at trial that the non-compete did not prevent his ability to earn a livelihood. Further, the non-compete did not prevent Lucas from working in these four states or prevent him from engaging sales, business, accounting, or financial services. Nor did the non-compete prevent him from selling other types of technology or services, such as the "Judicial Data Exchange" system that Lucas developed. Rather, the non-compete only applied to "COMPETING SERVICES" as defined in the Employment Agreement.

I further find that public policy favors the enforceability of the non-compete. In *Wolf*, the Court of Appeals, in upholding a restrictive covenant, found that "sound public policy generally requires the enforcement of contracts freely entered into by the parties." *Id.* at 108, 420 S.E.2d at 221. Lucas actively negotiated the terms of his Agreement, and he "freely and voluntarily" signed the Agreement with "the opportunity to edit, revise, or change any of the language of the Agreement." Lucas testified the Agreement was "a product of [him] and Mr. Yarbrough negotiating the terms of [his] employment," and that he had "read and underst[ood] the terms of employment."

Defendants made a variety of arguments regarding the over breadth, lack of enforceability, unclean hands and other legal issues at the summary judgment stage as well as directed verdict and even these post trial motions. Plaintiff made a variety of arguments in contravention of Defendants' positions. To the extent that the above discussion have not been dealt with specifically here, the record will reflect that this Court has considered all such

arguments, and although there are meritorious arguments and evidence to support each sides contention, this Court believes in the end the non-compete is reasonable and enforceable, was breached, and caused damage to the Plaintiff.

C. JNOV: The "step-down" provision of the Non-Compete is Enforceable

Lucas argues that the step-down provision is unenforceable because it was not operative until the nationwide non-compete was declared unenforceable by the court on November 19, 2009. Lucas argues, in effect, that the court's declaration of the non-enforceability of the nationwide non-compete was a condition precedent, or trigger, to the step-down provision becoming applicable to Lucas. I find that this issue was previously addressed by the Court of Appeals in *Team 1A v. Lucas*, and, therefore, is the law of the case. The Court of Appeals held:

We conclude that alternative territorial restrictions contained in the parties' original agreement (South Carolina, North Carolina Georgia, and Alabama) would remain valid and enforceable to the extent it is not overly-broad after further development of the facts.

Lucas, 395 S.C. at 245, 717 S.E.2d 107 (emphasis added). Because this Court has concluded that the four states comprising the restricted territory is not overly broad, the four state fall back provision is valid. Further, to adopt Lucas' argument would strain the reasonable construction of the plain language of the Employment Agreement. The timing of the Court adjudicating the enforceability of the nationwide restriction has no bearing on the enforceability of the step-down provision. The Employment Agreement contains no language that the timing of this determination has any impact on the enforceability, or contemplates that the scope of the alternative territory only applies prospectively from the date a court issues a ruling. Courts have held that the covenant is "saved" by the step-down provision. See *Compass Bank v. Hartley*, 430 F.Supp.2d 973, 981 (D. Ariz. 2006) (holding that the covenant is saved by the step-down provisions allowing the Court to limit its duration).

A TRUE COPY

11

SED - 11/37

Lex. Co. C.C.P., G.S. & F.C.

D. JNOV: Lucas did Solicit "Customers" of the Plaintiff

Lucas argues that the non-solicitation provision should not apply to county governments due to the definition of "Customer" in the Employment Agreement. The Employment Agreement specifically identified "Customer" as a "person, firm or business entity." (Agreement ¶ V.A.1). Team IA argued the customers that are counties fall within the scope of a "person, firm or business entity" based on the ordinary use of those words and existing law.

Team IA further argued that under federal law in contexts other than contract interpretation, a city, county, or municipality is considered a "person." *See Monell v. Dep't. of Soc. Servs.*, 436 U.S. 658, 690, (1978) (holding that municipalities and local governments are considered "persons" under § 1983). *Black's Law Dictionary* states that "a county is a person in a legal sense." *Black's Law Dictionary*, 4th Ed., p 1300 (citing *Lancaster Co. v. Trimble*, 52 N.W. 711 (Neb. 1903)). For determining trade, business, or occupation, the word "person" includes "corporations and governmental entities." *Lawrence v. U.S.*, 972 F.2d 340 (4th Cir. 1992). Furthermore, under the Georgia Constitution, counties are defined as "a body corporate" and empowered to perform business. (Georgia Const. Art. IX, Sec. I). In any event, Team IA points out that Lucas' argument overlooks section 2 of the Non-Solicitation provision, which states, "Employee agrees not to induce or attempt to influence any person or entity which has a business relationship with the Employer to terminate or otherwise alter that relationship with the Employer." (Agreement, V.A.2).

However, at trial, the issue before this Court was whether "CUSTOMER" was ambiguous and should therefore be submitted to the jury. "A contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent

12 SEP-12/37
R-49
A TRUE COPY
Lex. Co. C.O.P., G.S. & F.C.

person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *Hawkins v. Greenwood Development Corp.*, 328 S.C. 585, ___ 493 S.E.2d 875, ___ (S.C. App. 1997). "It is a question of law for the court whether the language of a contract is ambiguous." *Id.* "Once the court decides that the language is ambiguous, evidence may be admitted to show the intent of the parties. The determination of the parties' intent is then a question of fact for the jury." *Id.*

In this motion, Lucas argues the definition of "Customer" was unambiguous, did not expressly state "county governments," and must be enforced as written or not at all as a matter of law. However, during trial, Lucas took the opposite position that the definition of "Customer" was ambiguous, and, therefore, the meaning and scope of Customer was a matter for the jury to determine. At trial, I found the definition of "Customer" was ambiguous, and the intent and scope of "Customer" was presented to the jury. Based on the request of Lucas, the jury was charged with instructions regarding ambiguity in contracts and presented with a Special Interrogatory on this issue.

The jury rejected this attempt to avoid the non-solicitation provision. As a Special Interrogatory, the jury answered "Yes" to the following question:

- (a) Were Fulton County, Fayette County, DeKalb County, and Richmond County "CUSTOMERS" as defined by the non-solicitation provision of the contract?

There was evidence sufficient for a jury to find that the definition of "CUSTOMER" included the named counties. Thus, JNOV is denied.

E. JNOV: The Non-Solicitation Provision is Enforceable

Lucas moved for JNOV on the enforceability of the non-solicitation provision. Lucas contends the non-solicitation provision is not enforceable under South Carolina law because it was not limited to "existing customers."

The Non-Solicitation provision provides, in part: "Employee agrees. . . for a period of twelve (12) months following termination. . . that he will neither directly or indirectly for himself or on behalf of any other person, firm or business entity, solicit, attempt to solicit, sell to, or attempt to sell to any Employer CUSTOMER any products or services that are competitive with Employer's products or services." (Agreement ¶ V.A.1). The Agreement narrowly defines "Customer" as one who (a) currently has a system or product which was designed or installed by or is being serviced by Employer; or (b) who has purchased goods or services, or who has contracted to purchase goods or services, from Employer during the twelve (12) months prior to Employee's separation from employment; (c) or, who is an Employer prospect who has been contacted and offered business services by Employer or its employees within the last twelve (12) months. (Agreement ¶ V. 1).

A non-solicitation provision is "not only valid, but is looked upon more favorably by the courts than traditional covenants not to compete." *Labor and Employment Law for South Carolina Lawyers*, 4th Ed., p. 34 (S.C. Bar. 2011). South Carolina law has long enforced non-solicitation provisions in employment agreements. In *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 66, 119 S.E.2d 533, 538 (1961), the Supreme Court held:

It has been said that the most important single asset of most businesses is their stock of customers. Protection of this asset against appropriation by an employee is recognized as a legitimate interest of the employer. A restrictive covenant, therefore, is reasonable if it is designed to protect the employer against loss of his customers. Hence, if the employer can show a need of protection against unfair appropriation of his customers by his

A TRUE COPY

14

serdy

11/37

CC, C.C.P., G.S. & F.C.

employee, the negative restrictive covenant is reasonable as to the employer.

On the basis of this well-established rule of law, courts in South Carolina have repeatedly upheld and enforced agreements containing restrictions against both soliciting and accepting business from the employer's customers. For example, the South Carolina Supreme Court has enforced an agreement precluding a former employee from "*selling to the accounts or in the territory in which he ha[d] been performing his duties as [a] sales representative.*" *Standard Register*, 238 S.C. at 59, 119 S.E.2d at 535 (emphasis added). Similarly, the Court of Appeals has upheld as enforceable a restriction that precluded a former employee from "[s]olicit[ing] or accept[ing] sales of competing services in any account in which the employer had already established payroll deduction procedures." *Wolf v. Colonial Life & Accident Ins. Co.*, 309 S.C. 100, 105, 420 S.E.2d 217, 220 (Ct. App. 1992) (emphasis added). Likewise, the United States District Court for the District of South Carolina has upheld an agreement that prohibits the former employee from "*soliciting or accepting business from any of [the employer's] dealers, vendors, clients, or customers whose identity was obtained through use of [the employer's] confidential information.*" *Rockford Mfg., Ltd. v. Bennet*, 296 F. Supp. 2d 681, 690 (D.S.C. 2003).

"A non-solicitation covenant often does not contain a limitation as to place, as it restricts contacts with existing customers rather than competition within a specific geographic area." *Dove Data Prods., Inc. v. DeVeaux*, Opinion No. 2008-UP-202, March 24, 2008 (Ct. App. 2008). "South Carolina law provides that a customer-based restriction can substitute for a limitation as to a 'place' in a non-solicitation covenant." *Wolf*, 309 S.C. at 109, 420 S.E.2d at 222 (stating that prohibitions against contacting customers can be a valid substitute for a geographic limitation). Thus, non-solicitation provisions are less scrutinized in the law than a non-compete clause.

Here, the testimony and exhibits in evidence demonstrated that Lucas solicited Team 1A

SCM

15/37

A TRUE COPY
[Signature]
Lex. Off. C.C.R. G.S. & E.C.

customers within the first twelve (12) months after leaving his employment with Team IA. Fulton County, Fayette County, DeKalb County, and Richmond County were all existing customers of Team IA.

I reject Lucas' position that the non-solicitation provision is unenforceable because it applies to prospective customers. Lucas admitted in his videotaped deposition that the language of the non-solicitation provision is proper to protect against loss of prospective customers that are being actively marketed. (Lucas p. 236-237). He agreed this protection is a "legitimate interest of an employer" and the non-solicitation provision was reasonable to place in an employment agreement. (Lucas p. 236-237).

The Employment Agreement does not broadly include any "prospective customer," but is limited to only an "Employer prospect who has been contacted and offered business services by Employer or its employees within the last twelve (12) months." The important consideration is whether protection of prospective customers is reasonable for a legitimate interest of the employer. A restrictive covenant is reasonable if it is designed to protect an employer against the loss of foreseeable customers. Here, the protection related to prospective customers is narrowly tailored to a "prospect who has been contacted and offered business services by Employer or its employees within the last twelve (12) months."

Furthermore, South Carolina has never held that a non-solicitation provision cannot apply to prospective customers. There is no *per se* prohibition against non-solicitation of prospective customers. In fact, other courts have held that non-solicitation provisions are enforceable as to prospective customers. For example, Georgia law holds that non-solicitation provisions are enforceable for both existing and prospective customers. See *Mohr v. Bank of N.Y. Mellon Corp.*, 393 Fed. Appx. 639, 645 (11th Cir. 2010) (applying Georgia law and finding that a non-

SCB
6/37

A TRUE COPY

Lex. Co. C.C.P., O.S. & F.G.

solicitation was reasonable as to "former and prospective customers" and that "there is no need for a territorial restriction expressed in geographic terms for such clauses"); *see also* *Murphree v. Yancey Bros. Co.*, 716 S.E.2d 824 (Ga. Ct. App. 2011); *Palmer & Cay of Ga., Inc. v. Lockton Cos.*, 629 S.E.2d 800 (Ga. 2006); *Habif, Arogeti & Wynne, P.C. v. Baggett*, 498 S.E.2d 346 (Ga. Ct. App. 1998). Cases from other jurisdictions also agree that non-solicitation provisions are enforceable as to prospective customers. *See e.g. Wade S. Dunbar Ins. Agency, Inc. v. Barber*, 556 S.E.2d 331 (N.C. 2001) (holding a restrictive covenant is enforceable where former employee was restricted from soliciting any customers having an active account with employer at time of employee's termination or prospective customers during the six months preceding termination); *GPS Indus. LLC v. Lewis*, 691 F. Supp.2d 1327 (M.D. Fla. 2010) (holding that Florida law, Fla. Stat. § 542.335(1)(b), has determined that relationships with prospective or existing customers or clients constitute a legitimate business interest.); *Digitel Corp. v. Deltacom, Inc.*, 953 F.Supp. 1486 (M.D. Ala. 1996) (allowing a non-solicitation to be enforceable as to prospective customers); *Solari Indus., Inc. v. Malady*, 55 N.J. 571 (N.J. 1970) (noting that an employers' legitimate interests would be adequately protected by restraint against former employee's dealing with plaintiffs' actual customers or prospective customers with whom he had dealings); *Henderson v. U.S. Bank, N.A.*, 615 F.Supp.2d 804 (E.D. Wis. 2009) (holding that restrictions related to prospective customers are not *per se* unenforceable).

For these reasons, the Court concludes the non-solicitation provision is enforceable and Lucas's motion for JNOV on this ground is denied.

F. JNOV: There was sufficient evidence presented for a reasonable jury to conclude that Defendants Tortiously Interfered with Contractual Relations or Prospective Contractual Relations

Defendants argued that Team IA failed to produce sufficient evidence that Defendants tortiously interfered with present or prospective contractual relations. To state a cause of action for interference with a contractual relationship, the plaintiff must prove: (1) the existence of a contract; (2) knowledge of the contract by the tortfeasor; (3) intentional procurement by the tortfeasor of the contract's breach; (4) absence of justification; and (5) damages resulting therefrom. *Love v. Gumble*, 316 S.C. 203, 213-14, 448 S.E.2d 876, 882 (Ct. App. 1994).

"Under the common law, a trial court should submit to the jury the issue of existence of a contract when its existence is questioned and the evidence is either conflicting or admits of more than one inference." *Allegro, Inc. v. Scully*, 409 S.C. 392, 413, 762 S.E.2d 54, 67 (S.C. App., 2014). "General contract law provides that a 'contract exists when there is an agreement between two or more persons upon sufficient consideration either to do or not to do a particular act.'" *Id.* (citing *Carolina Amusement Co. v. Conn. Nat'l Life Ins. Co.*, 313 S.C. 215, 220, 437 S.E.2d 122, 125 (Ct. App. 1993)). "A contract may arise from oral or written words or by conduct." *Id.* (citing *Rushing v. McKinney*, 370 S.C. 280, 290, 633 S.E.2d 917, 922 (Ct. App. 2006)).

The elements for the tort of intentional interference with *prospective* contractual relations are: (1) intentional interference with the plaintiff's potential contractual relations; (2) for an improper purpose or by improper methods; and (3) causing injury to the plaintiff. *United Educ. Distrihs., LLC v. Educ. Testing Serv.*, 350 S.C. 7, 14, 564 S.E.2d 324, 328 (Ct. App. 2002). To support a claim for intentional interference of prospective contractual relations, the existence of a contract is not required; instead, the plaintiff need show only a prospective contractual

FA2
18/37

A TRUE COPY

Lex. Co. C.C.P., G.S. & F.C.

relationship that results in "the loss of an identifiable contract or [identifiable] expectation." *Id.* at 14, 564 S.E.2d at 328. "The plaintiff must actually demonstrate, at the outset, that he had a truly prospective (or potential) contract with a third party. This does not require plaintiff to prove the tort in his initial pleadings; rather, the allegations must present facts that give rise to some reasonable expectation of benefits from the alleged lost contracts." *Id.* at 15, 564 S.E.2d at 329.

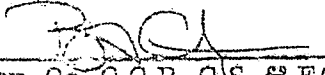
The evidence was sufficient for a reasonable jury to find that a contract existed between Team IA and Fulton County, Fayette County, DeKalb County, and Richmond County to support the jury's finding for tortious interference with contractual relations. At the very least, a prospective contractual relationship existed between Team IA and these counties. The evidence established a reasonable probability or expectation that contractual relations between Team IA and these counties may have been realized or expected. Further, the evidence supported the jury's finding that the actions of the Defendants were taken without proper justification and for improper purposes or improper methods. The methods of interference considered improper the jury could have considered included violating a non-compete or non-solicitation agreement, defamation, misuse of inside or confidential information, or misappropriation of Team IA's trade secrets.

G. JNOV: The Evidence Did Not Permit Only One Reasonable Conclusion for the Affirmative Defense of Fraudulent Inducement

During trial, Lucas raised and argued the affirmative defense of fraudulent inducement in entering into the Employment Agreement.

To establish fraud, a party must prove with clear and convincing evidence the following: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the

A TRUE COPY

19 SEP 19/37 
Lex. Co. C.C.P., G.S. & F.C.

hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. *Sorin Equipment Co., Inc. v. The Firm, Inc.*, 323 S.C. 359, 366, 474 S.E.2d 819, 823 (S.C. App. 1996). The failure to prove any element of fraud is fatal. *Id.* Further, a fraudulent representation must relate to a present or preexisting fact and cannot be based on unfulfilled promises or statements about future events. *Woodward v. Todd*, 270 S.C. 82, 240 S.E.2d 641 (1978).

Due to the heavily contested and disputed issues of the facts and circumstances surrounding the execution of the Employment Agreement and parol evidence, this defense was submitted to the jury as a Special Interrogatory to Team IA's breach of contract claims against Lucas. The jury found that Team IA did not fraudulently induce Lucas to enter into the Employment Agreement. This conclusion is well supported by the evidence. In viewing the evidence and its inferences in the light most favorable to the nonmoving party, this motion is denied.

H. JNOV: The Evidence did not Permit Only One Reasonable Conclusion for the Affirmative Defense of Prior Breach

During trial, Lucas raised and argued the affirmative defense that Team IA caused a prior material breach of the Employment Agreement, thereby, rendering the Employment Agreement unenforceable. *See Williams v. Riedman*, 339 S.C. 251, 277-278, 529 S.E.2d 28, 41-42 (Ct. App. 2000); *Associated Spring Corp. v. Roy F. Wilson & Avnet, Inc.*, 410 F. Supp. 967, 976 (D.S.C. 1976). This issue was contested by the parties, and at trial, disputed facts were presented as to whether a prior material breach of the Employment Agreement occurred. As more than one reasonable conclusion could be drawn from the evidence, a Special Interrogatory was presented to the jury on this issue. Once again, the jury ruled against Lucas. In viewing the evidence and

20 *SCM*
R-57 20/37
A TRUE COPY
[Signature]
Lex. Co. O.C.P., G.S. & P.G.

its inferences in the light most favorable to the nonmoving party, evidence supported the jury's verdict and this motion is denied.

I. JNOV: Evidence was Presented for a Reasonable Jury to Conclude that Team IA would have performed the Projects.

Lucas argued that JNOV should be granted because there was no evidence that Team IA would have performed the work on the projects following his resignation. Based on the testimony at trial, Ro Lucas, George Lawson, and Sheila Studdard claim that Team IA would not have gotten this work. However, the testimony of Brent Yarborough, various employees of Team IA, the various exhibits, and the course of dealing between Team IA and these counties clearly created evidence in dispute. Further, the testimony of Aviery Meeks and Tina Robinson of Fulton County supported the jury's finding that work was taken from Team IA directly based upon the conduct of the Defendants. The issue of proximate causation and damages is a question for the jury, not the Court. *See Jensen v. South Carolina Dept. of Social Services*, 297 S.C. 323, 377 S.E.2d 102 (Ct. App. 1988), *affirmed*, 304 S.C. 195, 403 S.E.2d 615 (1991). Accordingly, JNOV on this basis is denied.

J. JNOV: The Evidence Established that Plaintiff Did Not Fail to Mitigate its Damages.

Lucas argued that JNOV should be granted for Plaintiff's failure to mitigate damages. "A party injured by the acts of another is required to do those things a person of ordinary prudence would do under the circumstances to mitigate damages; however, the law does not require unreasonable exertion or substantial expense for this to be accomplished." *Genovese v. Bergeron*, 327 S.C. 567, 572, 490 S.E.2d 608, 611 (Ct. App. 1997). Furthermore, "the law does not require him to unreasonably exert himself or to incur substantial expense to avoid damages." *Tri-Continental Leasing Corp. v. Stevens, Stevens & Thomas, P.A.*, 287 S.C. 338, 342, 338

S.E.2d 343, 346 (Ct. App. 1985). "The party who claims damages should have been minimized has the burden of proving they could reasonably have been avoided or reduced." *Id.* "Whether the party acted reasonably to mitigate damages is ordinarily a question for the jury." *Baril v. Aiken Regional Medical Centers*, 352 S.C. 271, 285, 573 S.E.2d 830 (S.C. App. 2002). In viewing the evidence and its inferences in the light most favorable to the nonmoving party, evidence was presented that supported the jury's verdict and this motion is denied.

K. JNOV: Unclean Hands

Lucas argued that JNOV should be granted based on the doctrine of "unclean hands." This motion is denied. The defense of "unclean hands" is only a defense in non-jury cases of "equity", and "has no application to an action at law." *Aaron v. Mahl*, 381 S.C. 585, 674, S.E.2d 482 (2009). To the extent that any relief requested is equitable in nature, Team IA did not act with unclean hands. This conclusion is further supported by the jury's determination that Team IA did not breach the agreement, commit fraud, or fail to pay Lucas any earned wages or bonuses.

L. JNOV: Defendant Lucas is not Entitled to Recover on his Counterclaims

Lucas requested JNOV on his counterclaim for wages and bonus income. The jury found that Team IA and Brent Yarborough *did* pay Lucas all of the wages earned by him while employed at Team IA. The evidence at trial, including the testimony of Brent Yarborough, supports the jury's verdict. In viewing the evidence and its inferences in the light most favorable to the nonmoving party, this motion is denied.

M. NEW TRIAL: On All Issues Set Forth Above

Alternatively, Lucas requests a new trial on all of the issues set forth above based on the "thirteenth juror" standard. A trial judge may also set aside a verdict and grant a new trial based

solely on the judge's view of the evidence; this standard is known as the "thirteenth juror" standard. *Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265 (1990). Based on the evidence submitted and the jury's verdict, a new trial is not warranted.

N. ELECTION OF REMEDIES

The parties have agreed to resolve the election of remedies by consent order, the terms of which are incorporated herein by reference.

II. TEAM IA'S MOTION TO ALTER OR AMEND JUDGMENT, MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, AND MOTION FOR NEW TRIAL AND/OR NEW TRIAL *ADDITUR*

A. Entry of Pre-Judgment Interest

Team IA requests pre-judgment interest pursuant to S.C. Code § 34-31-20(A). "Prejudgment interest is allowed on a claim of liquidated damages; i.e., the sum is certain or capable of being reduced to certainty based on a mathematical calculation..... [t]he fact that the amount due is disputed by the opposing party does not render the claim unliquidated for the purposes of an award of prejudgment interest." *Butler Contracting, Inc. v. Court Street, LLC*, 369 S.C. 121, 133, 631 S.E.2d 252, 258-59 (2006).

"The law allows prejudgment interest on obligations to pay money from the time when, either by agreement of the parties or operation of law, the payment is demandable and if the sum is certain or capable of being reduced to certainty." *Smith-Hunter Const. Co., Inc. v. Hopson*, 365 S.C. 125, 128, 616 S.E.2d 419, 421 (2005). "The fact that the sum due is disputed does not render the claim unliquidated for the purposes of an award of prejudgment interest." *Id.* "The proper test for determining whether prejudgment interest may be awarded is whether or not the measure of recovery, not necessarily the amount of damages, is fixed by conditions existing at the time the claim arose." *Id.*

Team IA argued that its financial damages were capable of being reduced to a sum based on mathematical calculations and the amount awarded was capable of being reduced to a sum. However, while the damages were liquidated, the court finds that prejudgment interest should not be awarded because the amount of damages was not fixed.

B. Amount of Jury Verdict

Team IA requested a new trial *nisi additur*. When the jury's verdict is inadequate, the trial judge has the discretionary power to grant a new trial *nisi*. *Bailey v. Peacock*, 318 S.C. 13, 455 S.E.2d 690 (1995). *See also McCourt by and through McCourt v. Abernathy*, 318 S.C. 301, 457 S.E.2d 603 (1995) (trial judge alone has power to grant new trial *nisi* when he finds amount of verdict to be merely inadequate). When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice or prejudice. *See Allstate Ins. Co. v. Durham*, 314 S.C. 529, 431 S.E.2d 557 (1993).

Team IA requested a new trial, or in the alternative, a new trial *nisi additur*, to increase the damages award based on the uncontroverted evidence of lost profits for each project/contract that the jury found was wrongfully taken by the Defendants. *See Plaintiff Trial Ex. 122-128, 140-147 (Lost Profit Summaries)*. Team IA argued the lost profit amounts awarded by the jury have no basis in fact, and that the only competent evidence of the amount of lost profits was the evidence set forth in the Lost Profit Summaries. Team IA is correct that the amounts delineated by the jury for each project were not sums that either party argued to be the correct amount of alleged damages sustained. However, the court is not inclined to grant a new trial based on the jury's determination of damages.

SCAL
24/37

A TRUE COPY

Lex. CO. C.C.P., G.S. & E.G.

C. Civil Conspiracy

Team IA moved for JNOV and a new trial on the claim for civil conspiracy. Team IA argued that civil conspiracy should have been submitted to the jury.

The tort of civil conspiracy has three elements: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, and (3) causing plaintiff special damage. *Vaught v. Waites*, 300 S.C. 201, 208, 387 S.E.2d 91, 95 (Ct. App. 1989). Civil conspiracy involves acts that are by their very nature covert and clandestine and usually not susceptible of proof by direct evidence. *Robertson v. First Union Nat'l Bank*, 350 S.C. 339, 349, 565 S.E.2d 309, 314 (Ct. App. 2002). "A claim for civil conspiracy must allege additional acts in furtherance of a conspiracy rather than reallege other claims within the complaint." *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 293, 278 S.E.2d 607, 611 (Ct. App. 1981), *rev'd on other grounds*, 283 S.C. 155, 321 S.E.2d 602 (1984), *quashed in part on other grounds*, 287 S.C. 190, 336 S.E.2d 472 (1985).

Conspiracy is the act of conspiring or combining together to do an unlawful act to the detriment of another or the doing of a lawful act in an unlawful way to the detriment of another." *Id.* Only "lawful acts may become actionable as a civil conspiracy when the object is to ruin or damage the business of another." *LaMotte v. Punch Line of Columbia, Inc.*, 296 S.C. 66, 370 S.E.2d 711 (1988) (emphasis added).

The Court directed the verdict on civil conspiracy due to Team IA's failure to satisfy the "special damages" element. In *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 116, 682 S.E.2d 871, 875 (S.C. App. 2009), the court held that "if damages sought in the conspiracy cause of action are the same as those sought in the breach of contract cause of action," then the damages are not considered "special damages."

SCH
25/37

A TRUE COPY
FSC
Per. C.C.C.P., G.S. & E.C.

Team IA argued that *Hackworth* and other related opinions addressing “special damages” for the civil conspiracy erroneously confuse the actual definition between “general damages” and “special damages.” Team IA contended that special damages means “pecuniary” or economic material loss, as opposed to general damage such as pain and suffering, emotional distress, and other types of non-economic damages. See *Hampton v. Conso Products, Inc.*, 808 F.Supp. 1227 (D.S.C. 1992); see also *Huff v. Jennings*, 319 S.C. 142, 459 S.E.2d 886 (Ct. App. 1995) (“Special damages...are the pecuniary losses.”); Restatement of the Law, Second, Torts, § 575 (Special damage, or “special harm” is “the loss of something having economic or pecuniary value.”); 22 Am. Jur. 2d Damages § 42 (2003) (“General damages cannot be definitively measured in monetary terms [whereas] [s]pecial damages are usually synonymous with pecuniary loss.”); 16 Am. Jur. 2d Conspiracy §§ 50-53 (2009) (“In the civil conspiracy context, “special damages” means “quantifiable monetary losses such as lost wages, medical expenses, or property damage.”); *James v. Pratt & Whitney*, 126 Fed. Appx. 607 (4th Cir. 2005) (“Special damages are those damages to which an exact dollar amount can be assigned or which can be established with reasonable mathematical certainty.”) (applying South Carolina law). In recognizing the merit of Team IA’s position, this Court believes that our appellate courts are best suited to address the “special damages” element to civil conspiracy. Accordingly, this motion is denied.

D. Failure to Charge Punitive Damages

Team IA requested judgment notwithstanding the verdict and/or a new trial for failure to charge punitive damages.

Punitive damages are recoverable where there is evidence the defendant’s conduct was intentional, reckless, willful, or wanton. See *Cartee v. Lesley*, 290 S.C. 333; 350 S.E.2d 388 (1986). “The issue of punitive damages must be submitted to the jury if more than one

reasonable inference can be drawn from the evidence as to whether the defendant's behavior was reckless, willful, or wanton." *Mishoe v. QHG of Lake City, Inc.*, 366 S.C. 195, 201, 621 S.E.2d 363, 366 (Ct. App. 2005). Team IA claimed that Defendants acted intentionally, willfully, or wantonly in stealing and interfering with Team IA's existing contracts and prospective contractual relations. Team IA argued the first element of both torts of Intentional Interference with Contractual Relations and Intentional Interference with Prospective Contractual Relations is "intentional conduct" which should give rise to a charge of punitive damages. See *Collins Entertainment v. Coats and Coats*, 368 S.C. 410, 629 S.E.2d 635 (2006) ("As its name implies, tortious interference with a contract is a tort, requiring the plaintiff to establish, among other things, intentional procurement of the contract's breach.) Moreover, Team IA argued that South Carolina precedent has recognized that "punitive damages may be justified for aggravated, unjustified interference with the contractual rights of a party." *Todd v. South Carolina Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 278 S.E.2d 607 (1981) (citing 45 Am.Jur.2d Interference § 61, at 334.).

Over the objection of Team IA, this Court determined not to charge the jury with punitive damages. This Court declines to grant JNOV and/or a new trial for punitive damages.

E. Jury Verdict Form and Interrogatories

Team IA requested JNOV and/or a new trial related to the jury verdict and special interrogatories. Team IA argued the jury verdict form was unduly prejudicial as it was lengthy, confusing, conflated issues of damages for a jury, and omitted the cause of action for violation of S.C. Trade Secrets Act. These objections, except for the issue of the inclusion of a trade secrets cause of action in the jury form, were raised to the court at trial and are again denied.

F. Defense of Fraudulent Inducement

Team IA moved for a new trial for failure to direct verdict on Lucas' affirmative defense for fraudulent inducement. Team IA argued that this affirmative defense polluted the trial with improper parole evidence and other incompetent evidence that would have otherwise been inadmissible. Ultimately, the jury rejected this affirmative defense, and this Court denies Team IA's motion for a new trial on this ground.

III. TEAM IA'S MOTION FOR ATTORNEY'S FEES, EXPENSES, AND COSTS AGAINST LUCAS

"The general rule is that attorney's fees are not recoverable unless authorized by contract or statute." *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993). "When there is a contract, the award of attorney's fees is left to the discretion of the trial judge and will not be disturbed unless an abuse of discretion is shown." *Id.* "When attorney's fees are requested and authorized by contract or statute, the court should make specific findings of fact regarding certain factors including: (1) the nature, extent, and difficulty of the legal services rendered; (2) the time and labor devoted to the case; (3) the professional standing of counsel; (4) the contingency of compensation; (5) the fee customarily charged in the locality for similar services; and (6) the beneficial results obtained." *Id.* at 494, 427 S.E.2d at 660-61; *see also Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997). "A lodestar figure is designed to reflect the reasonable time and effort involved in litigating a case, and is calculated by multiplying a reasonable hourly rate by the reasonable time expended." *Layman v. State*, 376 S.C. 434, 457, 658 S.E.2d 320, 332 (S.C. 2008).

In the Employment Agreement between Team IA, Inc. and Cicero Lucas, Lucas is responsible for the attorney's fees, costs, and expenses incurred in Team IA, Inc. enforcing the terms of the Employment Agreement. Based on the jury's verdict determining that Cicero Lucas

breached the Employment Agreement, Team IA Inc. is entitled to reimbursement of attorney's fees, expenses, and costs incurred. Paragraph VII, (G) of the Employment Agreement provides:

Fees, Costs, and Expenses: In the event Employer must enforce any of the rights herein granted to it through an attorney, Employee shall be liable for any and all reasonable attorney's fees, expenses, and court costs incurred in connection with the enforcement of Employer's rights hereunder.

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. I find that the attorney's fees, costs, and expenses incurred by Team IA were reasonable and necessary.

(A) Lucas is Not Entitled to a Jury Trial on Attorney's Fees, Costs, and Expenses.

Lucas is not entitled to a jury trial on the recoverability of attorney's fees and expenses that Team IA incurred. Team IA's claim for attorney's fees was not part of the underlying merits of the action, but only became actionable when the jury found the contract enforceable against Lucas.

South Carolina precedent holds that an award of attorney's fees and costs is a function of the trial judge in post-trial motion. See, e.g., *Taylor v. Medenica*, 332 S.C. 324, 326, 504 S.E.2d 590, 591 (1998); *Austin v. Stokes-Craven Holding Corp.*, 406 S.C. 187, 199, 750 S.E.2d 78, 84 (2013). The six factors that the court must consider contemplate counsel's professional standing, beneficial results obtained, and customary legal fees—all issues that are not appropriate for a lay jury. South Carolina has never held that an award of attorney's fee based on a fee-shifting provision in a contract is a matter for the jury. Instead, the balance of case law from other jurisdictions, as cited in Team IA's brief, demonstrates that this matter is reserved for the judge at the conclusion of the trial. Allowing a jury to determine reasonable attorney's fees is fraught

with practical difficulties regarding the presentation of evidence at trial, including how a plaintiff would obtain attorney's fees after the presentation of evidence, in post-trial matters, or on appeal.

Further, Lucas does not have a constitutional right to a jury trial for the recovery of attorney's fees. Since attorney fees were not allowable at common law, there is no constitutional right to a jury trial on the issue of attorney fees. Article I, Section 25 of the South Carolina Constitution provides, "the right of trial by jury shall be preserved inviolate." However, our courts have interpreted the right to a jury trial "only in cases in which that right existed at the time of the adoption of the constitution." *C.W. Matthews Contracting Co., Inc. v. South Carolina Tax Commission*, 230 S.E.2d 223, 267 S.C. 548 (1976). "Whether a party is entitled to a trial by jury depends on whether the right to a jury was secured at the time of the adoption of our state Constitution. *Carolina First Bank v. Badd, L.L.C.*, Opinion No. 27486 (S.C. Jan. 28, 2015) (citing *Mims Amusement Co. v. S.C. Law Enforcement Div.*, 366 S.C. 141, 150, 621 S.E.2d 344, 348 (2005) ("The right to a trial by jury is guaranteed in every case in which the right to a jury was secured at the time of the adoption of the Constitution in 1868.")). The right to recover attorney's fees was not a common law right existing at the time of the adoption of this state's Constitution in 1868. It is well established that in South Carolina, a "successful litigant ha[s] no right at common law to recover attorney's fees from his opponent." *Collins v. Collins*, 239 S.C. 170, 122 S.E.2d 1 (1961).

Additionally, Lucas never once raised the issue that the recovery of attorney's fees and costs must be submitted to the jury until after the trial. Lucas understood that Team IA would seek attorney's fees and costs if successful, and if he believed that a jury should determine this issue, then Lucas should have timely made this argument to the Court, not after the jury was dismissed. As a result, Lucas' right to a jury trial on attorney's fees is waived, or otherwise

untimely. For these reasons, I find it is proper to consider Team IA's request for attorney's fees, costs, and expenses.

(B) The Defense of "Unclean Hands" Does not Bar Relief.

Lucas argued that Team IA's award of attorney's fees is barred by the equitable defense of unclean hands. To the extent this defense could apply, I find that Team IA did not act with unclean hands. To further support this finding, the jury found that Team IA and Brent Yarborough did not make fraudulent inducements or misrepresentations, or breach the agreement. The jury also found that Defendant Lucas was not owed any unpaid wages.

(C) Team IA Has Presented Evidence to Support the Recovery of Attorney's Fees, Costs, and Expenses.

Team IA has presented evidence to support the recovery of attorney's fees, costs, and expenses. In support, Team IA has presented the Affidavit and Supplemental Affidavit of Robert F. Goings, the Affidavit of Professor John P. Freeman, and all billing records, invoices, and documentation related to the fees and costs sought in this motion. I find that Team IA has provided evidentiary support for each of the factors necessary to determine a reasonable attorney's fee award.

1) Nature, Extent, and Difficulty of the Legal Services Rendered

I find that this litigation involved many complex legal and factual issues. This case involved multiple causes of action arising out of violations of the Employment Agreement. Lucas denied these allegations and Lucas raised various affirmative defenses and six counterclaims regarding the Employment Agreement. This case has been difficult, highly contentious and time consuming for the last six (6) years. Prior to a trial on the merits, this case went to the South Carolina Court of Appeals and the South Carolina Supreme Court. The litigation file of Team IA's lead counsel consisted of roughly 16 bankers boxes of documents

and several gigabytes of electronic data. The discovery process was complicated, involving the production of thousands of documents and electronic discovery and data. The parties participated in eleven (11) depositions, including three out of state. The motions filed by the parties were extensive throughout the litigation. I find that the nature, extent, and difficulty of the legal services rendered supports the attorney's fees and expenses sought by Team IA in this case.

2) Time and Labor Devoted to the Case

I find that Team IA has presented overwhelming evidence of the time and labor spent on enforcing the provisions of the Employment Agreement. "Time spent is but one factor to consider in setting a reasonable attorney's fee." *Taylor v. Medenica*, 331 S.C. 575, 581, 503 S.E.2d 458 (1998). Lucas does not argue that the hourly rates proposed and the time spent on this litigation is excessive. Based on a review of the detailed billing records and time summaries, I find that the time and labor invested by Team IA's counsel over the course of this litigation is fair and reasonable.

Defendant Lucas also argues that attorney's fees should not be awarded because the time was not broken down for claims exclusive to enforcing the Employment Agreement. I find that it would be impractical, if not impossible, for Team IA to present the attorney's fees based on how much time was spent on any particular claim. In this case, Team IA's main causes of action were based on enforcement of the Employment Agreement. The tort related causes of action arose from Lucas' employment and were closely related and intertwined with the enforcement of the contract. Lucas' affirmative defenses and counterclaims for unpaid wages were based on the Employment Agreement. The facts to prove the enforcement of the Employment Agreement are based on the same factual circumstances and elements of proof for the other causes of action.

Similarly, the facts giving rise to liability to George Lawson relate to the same set of facts as Lucas. Further, I cannot find work was performed exclusively for the claims as to George Lawson that were wholly unrelated to Lucas. I find that it would be unreasonable and untenable for Team IA to dissect work spent on each cause of action or to carve out fees related to George Lawson since the substantive claims, the discovery, and trial were significantly intertwined together as one.

The South Carolina Supreme Court in *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 50, 691 S.E.2d 135, 149 (2010) has rejected the exact argument advanced by Lucas. In *Austin*, the Supreme Court found the plaintiff was entitled to fees for the entire amount of the litigation regardless of causes of action that did not provide for attorney's fees. The Supreme Court reasoned:

Under the specific facts of this case, we find it would be difficult to dissect Austin's counsel's fee affidavit to ascertain how much time was spent on this particular claim given the violation of the Act was based on the same facts and circumstances underlying his claims for fraud and constructive fraud.

Additionally, in *Taylor v. Nix*, 307 S.C. 551, 557, 416 S.E.2d 619, 622 (1991), the defendant argued that attorney's fees related to non-attorney fee based causes of action should have been excluded from an attorney's fee award. The Supreme Court in *Taylor* rejected this argument, reasoning:

The breach of warranty and strict liability claims were related and intertwined with the statutory claim. The conduct of the breach of warranty was the same conduct which was deemed to be a violation of the statute. We hold when an action in which attorney fees are recoverable by statute is joined with alternative theories of recovery based on the same transaction, no allocation of attorney's services need be made except to the extent counsel admits that a portion of the services was totally unrelated to the statutory claim or it is shown that the services related to issues which were clearly beyond the scope of the statutory claim proceeding. *Accord*,

Heindel v. Southside Chrysler-Plymouth, Inc., 476 So.2d 266 (Fla. App. 1985). This approach requires the party asserting the right to attorney fees to produce an itemized affidavit of their fees that they believe are related to the statutory claim. The opposing party then has the burden of showing which of the fees are clearly unrelated.

Id. Both *Austin* and *Taylor* stand for the proposition that an attorney's fee award in this case is proper for the entire litigation even though it involved multiple causes of action. This case is similar to *Austin* and *Taylor*, and I find that the fee-shifting provision in the Employment Agreement is broad enough to cover the entire litigation based on the facts of this case. Accordingly, I find that Team IA has provided sufficient evidence for the time and labor incurred in connection with the enforcement of Team IA's rights under the Employment Agreement.

3) Professional Standing of Counsel

Lucas does not contest the professional standing of Team IA's counsel related to the fees sought in this litigation. I find that Team IA's legal counsel has an outstanding professional reputation and standing in the legal community. In addition to the Affidavit of Professor Freeman attesting the professional standing of Team IA's legal counsel, I take judicial notice of their professional standing.

During the course of pre-trial matters and trial, I was impressed with Team IA's legal counsels' preparation and understanding of the complex factual and legal issues involved in this case. During the course of trial, the time spent by Team IA's counsel was demonstrated by their ability to present the evidence in a well-organized and efficient manner. I will note that Defendants were also very well represented by outstanding counsel, and despite the contentious nature of this litigation, counsel for both parties acted with the upmost civility towards one another and the Court.

4) Contingency of Compensation

The contingency of compensation is a factor that is not particularly relevant because the Employment Agreement requires that Team IA be paid reasonable attorney's fees from Lucas. Lucas has presented no evidence that he would be unable to pay an award in the amount sought.

5) Fee Customarily Charged in the Locality for Similar Services

I find that the attorney's fees incurred based on the rate and hours submitted are customary for similar services based on the locality. The evidence to support this factor is based on the Affidavits of Professor Freeman and Mr. Goings, and well as my own knowledge in the legal community. Based on my experience, I find the hourly rates charged and the time necessarily devoted to this case is customary in the locality for similar services are fair and reasonable.

6) Beneficial Results Obtained

Counsel was successful in obtaining beneficial results on behalf of Team IA. "The factor 'beneficial results obtained' merely aids in determining whether an award is appropriate when considering whether the services of a lawyer facilitated a favorable result." *Marquez v. Caudill*, 376 S.C. 229, 656 S.E.2d 737, 746 (2008). "There is no requirement that attorney's fees be less than or comparable to a party's monetary judgment." *Taylor v. Medenica*, 331 S.C. 575, 580, 503 S.E.2d 458, 461 (1998).

Team IA was successful with achieving the legal determination that the Non-Compete and Non-Solicitation provisions of the Employment Agreement were valid and enforceable. The jury found Lucas breached those provisions and awarded damages. Further, Team IA was successful in the jury determining that the Employment Agreement was not induced by fraud and not previously breached by Team IA.

D. Award of Attorney's Fees and Expenses

Based on a review of the above six factors and a lodestar analysis, I find that a reasonable hourly rate for Robert F. Goings, of the Goings Law Firm, LLC, and Christian Boesl, of Collins & Lacy, P.C., is \$400.00 an hour. Robert F. Goings performed 1049.93 hours of legal work, and based on a \$400.00 an hour rate, the attorneys' fees incurred by him total \$419,972.00. Christian Boesl performed 99.20 hours of legal work, and based on a \$400.00 an hour rate, the attorneys' fees incurred by him total \$39,680.00. I find that these amounts were necessary and reasonably incurred in order to enforce Team IA's rights under the Employment Agreement. I decline to reimburse attorney's fees for the work incurred by Ford & Harrison, LLP in this litigation.

I find that Team IA incurred paralegal fees and expenses with Collins & Lacy, P.C. and the Goings Law Firm, LLC in the amount of \$18,241.00. In reviewing the above six factors and a lodestar analysis, I find this amount to be fair and reasonably incurred to enforce Team IA's rights under the Employment Agreement. Further, Team IA incurred litigation expenses and costs as set forth in the Expenses and Costs Detail Summary in the amount of \$48,441.52. I find these expenses and costs to be fair and reasonably incurred to enforce Team IA's rights under the Employment Agreement.

CONCLUSION

Based on the above findings of fact and conclusions of law, I hereby order as follows on the post-trial motions submitted by the parties:

1. Defendants' Motion for Judgment Notwithstanding the Verdict, New Trial and for Election of Remedies is **GRANTED AND DENIED IN PART**. The motion is granted only for JNOV for the damages for the Breach of Contract causes of action awarded by the jury on the

Fulton County Historical Reindexing project and the DeKalb County Historical Reindexing project. Thus, the damages recoverable under the Breach of Contract claims are \$278,137.34.

2. Team IA's Motion to Alter or Amend Judgment, Motion for Judgment Notwithstanding the Verdict, and Motion for New Trial and/or New Trial *Additur* is **DENIED**.

3. Team IA's Motion for Attorney's Fees, Expenses, and Costs Against Lucas is **GRANTED** in the amount of \$526,334.52.

4. Based on the Consent Order entered into by the parties and as incorporated by reference herein, Team IA's election of remedy at this stage for breach of contract against Lucas shall not prohibit or prejudice either party from presenting issues regarding the tort-related causes of action on appeal or this Court entering judgment against the Defendants on the tort-related causes of action on remand, should an appeal be taken by either party.

THEREFORE, judgment in favor of Team IA against Lucas shall be entered in the amount of \$804,471.86.

IT IS SO ORDERED.


Eugene Z. Griffith, Jr.
S.C. Circuit Court Judge

November 27th, 2015

Newberry, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Team IA, Inc.,

Plaintiff,

vs.

Cicero Lucas, George Lawson, IV and 5 Point
Solutions, LLC,

Defendants.

Cicero Lucas and George Lawson, IV,

Third-Party Plaintiffs,

vs.

Brent Yarborough and Team IA, Inc.,

Third Party Defendants.

IN THE COURT OF COMMON PLEAS

ELEVENTH JUDICIAL CIRCUIT

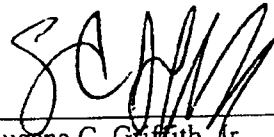
CIVIL ACTION No: 2009-CP-32-1078

2015 NOV 24 PM 8:21
BETH J. L. JUDGE
CLERK OF COURT

**CONSENT ORDER ON DEFENDANTS'
MOTION FOR ELECTION OF REMEDIES**

The parties hereby enter the following Consent Order on Defendants' Motion for Election of Remedies. At the stage, Plaintiff agrees to elect its remedy in contract to allow judgment to be entered. The parties agree that this election is without prejudice, as this court and the parties recognize that many of the legal issues raised in the respective post-trial motions concern issues related to both the tort and contract causes of action. The parties agree this election not prevent or prejudice either party from raising these issues on appeal that may relate to tort causes of action, and should an appeal be taken and this matter be remanded, Plaintiff is not prohibited for electing its remedy in tort. Further, the parties agree this election should not be construed to prejudice either party on appeal.

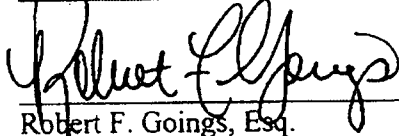
IT IS SO ORDERED.



Eugene C. Griffith, Jr.
S.C. Circuit Court Judge

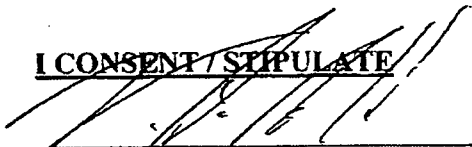
November 20, 2015
Newberry, South Carolina

I CONSENT / STIPULATE



Robert F. Goings, Esq.
Counsel for Plaintiff

I CONSENT / STIPULATE



W. Andrew Arnold, Esq.
Counsel for Defendant

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Team IA, Inc.,

Plaintiff,

vs.

Cicero Lucas, George Lawson, IV and
5 Point Solutions, LLC,

Defendants.

IN THE COURT OF COMMON PLEAS

ELEVENTH JUDICIAL CIRCUIT

Special Interrogatories for Jury / Jury Verdict

Cicero Lucas and George Lawson, IV,

Third-Party Plaintiffs,

vs.

Brent Yarborough and Team IA,

Third Party Defendants.

FILED
2015 MAR 30 A 8 15
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

PLAINTIFF'S CLAIMS AGAINST DEFENDANTS

A. Breach of Duty of Loyalty

1. Did Ro Lucas engage in disloyal/competitive conduct while he was employed by Team IA?

Yes ☒

No ☐

2. What are the damages suffered by Team IA because of Ro Lucas' breach of his duty of loyalty?

[Signature]

B. Tortious Interference with Contractual Relations: Ro Lucas

1. Did Ro Lucas intentionally cause Fulton County to breach a contract with Team IA?

Yes ✓ No

2. Did Ro Lucas with improper purpose or improper motive interfere with a prospective contract with Fulton County?

Yes ✓ No

3. Did the Defendant Ro Lucas intentionally cause Fayette County to breach a contract with Team IA?

Yes ✓ No

4. Did Ro Lucas with improper purpose or improper motive interfere with a prospective contract with Fayette County?

Yes ✓ No

5. Did Defendant Ro Lucas intentionally cause DeKalb County to breach a contract with Team IA?

Yes ✓ No

6. Did Ro Lucas with improper purpose or improper motive interfere with a prospective contract with DeKalb County?

Yes ✓ No

7. Did Ro Lucas with improper purpose or improper motive interfere with a prospective contract with Richmond County?

Yes ✓ No

8. Did Ro Lucas with improper purpose or improper motive interfere with a prospective contract with Palmetto Health?

Yes No ✓

9. What were the damages to Team IA for tortious interference with contract relations with caused by Ro Lucas?

\$ 282,341.30

C. Tortious Interference with Contractual Relations: George Lawson

1. Did the Defendant George Lawson intentionally cause Fulton County to breach a contract with Team IA?
Yes ✓ No
2. Did George Lawson with improper purpose or improper motive interfere with a prospective contract with Fulton County?
Yes ✓ No
3. Did the Defendant George Lawson intentionally cause Fayette County to breach a contract with Team IA?
Yes ✓ No
4. Did George Lawson with improper purpose or improper motive interfere with a prospective contract with Fayette County?
Yes ✓ No
5. Did the Defendant George Lawson intentionally cause DeKalb County to breach a contract with Team IA?
Yes ✓ No
6. Did George Lawson with improper purpose or improper motive interfere with a prospective contract with DeKalb County?
Yes ✓ No
7. Did George Lawson with improper purpose or improper motive interfere with a prospective contract with Richmond County?
Yes No

A TRUE COPY

Lex. Ct. C.C.P., G.S. & F.C.

8. Did George Lawson with improper purpose or improper motive interfere with a prospective contract with Palmetto Health?

Yes ☒ No ☐

9. What were the damages suffered by Team IA for tortious interference with contractual relations caused by George Lawson?

\$ 282,341.30

D. Breach of Contract

Did Team IA induce Ro Lucas to enter into his Employment Agreement by making fraudulent representations to Ro Lucas about the terms and conditions of his employment OR fail to perform its obligations under the Employment Agreement or any other oral or written agreement between the parties relating to his employment?

Yes ☐ No ☒

If No, answer question regarding Non-solicitation and Non-compete provisions (Sections D1 thru D2). If Yes, then proceed to Section E

1. Non-solicitation Provision

(a) Were Fulton County, Fayette County, Dekalb County, and Richmond County "CUSTOMERS" as defined by the non-solicitation provision of the contract?

Yes ☒ No ☐

(b) Was Palmetto Health a "CUSTOMER" as defined by the non-solicitation provision of the contract?

Yes ☒ No ☐

If no, skip the remaining subparts and questions 2, 3, and 4 below.
If yes, answer the subparts (c) thru (k).

(c) Did Ro Lucas violate the terms of the non-solicitation provision as it relates to Fulton County's Microfilm Conversion project performed?

Yes ☒ No ☐

What were the lost profits caused by Ro Lucas' breach of the contract as it relates to this project?

\$ 220,846.17

- (d) Did Ro Lucas violate the terms of the non-solicitation provision as it relates to Fulton County's Historical Reindexing project?

Yes ☒

No ☐

If yes, answer subpart

What were the lost profits caused by Ro Lucas' breach of the contract as it relates to Fulton County Historical Reindexing project?

\$ 136,904.92

- (e) Did Ro Lucas violate the terms of the non-solicitation provision as it relates to Fayette County's civil case conversion project?

Yes ☒

No ☐

If yes, answer subpart

What were the lost profits caused by Ro Lucas' breach of the contract as it relates to Fayette County civil case conversion project?

\$ 9,842.82

- (f) Did Ro Lucas violate the terms of the non-solicitation provision as it relates to DeKalb County's Maintenance contract?

Yes ☒

No ☐

If yes, answer subpart

What were the lost profits caused by Ro Lucas' breach of the contract as it relates to DeKalb County Maintenance contract?

\$ 19,334.70

- (g) Did Ro Lucas violate the terms of the non-solicitation provision as it relates to DeKalb County's Historical Re-indexing project?

Yes ☒

No ☐

5
If yes, answer subpart

What were the lost profits caused by Ro Lucas' breach of the contract as it relates to DeKalb County Historical Re-indexing project?

\$ 48,686.62

- (h) Did Ro Lucas violate the terms of the non-solicitation provision as it relates to DeKalb County's Microfilm Conversion project?

Yes ☒

No ☐

If yes, answer subpart.

What were the lost profits caused by Ro Lucas' breach of the contract as it relates to DeKalb County Microfilm Conversion project?

\$ 4728.65

- (i) Did Ro Lucas violate the terms of the non-solicitation provision as it relates to DeKalb County's Image Submission project?

Yes ☒

No ☐

If yes, answer subpart

What were the lost profits caused by Ro Lucas' breach of the contract as it relates to DeKalb County Image Submission project?

\$ 20,108.46

- (j) Did Ro Lucas violate the terms of the non-solicitation provision as it relates to Richmond County Microfilm Conversion project?

Yes ☒

No ☐

If yes, answer subpart.

What were the lost profits caused by Ro Lucas' breach of the contract as it relates to the Richmond County Microfilm Conversion project?

\$ 3,209.51

- (k) Did Ro Lucas violate the terms of the non-solicitation provision as it relates to the Palmetto Health scanning and indexing of medical records project?

Yes ☒

No ☐

If yes, answer subpart.

What were the lost profits caused by Ro Lucas' breach of the contract as it relates to the Palmetto Health scanning and indexing of medical records project?

0

2. Non-Compete Provision

- (a) Did Ro Lucas violate the terms of the non-compete as it relates to the Fulton County Microfilm Conversion Project?

Yes ☒

No ☐

If yes, answer subpart.

What were the lost profits caused by Ro Lucas' breach of the non-compete as it relates to the Fulton County Microfilm Conversion project?

\$ 220,846.17

- (b) Did Ro Lucas breach the terms of the non-compete as it relates to the Fulton County Historical Re-indexing Project?

Yes ☒

No ☐

If yes, answer subpart.

What were the lost profits caused by Ro Lucas' breach of the non-compete as it relates to Fulton County Historical Re-indexing project?

\$ 136,904.92

- (c) Did Ro Lucas violate the terms of the non-compete as it relates to the Fayette County Civil Case Conversion Project?

Yes ☒

No ☐

If yes, answer subpart

What were the lost profits caused by Ro Lucas' breach of the non-compete as it relates to the Fayette County Microfilm Conversion project?

\$ 849.82

- (d) Did Ro Lucas breach the terms of the non-compete as it relates to Palmetto Health's scanning and indexing project?

Yes ☒

No ☐

If yes, answer subpart

What were the lost profits caused by Ro Lucas' breach of the non-compete as it relates to Palmetto Health?

0

- (e) Did Ro Lucas breach the non-compete as it relates to DeKalb County's Maintenance contract?

Yes ☒

No ☐

If yes, answer subpart

What were the lost profits caused by Ro Lucas' breach of the non-compete as it relates to DeKalb County Maintenance contract?

\$ 12,334.70

- (f) Did Ro Lucas breach the non-compete provision as it relates to DeKalb County's Historical Re-indexing project?

Yes ☒

No ☐

If yes, answer subpart.

What were the lost profits caused by Ro Lucas' breach of the contract as it relates to DeKalb County Historical Re-indexing project?

\$ 48,686.62

- (g) Did Ro Lucas breach the non-compete provision as it relates to DeKalb County's Microfilm Conversion project?

Yes ☒

No ☐

If yes, answer subpart.

What were the lost profits caused by Ro Lucas' breach of the contract as it relates to DeKalb County Microfilm Conversion project?

\$ 4,728.68

- (h) Did Ro Lucas breach the non-compete provision as it relates to DeKalb County's Image Submission project?

Yes ☒

No ☐

If yes, answer subpart.

What were the lost profits caused by Ro Lucas' breach of the contract as it relates to DeKalb County Image Submission project?

\$ 20,108.46

- (i) Did Ro Lucas breach the non-compete provision as it relates to Richmond County's Microfilm Conversion project?

Yes ☒

No ☐

If yes, answer subpart.

What were the lost profits caused by Ro Lucas' breach of the contract as it relates to Richmond County Microfilm Conversion project?

\$ 3,269.51

E. **RO LUCAS' CLAIM AGAINST TEAM IA and BRENT YARBOROUGH**

- 1 Did Brent Yarborough and Team IA fail to pay all the bonus income earned by Ro Lucas based on an enforceable contract while he was employed by Team IA?

Yes _____

No ☒ _____

If no, then you are finished.

2. What is the total amount of unpaid bonuses owed to Ro Lucas?

_____ ϕ _____

Now you are finished.

Dated 3/27/15

Christy
Signature of Jury Foreperson

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON)

SCANNED

2009 MAR 17 3:44

TEAM IA, INC.,

Plaintiff,

v.

Case No. _____

CICERO LUCAS,
GEORGE LAWSON, IV,
AND 5 POINT SOLUTIONS, LLC,

Defendants.

2009CP3201078

COMPLAINT FOR INJUNCTIVE RELIEF AND DAMAGES

Plaintiff, Team IA, Inc. ("Team IA"), by and through its undersigned counsel, files this Complaint for Injunctive Relief and Damages against Defendants, Cicero Lucas, George Lawson, IV, and 5 Point Solutions, LLC, and would show as follows:

I. PARTIES AND JURISDICTION

1. Team IA is a South Carolina corporation with its principal place of business in Lexington County, South Carolina.

2. Defendant Cicero Lucas ("Lucas") is a citizen and resident of Lexington County, South Carolina. Lucas resigned from Team IA on February 3, 2009, and started a business competitive with Team IA's business. On information and belief, Lucas is a current employee and part-owner of 5 Point Solutions.

3. Defendant George Lawson, IV., ("Lawson") is a citizen and resident of Lexington County, South Carolina. Lawson resigned from Team IA on February 3, 2009, to assist a business competitive with Team IA's business. On information and belief, Lawson is a current employee and part-owner of 5 Point Solutions.

4. Defendant 5 Point Solutions, LLC, ("5 Point") is a South Carolina Limited Liability Company conducting business in Lexington, South Carolina. On information and belief, 5 Point Solutions is partially-owned and operated by Lucas and Lawson. Lucas is listed on the South Carolina Secretary of State's records as 5 Point's registered agent.

5. Pursuant to S.C. Code Ann. § 15-7-30, venue for this case properly lies in Lexington County.

6. This Court has jurisdiction over Defendants because Defendants are located in, conduct business in, and engaged in tortious conduct in Lexington County, South Carolina.

II. INTRODUCTION

7. Team IA brings this action to protect its business interests from the improper competitive actions of Defendants. Team IA refused to allow itself to be "hijacked" by Lucas over compensation Lucas claimed Team IA should pay him. In accordance with his Employment Agreement with Team IA, Lucas was paid a salary and discretionary bonus. As long as this arrangement worked to Lucas' benefit, he was fine.

8. In November 2008, Lucas sold a large project on behalf of Team IA and thereafter decided that he should be entitled to his salary being doubled and more. Lucas

requested that his salary be doubled, despite Team IA neither having completed the necessary services nor receiving payment from the customer.

9. When Team IA refused to give in to Lucas' demands, Lucas resigned, and in direct violation of his Employment Agreement and State law, along with Lawson and 5 Point, has sought to take Team IA's business opportunities without justification.

III. FACTUAL BACKGROUND

10. Team IA conducts business in the software and related services industry. Team IA markets its business on a nationwide basis through electronic and print media, including the internet, attending tradeshow, submitting bids, direct sales, and other means.

A. Lucas' Employment Agreement With Team IA

11. On or about April 2, 2001, Team IA hired Lucas with his primary responsibility to be sales representative and to provide limited assistance in accounting, while training to be a sales representative..

12. Prior to his hiring, Lucas knew that his employment with Team IA would be contingent upon his entering into an employment agreement which contained restrictive covenants. Lucas' offer letter from Team IA dated February 28, 2001, stated:

Requirements-In addition to those already mentioned, an employment agreement with non-competition, non-disclosure, ownership of work, and other clauses as identified attached must be executed. In other words, acceptance of this offer is contingent on agreement of an employment agreement being executed.

(See Exhibit A).

13. On March 2, 2001, Lucas signed the offer letter thereby accepting Team IA's offer of employment.

14. Lucas reviewed the Employment Agreement offered by Team IA well in advance of his employment with Team IA. Lucas negotiated the terms of the Employment Agreement.

15. On March 2, 2001, Lucas executed the Employment Agreement (See Exhibit B), thereby agreeing to be bound by the terms and conditions contained therein. In Paragraph VII.H. of the Employment Agreement and the unnumbered paragraph appearing immediately thereafter, Lucas acknowledged that he had full opportunity to obtain independent legal advice and stated that "he is fully aware of and in agreement with the terms set forth and does contract to be bound by the Agreement."

16. Paragraph III. of the Employment Agreement restricts Lucas' use of Team IA's confidential and proprietary information, and trade secrets. (See Exhibit B).

17. Paragraph V.A. of the Employment Agreement restricts Lucas' competitive activities with respect to Team IA's customers, prospects, and employees for twelve (12) months following his separation from employment with Team IA. (See Exhibit B).

18. Paragraph V.B. of the Employment Agreement contains a non-competition provision which restricts Lucas' competitive activities for twelve (12) months following his separation from employment with Team IA. (See Exhibit B).

19. Paragraph VII.B. of the Employment Agreement entitles Team IA to injunctive relief in the event Lucas breaches the Employment Agreement. (See Exhibit B).

B. Lucas' Employment Activities And Access to Team IA Resources

20. On or about April 2, 2001, Lucas began his employment with Team IA. Prior to joining Team IA, Lucas did not have experience or knowledge of the software and related services industry and did not have any sales experience.

21. Team IA provided Lucas with extensive equipment and resources, including but not limited to, a cell phone, a truck, a laptop, a blackberry, and product/systems training and certifications (including Dale Carnegie, CDIA Certification, Accountancy Renewal Fees, and others).

22. Because of the important function he was to serve, Team IA provided Lucas with access to, among other things, financial data, customer lists, prospect lists, training materials, and Lucas was introduced to most of Team IA's customers and to many prospects..

23. Team IA provided Lucas with this critical information because it knew that, in order to be productive for the Company, Lucas needed such information, and Team IA knew that it had protection in the Employment Agreement to prevent Lucas from improperly using its information.

24. One of Lucas' duties was to develop sales opportunities for Team IA. Team IA sales data shows that Lucas solicited business in a number of states across the United States and also had a prospect in Canada. Team IA did not attempt to limit Lucas' ability to sell its products and services in any geographic location.

25. As Lucas' employment continued, Team IA provided Lucas greater opportunities to assist the Company with its goals, while also allowing Lucas to benefit personally. Lucas' expanded opportunities included, but were not limited to, sales leads, sales assistance, and coaching. As a result of these opportunities, Lucas enjoyed significant growth in his compensation.

26. Throughout his employment, Lucas was compensated on a salaried basis plus a discretionary bonus. Lucas was not on any commissioned-based pay. Despite not selling any products or services for three years, Lucas continued to receive a salary and a discretionary bonus consistent with the Employment Agreement. This pay arrangement yielded Lucas in excess of \$1,100,000 during his tenure with Team IA.

C. Team IA's Business Plan and Investment

27. Since approximately 1998, Team IA has pursued business opportunities in Georgia; especially with the various Clerk of Superior Court Offices in Georgia. Team IA has invested significant time and resources, prior to Lucas' employment with Team IA and thereafter, to develop this business.

28. After hiring and training Lucas, consistent with Team IA's business plan to further expand its business, Team IA assigned the task of further developing the Georgia market. Lucas was charged with, among other duties, the responsibility of developing business with the Clerk of Superior Court Offices in the various Counties in the State of Georgia.

29. In an effort to enhance its business, Team IA invested considerable resources in Georgia in an effort to attract business from Counties located in Georgia. Team IA committed

extensive time, manpower, and money to this process. Some of the investment included, but was not limited to, attending tradeshow (including PRISM, PRODA, NFBPA, IACREOT, PRIA, SCITDA, and AIIM), sponsoring events, making sales calls, and other sales and marketing efforts.

30. Through his position with Team IA and with the resources provided by Team IA, Lucas developed numerous contacts, prospects, and customers for Team IA.

31. During his employment with Team IA, Lucas, along with other Team IA employees, participated in the sale of products and/or services to Superior Clerk of Court Offices in Georgia Counties.

32. During his employment with Team IA, Lucas, along with other Team IA employees, participated in attracting prospective Team IA customers in a number of Superior Clerk of Court Offices in Georgia Counties.

33. During his employment with Team IA, Lucas, along with other Team IA employees, participated in submitting bids for work for a number of Superior Clerk of Court Offices in Georgia Counties.

D. Lucas' Improper Actions Prior to His Resignation

34. On information and belief, while still employed with Team IA and during normal working hours, Lucas had numerous telephone conversations with a third party believed to be a principal investor in 5 Point, about forming a business competitive with Team IA.

35. On information and belief, during Lucas' employment with Team IA, Lucas discussed his plans to start a competitive business with Team IA customers and/or prospects.

36. On information and belief, during Lucas' employment with Team IA, Lucas solicited a Team IA employee to start a competitive business.

37. On January 29, 2009, Lucas met with Brent Yarborough, Team IA's President, and Lorri Yarborough, Team IA's minority owner and account executive, to discuss his compensation. Lucas requested that his salary be doubled and explained that he did not understand why doubling his salary was such a big deal because he had sold a big microfilm project to a Clerk of Superior Court Office in Georgia.

38. Lucas asked Lorri Yarborough why Team IA could not go ahead and pay him for the microfilm project which had been sold, but Team IA had yet to perform the services necessary to receive payment and had not received payment.

39. On or about January 31, 2009, Lorri Yarborough had a meeting with Lucas. During this meeting, Lucas voiced his displeasure with his compensation from Team IA, and he said Team IA may not be big enough to pay him what he needed to make.

40. Lucas complained to Lorri Yarborough that his pay was about \$50,000.00 less in 2008 than it should have been. Lucas' 2008 compensation totaled \$151,237.06.

41. Just prior to Lucas' resignation from Team IA, Brent Yarborough suspected Lucas would attempt to establish a competitive business, so he asked Lucas what his plans were. Lucas refused to tell Brent Yarborough what his plans were.

42. Prior to his departure from Team IA, Lucas intentionally deleted information from his Company Outlook account containing contact information for key Team IA customers, prospects, and vendors and also deleted emails from key Team IA customers and/or prospects.

43. Lucas resigned from employment with Team IA on February 3, 2009.

44. Prior to and after Lucas' resignation, Brent Yarborough reminded Lucas that he was subject to the Employment Agreement, and that Team IA expected Lucas to observe his obligations under the Employment Agreement.

45. Subsequent to his departure from Team IA, Lucas, in violation of the Employment Agreement, solicited business from Team IA customers and/or prospects.

46. On information and belief, Lucas made defamatory statements to existing Team IA customers and/or prospects which caused the customers and/or prospects to be concerned about conducting business with Team IA and, in some instances, caused the customers and/or prospects to cease their relationships or planned relationships with Team IA.

47. On information and belief, during Lucas' employment with Team IA, he made false statements to Team IA officials regarding his activities in taking steps to start a competitive business.

48. Subsequent to his departure from Team IA, Lucas refused to return Team IA's plasma television despite Team IA's demand for the return of the property. Upon information and belief, Team IA's plasma television is still in Lucas' possession.

49. 5 Point became a South Carolina LLC on February 9, 2009; just six days after Lucas' resignation.

50. Upon information and belief, 5 Point has obtained business and/or is in the process of obtaining business from Team IA customers and/or prospective customers that 5 Point would not have otherwise obtained business from had Lucas not violated the Employment Agreement and engaged in the misconduct described above.

E. Lawson's Employment History With Team IA

51. On or about July 25, 1995, Team IA hired Lawson as a software engineer.

52. During the course of his employment with Team IA, Lawson performed software development, installation, support, pre-sale support, analysis, and project management.

53. During the course of his employment, Team IA provided Lawson with access to confidential and proprietary information to assist Lawson in the performance of his duties and to advance Team IA's business.

54. During the course of his employment with Team IA, Team IA provided Lawson with access to its customers and prospects.

55. During the course of his employment with Team IA, Lawson met with and provided services to Counties in Georgia which are Team IA customers and/or prospects.

56. During the course of his employment with Team IA, Lawson met with and offered services to Team IA prospects on behalf of Team IA.

57. On information and belief, Lucas discussed forming a competitive business with Lawson prior to their resignations from Team IA.

58. Prior to his departure when asked by a Team IA employee about his future plans, Lawson indicated that he was starting a business which might be healthcare-related, but he would not be competing with Team IA. In response, Brent Yarborough offered to assist Lawson, and Lawson stated maybe when we get further down the road I will show you what we are doing.

59. On February 3, 2009, Lawson gave notice of his resignation from employment with Team IA. Lawson indicated that he would work through February 13, 2009, but did not do so.

60. On information and belief, Lawson is assisting Lucas and 5 Point with activities competitive with Team IA's business.

F. Team IA's Relationship With Customer No. 1 (A County Clerk Of Superior Court Office in the State of Georgia)

61. During 2007, Team IA was authorized to do historical re-indexing services for Georgia Superior Court Clerks' Cooperative Authority ("GSCCCA") and performed historical re-indexing services for numerous Georgia Clerk of Superior Court Offices.

62. On or about April 14, 2008, Team IA was again designated as an authorized vendor for the GSCCCA and as such could provide historical re-indexing services to any Georgia County Superior Court Clerk that designated Team IA as its vendor for specified services.

63. In 2008, Team IA initially began working with Customer No. 1 on a historical re-indexing project.

64. In or about November 2008, Team IA sold a microfilm services project to Customer No. 1. Lucas was the sales representative on the microfilm services project, and Lawson was the technical sales assistant on the project.

65. David Williams, the GSCCCA's Executive Director, and a Customer No. 1 official contacted Team IA and acknowledged that Team IA had been designated as Customer No. 1's microfilm vendor.

G. Team IA's Relationship With Customer No. 2 (A County Clerk of Superior Court Office in the State of Georgia)

66. During 2007 and 2008, Team IA performed re-indexing services for Customer No. 2.

67. Team IA also sold and installed an IA Folder Scan system for Customer No. 2. Lucas was the sales representative on Customer No. 2, and Lawson provided technical support.

68. Customer No. 2's Clerk of Superior Court verbally committed to purchase Team IA's CDIMS system with eFiling. She also verbally committed to an outsourcing scanning project for civil and criminal case files. Team IA and Customer No. 2's Clerk of Superior Court were negotiating the final language of the Statement of Work that would govern the services.

69. On information and belief, prior to his departure from Team IA, Lucas intentionally delayed a project for Customer No. 2.

70. Team IA had discussed working on a potential Jury Pool system for Customer No. 2's Clerk of Superior Court.

71. Subsequent to Lucas' departure from Team IA, Lucas continued to engage in improper interference with Team IA's relationship with Customer No. 2.

72. As a direct result of Lucas' improper interference with Team IA's relationship with Customer No. 2, Team IA has been unable to secure the business which Customer No. 2's Clerk of Superior Court had previously agreed to conduct with Team IA.

H. Team IA's Relationship With Prospect No. 1 (A County Clerk of Superior Court Office in the State of Georgia)

73. Team IA directed sales activities toward the Clerk of Superior Court's Office at Prospect No. 1. Lucas was the sales representative on the Prospect No. 1 account. Lucas was attempting to get a re-indexing services contract for Team IA.

74. On February 10, 2009, Prospect No. 1's Clerk of Superior Court indicated that she had spoken with Lucas that morning and, as a result, she expressed concern about Team IA and questioned why she should even do business with Team IA.

IV. FIRST CAUSE OF ACTION
(Breach of Contract against Lucas)

75. Team IA re-alleges and incorporates all of its allegations contained above as if fully set forth herein.

76. On March 2, 2001, Lucas entered into a binding contractual relationship with Team IA by signing the Employment Agreement.

77. The terms of the Employment Agreement are necessary for the protection of the legitimate interests of Team IA in protecting its confidential, proprietary, and trade secret information, and its relationships and good will with its employees, customers, and prospective customers.

78. The terms of the Employment Agreement are reasonably limited in their operation with respect to time and territory.

79. The terms are not unduly harsh and oppressive in curtailing the legitimate efforts of Lucas to earn a livelihood.

80. The terms are reasonable from the standpoint of sound public policy.

81. Lucas received valuable consideration for signing the Employment Agreement in the form of initial employment and the compensation outlined in the Employment Agreement.

82. Lucas, through his conduct outlined above, has breached and is continuing to breach his contractual obligations to Team IA contained in his Employment Agreement.

83. Lucas has breached the terms outlined in Paragraph III. C. of his Employment Agreement.

84. Lucas has breached the terms outlined in Paragraph IV. of his Employment Agreement.

85. Lucas has breached the terms outlined in Paragraph V.A.1. of his Employment Agreement.

86. Lucas has breached the terms outlined in Paragraph V.A.2. of his Employment Agreement.

87. Lucas has breached the terms outlined in Paragraph V.A.3. of his Employment Agreement.

88. Lucas has breached the terms outlined in Paragraph V.A.4. of his Employment Agreement.

89. Lucas has breached the terms outlined in Paragraph V.B.1. of his Employment Agreement.

90. Lucas has breached the terms outlined in Paragraph V.B.2. of his Employment Agreement.

91. Lucas has breached the terms outlined in Paragraph V.B.3. of his Employment Agreement.

92. Lucas has breached the terms outlined in Paragraph VI.B. of his Employment Agreement.

93. Lucas has breached the terms outlined in Paragraph VI.C. of his Employment Agreement.

94. Lucas' actions have caused and will continue to cause damage to Team IA.

95. In Paragraph VII.B of the Employment Agreement, the parties expressly agreed that any material breach of the Agreement shall entitle Team IA to immediate injunctive relief in addition to all other equitable remedies available under prevailing law.

96. As a direct and proximate result of Lucas' actions and breaches of his contractual obligations to Team IA outlined in the Employment Agreement, Team IA has been injured irreparably and otherwise in its relationships with customers, prospective customers, and/or employees, and with respect to the disclosure of its confidential, proprietary and trade secret information to a direct competitor which cannot be adequately or wholly remedied by monetary damages. There is, therefore, no adequate remedy at law.

97. Team IA hereby seeks to have Lucas enjoined from all actions in violation of his Employment Agreement.

98. Team IA further seeks to have 5 Point enjoined from employing Lucas in a position in violation of his Employment Agreement and from using Team IA's confidential, proprietary and trade secret information.

99. Team IA also further seeks and is entitled to all appropriate monetary damages and equitable remedies, including lost profits and future lost profits.

100. As a result of Lucas' breach of contract, Team IA has been damaged, and will continue to be damaged, and seeks actual, compensatory, consequential, and incidental damages in an amount to be determined by the jury.

101. Team IA is entitled to recover its attorney's fees, costs, and expenses pursuant to Paragraph VII.G. of the Employment Agreement.

V. SECOND CAUSE OF ACTION
(Breach of Duty of Loyalty against Lucas)

102. Team IA re-alleges and incorporates all of its allegations contained above as if fully set forth herein.

103. The conduct of Lucas during his employment with Team IA was for the benefit of himself and a competitive business and to the detriment of Team IA. These actions constitute a breach of Lucas' duty of loyalty to Team IA.

104. As a result of Lucas' breach of his duty of loyalty, Team IA has been damaged, and will continue to be damaged, and seeks actual, compensatory, consequential, and incidental damages in an amount to be determined by the jury.

105. Team IA is also entitled to recover all wages paid to Lucas during the period of his disloyal conduct.

VI. THIRD CAUSE OF ACTION
(Tortious Interference with Contractual Relations against All Defendants)

106. Team IA re-alleges and incorporates all of its allegations contained above as if fully set forth herein.

107. Defendants have tortiously interfered with Team IA's contractual relationships with its customers.

108. Team IA had and has contractual relationships with its customers.

109. Defendants were aware of the contractual relationships between Team IA and its customers.

110. Defendants intentionally procured the breach of these contractual relationships without justification.

111. Defendants' conduct has resulted in and will continue to result in damages to Team IA.

112. Team IA seeks actual, compensatory, consequential, and punitive damages in an amount to be determined by the jury.

113. Team IA has been injured irreparably and otherwise in its relationships with customers. There is, therefore, no adequate remedy at law.

114. Team IA hereby seeks to have Defendants enjoined from any further interference with its contractual relations.

VII. FOURTH CAUSE OF ACTION
(Tortious Interference with Prospective Contractual Relations against All Defendants)

115. Team IA re-alleges and incorporates all of its allegations contained above as if fully set forth herein.

116. Defendants have tortiously interfered with Team IA's prospective contractual relationships with customers and potential customers.

117. Defendants were aware of Team IA's prospective contractual relationships with customers and potential customers.

118. Defendants intentionally interfered with Team IA's prospective contractual relations with its customers and prospective customers.

119. Defendants' actions were for an improper purpose.

120. Defendants' actions were by improper methods.

121. Defendants' conduct has resulted in and will continue to result in injury and damages to Team IA.

122. Team IA seeks actual, compensatory, consequential, and punitive damages in an amount to be determined by the jury.

123. Team IA has been injured irreparably and otherwise in its relationships with customers and prospective customers. There is, therefore, no adequate remedy at law.

124. Team IA hereby seeks to have Defendants enjoined from any further interference with prospective contractual relations.

VIII. FIFTH CAUSE OF ACTION
(Tortious Interference with Contractual Relations against Lucas)

125. Team IA re-alleges and incorporates all of its allegations contained above as if fully set forth herein.

126. Lucas has tortiously interfered with Team IA's relationship with its employee Lawson while Lawson was employed by Team IA.

127. Lucas was aware of Team IA's employment relationship with Lawson and intentionally procured and encouraged Lawson to terminate his employment relationship with Team IA.

128. Lucas' conduct has resulted in and will continue to result in damages to Team IA.

129. Team IA seeks actual, compensatory, consequential, and punitive damages in an amount to be determined by the jury.

IX. SIXTH CAUSE OF ACTION
(Violation of South Carolina Trade Secrets Act against All Defendants)

130. Team IA re-alleges and incorporates all of its allegations contained above as if fully set forth herein.

131. Team IA's customer and contact information and its confidential and proprietary information as described above constitutes trade secrets under the South Carolina Trade Secrets Act, S.C. Code Ann. §§ 39-8-10, *et seq.* ("SCTSA").

132. Defendants' actions in wrongfully misappropriating and using Team IA's trade secrets violated and continue to violate the SCTSA.

133. Defendants' actions in wrongfully misappropriating and using Team IA's trade secrets have caused damage to Team IA's business relationships and unjustly enriched Defendants.

134. Defendants' actions in wrongfully misappropriating and using Team IA's trade secrets entitles Team IA to recover actual damages sustained pursuant to S.C. Code Ann. § 39-8-40(A) and damages for unjust enrichment pursuant to S.C. Code Ann. § 39-8-40(B).

135. Defendants' actions in wrongfully misappropriating and using Team IA's trade secrets were and continue to be willful, entitling Team IA to recover exemplary damages pursuant to S.C. Code Ann. § 39-8-40(C) and reasonable attorney's fees pursuant to S.C. Code Ann. § 39-8-80.

136. The SCTSA provides that “actual or threatened” misappropriation may be enjoined. S.C. Code Ann. § 39-8-50. Team IA seeks and is entitled to an injunction against Defendants related to their actual and threatened misappropriation of Team IA’s confidential and trade secret information.

137. The conduct at issue constitutes a violation of SCTSA and will continue unless enjoined by this Court, as Team IA is without adequate remedy at law and is threatened with irreparable loss, injury, and damage unless the Court grants the equitable relief requested.

X. SEVENTH CAUSE OF ACTION
(Civil Conspiracy against All Defendants)

138. Team IA re-alleges and incorporates all of its allegations contained above as if fully set forth herein.

139. Defendants conspired to act for the purpose of damaging Team IA’s business.

140. The overt acts done pursuant to the conspiratorial combination of the Defendants have damaged Team IA by, but not limited to, the loss of confidential trade secret information, the improper use of confidential trade secret information, the loss of customers, the loss of potential customers, and the loss of employees.

141. As a result of Defendants’ conduct, Team IA has suffered actual, compensatory, consequential, incidental and special damages.

142. Team IA’s special damages include, but are not limited to, the loss of specific customers and promised business; the loss and misuse of specific information which has allowed 5 Point to compete with Team IA for specific business; the specific damages to Team IA’s

business; lost investment in employees; lost investment of marketing and sales costs; and damages to Team IA's ability to operate caused by Defendants' combined efforts to harm Team IA's business.

143. Defendants' conduct has been without privilege and done with such willful, malicious, and conscience indifference so as to justify an award of punitive damages.

XI. EIGHTH CAUSE OF ACTION
(Conversion against Lucas)

144. Team IA re-alleges and incorporates all of its allegations contained above as if fully set forth herein.

145. Lucas' wrongful taking and retention of Team IA property constitutes conversion of Team IA property.

146. The actions of Lucas were taken illegally, without Team IA's permission, and with the intent of permanently depriving Team IA of the use, custody, ownership, and control of its property.

147. Team IA is entitled to injunctive relief requiring that Lucas disgorge and return and restore to Team IA its property.

148. Team IA is entitled to its actual, compensatory, and consequential damages caused by Lucas' conversion of its property.

149. Lucas' conduct has been without privilege and done with such willful, malicious, and conscious indifference so as to justify an award of punitive damages.

XII. NINTH CAUSE OF ACTION
(Unjust Enrichment against All Defendants)

150. Team IA re-alleges and incorporates all of its allegations contained above as if fully set forth herein.

151. Defendants' improper conduct as alleged above has and will continue to enable Defendants to compete unfairly with Team IA.

152. Defendants' conduct was wrongful and performed in a malicious manner to harm Team IA and to unjustly enrich Defendants at Team IA's expense.

153. As a direct and proximate cause of Defendants' improper conduct, Defendants have been unjustly enriched in an amount to be determined by the trier of fact, and Team IA is entitled to the recovery and disgorgement of any and all profits, earnings and commissions attributable to Defendants' wrongful actions.

XIII. TENTH CAUSE OF ACTION
(Constructive Trust against All Defendants)

154. Team IA re-alleges and incorporates all of its allegations contained above as if fully set forth herein.

155. Defendants have derived and/or will derive profits from its wrongful conduct as alleged above.

156. Team IA is entitled to have a constructive trust imposed on any profits Defendants have derived, or will derive, from its wrongful activities pending the outcome of this litigation.

XIV. ELEVENTH CAUSE OF ACTION
(Defamation against Lucas and 5 Point)

157. Team IA re-alleges and incorporates all of its allegations contained above as if fully set forth herein.

158. Lucas has made false statements regarding Team IA's business and its ability to engage in business activities and service its customers to Team IA's customers and prospective customers in an effort to damage Team IA's business and unfairly compete with Team IA.

159. Lucas' statements to Team IA's customers and potential customers were false and were made for the purpose of unfairly competing with Team IA and damaging Team IA's business.

160. Lucas' statements were on behalf of himself and for the benefit of and as an agent of 5 Point.

161. Lucas' statements were made with the knowledge of and in the course and scope of his employment with 5 Point and, therefore, 5 Point is vicariously liable for Lucas' actions.

162. Lucas' statements are actionable per se.

163. As a proximate and foreseeable result of Lucas' deliberate and intentional conduct, Team IA has suffered both compensable and irreparable harm, including the potential loss of customer(s) and harm to its reputation.

164. Lucas' conduct has been without privilege and done with such willful, malicious, and conscience indifference so as to justify an award of punitive damages.

XV. TWELVTH CAUSE OF ACTION
(Fraud against Lawson)

165. Team IA re-alleges and incorporates all of its allegations contained above as if fully set forth herein.

166. Lawson made false statements to Team IA while still employed by Team IA, including, but not limited to, statements that he was not going to work for a competitor.

167. Team IA relied on Lawson's statements and had a right to rely on these statements.

168. As a result of Team IA's reliance on the truth of Lawson's statements, it did not limit Lawson's access to confidential, proprietary, and trade secret information; it did not limit or monitor Lawson's contact with customers, potential customers, and employees; it did not closely monitor Lawson's activity; and it did not take steps to protect itself from unfair competition.

169. Team IA allowed Lawson to continue working based on his representations, not knowing that Defendants were attempting to and taking steps to steal Team IA's business and anticipated business.

170. Team IA suffered damages as a result of Lawson's conduct.

171. Team IA is entitled to its actual, compensatory, and consequential damages caused by Lawson's fraudulent conduct.

172. Lawson's conduct has been without privilege and done with such willful, malicious, and conscience indifference so as to justify an award of punitive damages.

PRAYER FOR RELIEF

173. **WHEREFORE**, Team IA, having set forth its Complaint against Defendants herein, prays that the Court will:

(a) Issue a temporary restraining order, preliminary injunction, and permanent injunction directing Lucas to comply with the terms of the Employment Agreement;

(b) Extend the time restrictions in the Employment Agreement by the period of time Lucas has failed to comply with its terms.

(c) Issue a temporary restraining order, preliminary injunction, and permanent injunction directing Defendants to cease all interference with Team IA's contractual and prospective contractual relations;

(d) Issue the temporary restraining order, preliminary injunction, and permanent injunction prayed for without bond;

(e) Award Team IA actual, compensatory, consequential, incidental, special, and punitive damages;

(f) Award Team IA pre-judgment interest in the maximum amount allowable by law;

(g) Award Team IA actual damages, damages for unjust enrichment, and exemplary damages pursuant to S.C. Code Ann. § 39-8-40;

(h) Award Team IA its reasonable attorney's fees pursuant to S.C. Code Ann. § 39-8-80 and the Employment Agreement;

(i) Grant Team IA such other relief, whether at law or in equity, as the nature of its claims may require or the Court or jury deems appropriate; and

(j) Grant Team IA a trial by jury on all claims that can be so tried.

Dated this the 17th day of March, 2009.

Respectfully submitted,

By: S. Clay Keim
S. Clay Keim
Jeffrey A. Lehrer

FORD & HARRISON LLP
100 Dunbar Street, Suite 300 (29306)
P. O. Box 5398
Spartanburg, South Carolina 29304-5398
Telephone: (864) 699-1100
Facsimile: (864) 699-1101

Attorneys for Plaintiff

Spartanburg:79367.1

ORIGINAL

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON) CIVIL ACTION NO.: 2009-CP-32-01078

Team IA, Inc.,)

Petitioner,)

v.)

Cicero Lucas,)

Respondent.)

**VERIFIED PETITION FOR
SUPPLEMENTAL PROCEEDINGS**

PETITIONER WOULD RESPECTFULLY SHOW:

1. That heretofore Petitioner recovered and recorded judgment against Respondent Cicero Lucas ("Respondent") as hereinafter set forth; and that there is still due and owing on said judgment the sum indicated, Respondent having failed and refused to satisfy same:

DATE OF JUDGMENT: November 27, 2015
DATE OF ENTRY OF JUDGMENT: December 2, 2015
JUDGMENT ROLL #: 2016-CP-32-01078
AMOUNT DUE: \$744,092.40, plus interest

2. That execution thereafter was duly issued to the Sheriff of Lexington County against Respondents and said Sheriff has returned same NULLA BONA.

3. That upon information and belief, the Respondent has assets in the County not exempt from levy which Respondent unjustly refuses to apply toward satisfaction of said judgment.

4. That Petitioner is informed and believes that it is entitled under the law and statutes to have an examination of Respondent in supplementary proceedings and to ascertain and discover any and all property and assets, real, personal, or mixed, and wheresoever situated,

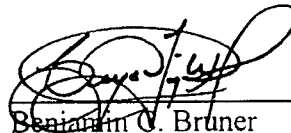
belonging to Respondent; or in which Respondent could claim any interest, solely or in conjunction with any person, firm, or corporation or entity, and any or all of which is or should be made applicable by the Court to the payment of said debt.

5. In addition, Petitioner is entitled to the appointment of a receiver of Respondent for any and all of the aforesaid property, assets, or effects which are so discovered or revealed in order to carry said judgment into effect.

WHEREFORE Petitioner prays that this court do inquire into the matters hereinabove alleged and that it issue such order or orders granting relief to which Petitioner believes it is entitled, for all expended and statutory costs allowable for this proceeding, and for such other and further relief and remedies as may be allowable and which the Court may deem proper.

And further Petitioner requests this matter be referred to the Master-in-Equity pursuant to Rule 53 of the South Carolina Rules of Civil Procedure with authority to enter a final order with any appeal being directly to the South Carolina Supreme Court.

BRUNER POWELL WALL & MULLINS, LLC



Benjamin C. Bruner
Bryan M. J. Triplett
P.O. Box 61110
Columbia, SC 29260
(803) 252-7693
Attorneys for the Petitioner Team IA, Inc.

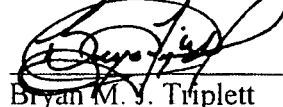
Columbia, South Carolina

July 13, 2016

VERIFICATION

ORIGINAL

PERSONALLY appears Bryan M. J. Triplett, who first being duly sworn, deposes and says that he is the attorney for the Petitioning judgment creditor and that he has read the foregoing Petition and knows the contents thereof and the same are true of his own knowledge except to matters alleged therein on information and belief, and as to these, he believes it to be true, that he is the attorney for the Petitioner and is authorized to make this oath on their behalf.



Bryan M. J. Triplett
Attorney for the Petitioner

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 13th DAY OF July, 2016

Rita D. DeCarlis Rita D. DeCarlis
Notary Public for South Carolina
My Commission Expires: October 18, 2020

FILED
2016 JUL 20 PM 12:20
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

In The Matter Of:

Team IA v.

Lucas

Cicero Lucas

November 3, 2016

Gina M. Smith Court Reporting, LLC

117 Harmon Creek Court

Lexington, SC 29072

803-359-5705

Original File 161103CL.txt

Min-U-Script® with Word Index

1 STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

2 COUNTY OF LEXINGTON

3
4 TEAM IA, INC.,

5 Plaintiff,

Civil Action No.: 2009-CP-32-01078

6 vs

7 CICERO LUCAS,

8 Defendant.

9
10 RULE TO SHOW CAUSE AND ORDER OF REFERENCE
BEFORE THE HONORABLE JAMES O. SPENCE

11 DATE: Thursday, November 3, 2016

12 TIME: 9:26 a.m.

13 REPORTED BY: GINA M. JOHNSON
14 Certified Shorthand Reporter
15 Registered Professional Reporter

16
17
18
19
20
21
22
23 -----
24 Gina M. Smith Court Reporting, LLC
25 117 Harmon Creek Court
Lexington, SC 29072
803-359-5705

1 **APPEARANCES:**

2 **ATTORNEYS FOR PLAINTIFF**
3 **TEAM IA, INC.:**

4 BRUNER, POWELL, WALL & MULLINS, LLC
5 BY: BENJAMIN C. BRUNER, ESQ.
6 1735 St. Julian Place, Suite 200
7 P.O. Box 61110
8 Columbia, SC 29260-1110

9 **ATTORNEYS FOR DEFENDANT**
10 **CICERO LUCAS:**

11 NEXSEN PRUET
12 BY: JULIO E. MENDOZA, JR., ESQ.
13 1230 Main Street, Suite 700
14 P.O. Drawer 2426
15 Columbia, SC 29202

16
17
18
19
20
21
22
23
24
25

1 THE COURT: All right. Let's do this.
2 Let's -- what I want y'all to do is we're going to
3 continue. We're going to break now. And what I
4 want y'all to do is I want y'all to contact my
5 office and set up a phone conference call with the
6 two of y'all.

7 MR. MENDOZA: Yes, sir.

8 THE COURT: And y'all tell me when you
9 need to have this conference call. We can do it
10 tomorrow, we can do it next week, but what I want
11 to do is I want to sort of do a scheduling order on
12 what y'all are going to do and then what we're
13 going to come back and put on the record because I
14 have a sense that some of this as far as getting
15 confirmation from your client about is this the
16 debt amount you guys are going to stipulate.

17 MR. MENDOZA: Yes, sir.

18 THE COURT: You can't argue with what's on
19 the settlement. So I think y'all can probably
20 stipulate all that and conduct any other discovery
21 that you want to do as far as documents, and then
22 you either -- then we got to come back probably and
23 argue a motion.

24 MR. MENDOZA: Yes, sir.

25 THE COURT: But I think we're -- we were

1 under the assumption these were -- we only
2 allocated a half an hour because staff didn't know
3 any better and I sense we've got a lot more than
4 that to do.

5 MR. MENDOZA: Yes, sir.

6 THE COURT: So if that's acceptable, I
7 want y'all to talk, and then I want
8 plaintiff/petitioner in all these, you get the
9 burden of setting up the conference call.

10 MR. BRUNER: Yes, sir.

11 THE COURT: So just call Gail or Leslie in
12 our office and set up a phone conference call, and
13 then y'all -- I want y'all to already have worked
14 through what you can stipulate to because it would
15 seem there's a bunch of stuff you can stipulate to
16 because, you know, if you're asking him stuff from
17 his tax returns, he's got to say I'm taking your
18 word for it because he doesn't have the document in
19 front of him and you're not going to disagree with
20 what he's filed.

21 MR. MENDOZA: That's correct.

22 THE COURT: So it seems like y'all can
23 stipulate to a bunch of that, and then the main
24 issue once y'all figure that, what the assets are,
25 and if there have been any transfers that you're

1 going to argue about fraudulent, then I think the
2 law says that has to be a separate action, that you
3 can't -- you can't turn the supplemental into a
4 fraudulent transfer because she's not here to
5 defend herself. You got to serve her on -- I think
6 that's what it is.

7 So we got to make sure we've got those two
8 things segregated properly, and then if you got to
9 send in a proposed order on your argument that,
10 wait a minute, I know can we can't garnish and take
11 wages, but if it's a distribution disguised as a
12 wage, then I got it, and you want to argue the
13 exact opposite, and there's got to be law on that.
14 So does that sound like a workable plan?

15 MR. BRUNER: I think that's certainly
16 workable. I would like for -- we only got a
17 portion of the way through the examination, your
18 Honor, but I would like to place one motion on the
19 record based on the evidence right now.

20 THE COURT: Okay. All right.

21 MR. BRUNER: That is a motion to sweep the
22 current balance of the First Community Bank
23 account. I believe that that's paying \$4,100 a
24 month and it's all money from him and it's going
25 down monthly, so once that money's gone --

1 THE COURT: Now, as far as the bank having
2 a secured interest in it or a setoff, not heard
3 that argument before.

4 MR. MENDOZA: Yes, sir.

5 THE COURT: I understand the bank says
6 draft it here so we can get our mortgage paid, but
7 I don't know that -- I mean, I'm just trying to
8 think because I've never heard this argument
9 before. I understand that, you know, you got to
10 purchase money and that gives you protection
11 against creditors, but I don't know -- I don't know
12 that the purchase money doctrine goes that way.
13 I've just never heard it argued that way.

14 MR. MENDOZA: Yes, sir.

15 THE COURT: So did that make any sense?

16 MR. BRUNER: It makes sense to me, your
17 Honor.

18 THE COURT: Okay.

19 MR. BRUNER: And I haven't seen any
20 security agreement that --

21 MR. MENDOZA: Well, your Honor, I don't
22 know that there is one, and --

23 THE COURT: I understand. We're talking
24 and we haven't committed yet, but I'm just saying
25 if y'all are unable to resolve that and we get on

1 the conference call and we're talking about a
2 proposed order, that's the kind of thing -- that's
3 how my mind's looking at it and analyzing it. Now,
4 if there's something else that I'm missing, tell me
5 at the point we get at the phone conference, but
6 I'm just -- while we're talking.

7 MR. MENDOZA: Yes, sir. I understand.

8 THE COURT: All right. Can y'all think of
9 anything else?

10 MR. BRUNER: We'll talk right after this
11 and try to get an agreeable date with your Honor.

12 THE COURT: Within a week I want the
13 conference call set up.

14 MR. BRUNER: Right.

15 THE COURT: It doesn't mean we have to
16 have the conference call within a week, but within
17 a week I want you to call our office and set that
18 up.

19 MR. BRUNER: I'd be happy to. I know my
20 client's eager to press forward and --

21 MR. MENDOZA: Yes, sir.

22 THE COURT: Well, you have to do it
23 because you're the plaintiff.

24 MR. BRUNER: That's right.

25 THE COURT: Petitioner always gets stuck

1 with that. You have to do the administrative work.

2 MR. MENDOZA: And, your Honor, we
3 recognize the fact that Mr. Lucas is desirous of
4 moving things -- instead of having them hanging out
5 there, he would like to have some resolution.

6 THE COURT: Right. You have to do it
7 orderly and you have to do it through a process,
8 and both sides need to have a sense of we did what
9 we're supposed to and this is what the law
10 required, and if there's gray areas you need to
11 make your argument and just see. So I understand
12 that and I appreciate everybody's consideration.
13 Okay. All right. Thank you.

14 MR. BRUNER: Thank you, your Honor.

15 MR. MENDOZA: Thank you.

16 (The proceeding concluded at 10:05 a.m.)
17
18
19
20
21
22
23
24
25

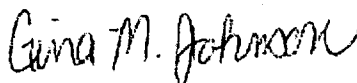
1 CERTIFICATE OF REPORTER
2

3 I, Gina M. Johnson, Registered Professional
4 Reporter and Notary Public for the State of South
5 Carolina at Large, do hereby certify:

6 That the foregoing proceeding was taken
7 before me on the date and at the time and location
8 stated on page 1 of this transcript; that all
9 statements made on the record at the time of the
10 proceeding were recorded stenographically by me and
11 were thereafter transcribed; that the foregoing
12 proceeding as typed is a true, accurate and
13 complete record of the proceeding to the best of my
14 ability.

15 I further certify that I am neither related
16 to nor counsel for any party to the cause pending
17 or interested in the events thereof.

18 Witness my hand, I have hereunto affixed my
19 official seal this 6th day of November, 2016, at
20 Columbia, Richland County, South Carolina.

21
22
23
24
25


Gina M. Johnson
RPR, CSR, Notary Public,
State of South Carolina
at Large.
My Commission expires
October 1, 2023.

1 State of South Carolina Court Of Common Pleas
2 County of Lexington CA No.2009-CP-32-1078
3
4 TEAM IA, INC.,)
5)
6 Plaintiff,)
7)
8 vs.)
9)
10 CICERO LUCAS,)
11)
12 Defendant.)
13)
14)
15)
16)
17)
18)
19)
20)
21)
22)
23)
24)
25)

MASTER-IN-EQUITY HEARING

BEFORE THE HONORABLE JAMES O. SPENCE

13 DATE: March 29, 2017
14 TIME: 2:00 p.m. - 3:30 p.m.
15 LOCATION: Lexington County Courthouse
16 205 E. Main Street
17 Lexington, South Carolina
18

19 REPORTED BY: KATHRYN J. LINDLER
20
21
22
23
24
25

1 APPEARANCES

2
3 Appearing in behalf of the Plaintiff:

4 Bruner, Powell, Robbins, Wall & Mullins, LLC
5 1735 St. Julian Place
6 Columbia, South Carolina 29206

7 By: Benjamin C. Bruner, Esquire,
8
9

10 Appearing in behalf of the Defendant:

11 Nexsen Pruet
12 1230 Main Street, Suite 700
13 Columbia, South Carolina 29201

14 By: Julio E. Mendoza, Jr., Esquire.
15
16
17
18
19
20
21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX

PAGE

ARGUMENTS:

MR. BRUNER. 4

MR. MENDOZA 7

MR. BRUNER. 10

MR. MENDOZA 13

MR. BRUNER:

 2nd Point. 15

 3rd Point. 19

 4th Point. 31

MR. MENDOZA 35

COURT CHECKLIST. 37

COURT INSTRUCTIONS 59

CERTIFICATE OF REPORTER 62

1 THE COURT: We are here on Team IA, Inc. versus
2 Lucas, 2009-CP-32-1078. This is Plaintiff's motion for
3 consideration. Mr. Bruner, your motion.

4 MR. BRUNER: That's correct, Your Honor. It's my
5 motion for reconsideration purely on the attorneys' fees
6 issue. As a housekeeping matter, I think in reviewing the
7 file preparing for this case, I realized there is no formal
8 motion that's been filed with the Court rather Mr. Mendoza
9 who represents the Defendant responded. Mr. Lucas and I
10 stipulated that Your Honor would hear purely the issue of
11 whether post-judgment attorneys' fees and costs are
12 recoverable in this case and then, of course, depending on
13 the ruling we would move forward. There is no formal
14 issue. It was more submitted as a stipulation of the
15 parties. I believe the court order reflects that and I
16 invite Mr. Mendoza to confirm or deny or quantify.

17 MR. MENDOZA: I agree with Mr. Bruner, Your
18 Honor. It's a matter we stipulated it needs to be
19 addressed, we appreciate your taking it.

20 THE COURT: Certainly.

21 MR. BRUNER: I bring that up just to clarify the
22 record in the event that becomes an issue in the future.
23 This was a motion to reconsider the order that Your Honor
24 issued purely on that and I got a number of points in my
25 motion. I've tried for purposes of this hearing to boil it

1 down to a few number of major bullet points. So I'll
2 address those and then I can answer whatever questions Your
3 Honor may have.

4 THE COURT: Okay.

5 MR. BRUNER: The first one is the Doctrine of
6 Merger and as I read the Court's order that was a large
7 contributor to the Court's ruling denying Team IA, Inc.'s
8 claim for post-judgment attorneys' fees and costs in this
9 case. The ruling was based on a case from the 19th
10 century, Your Honor. The Doctrine of Merger appears in
11 many different forms and many different areas of law in
12 this State regarding merger of property interest in a deed,
13 mortgage foreclosures. But the Doctrine of Merger as
14 discussed and the Court cited, in the cases cited by the
15 Court in this order is at issue here, I think falls more in
16 line with claim preclusion as in the Doctrine of Merger and
17 the Doctrine of Bar which now we know is claim preclusion
18 and issue preclusion and we also address as Res Judicata
19 and collateral estoppel.

20 In essence, Your Honor, what I'm saying is the
21 Doctrine of Merger discussed in the case on which the
22 Court relies for its order in today's jurisprudence as
23 applied today is claim preclusion embodied in the test for
24 Res Judicata. It is a claim for attorneys' fees that the
25 court has said we are not allowed because that was part of

1 the claim, it's precluded because that's part of the claim
2 that was reduced to a judgment. And, Your Honor, for that
3 reason, because there's no application of Res Judicata,
4 because this was a claim that is independent of all that,
5 it is a claim that certainly could not have arisen,
6 post-judgment attorneys' fees and costs certainly could
7 never have risen prior to judgment. We would respectfully
8 request that Your Honor reconsider and find that the
9 Doctrine of Merger which is cited in -- that the Doctrine
10 of Merger in that context does not apply.

11 There's some other points that Your Honor raises
12 under the paragraph under the section of the order that
13 discusses the application of Doctrine of Merger. There
14 are family court cases and bankruptcy cases. This is not
15 a family court case. This is not a case where attorneys'
16 fees are claimed as a matter of statute. This is not a
17 bankruptcy case where federal bankruptcy law could
18 intervene in effect.

19 THE COURT: Hold on before we get to that. Let
20 me -- I want to hear from you on what he's discussed as
21 Merger before, because you all both agree any claim that
22 you got from attorney fees, for attorney fees, arises from
23 the contractual language that was litigated at trial.

24 MR. BRUNER: I would say that, I would say
25 there's a contract provision and also, Your Honor, based on

1 the post-judgment order that Judge Griffith entered and the
2 language in that, that post-judgment order also gives rise
3 to our post-judgment attorneys' fees claim.

4 THE COURT: But again the order is based on the
5 contractual agreement we are going to talk about at some
6 point today?

7 MR. BRUNER: Correct. There's not a statute.

8 THE COURT: Right. What I'm hearing him say is
9 merger doesn't apply, it's not applicable, because it's a
10 different -- it's appellant stuff, not trial stuff. Is
11 that sort of?

12 MR. BRUNER: It's because the Doctrine of Merger
13 that's discussed in the cases, it's more claim preclusion
14 which does not apply to post-judgment attorneys' fees and
15 costs.

16 MR. MENDOZA: Your Honor, we maintain that it is
17 applicable, and I'm speaking on behalf of Mr. Lucas, the
18 Defendant, that the Doctrine of Merger is applicable to this
19 matter, Your Honor, and there are a couple points I would
20 make in that regard. One is that Your Honor has included
21 in your order there are some decisions from other
22 jurisdictions but just applying the Doctrine of Merger in
23 these decisions, well, there is one that is from 2009,
24 another from 1990. Your Honor, the decision that, the
25 South Carolina decision that was cited was just to show

1 that the Doctrine of Merger has long been in effect in
2 South Carolina and to see how it was applied, that the
3 Doctrine of Res Judicata and various doctrines were
4 principles of claim preclusion existed at the time that
5 case was entered too. Your Honor, we just maintain that
6 the Doctrine of Merger does apply. Once that happens, when
7 you sue on the contract, you obtain a judgment and then, of
8 course, you can go to supplemental proceedings, you're
9 proceeding based on the judgment, in fact the judgment is a
10 prerequisite to supplemental proceedings and so once you
11 have that judgment and then go to supplemental proceedings,
12 the contract provisions are merged into the judgment and
13 therefore extinguished by the judgment at least for the
14 purposes of proceeding to supplemental proceedings.

15 THE COURT: You all both agree there is no
16 controlling authority on whether an attorney fee clause
17 like we got now extends to anything beyond trial?

18 MR. BRUNER: I don't think there is anything
19 clearly on point other than the Renaissance case which was
20 overruled on other grounds, but I will say in response to
21 Mr. Mendoza's argument about the contract provisions being
22 extinguished, I will say that we have cited in support of
23 our arguments to the court that there are cases in South
24 Carolina which clearly indicate an award of -- which
25 clearly indicate contrary to the Respondent's position that

1 contract provisions are not all extinguished into the
2 judgment.

3 THE COURT: We're going to talk about --

4 MR. BRUNER: I can cite some cases.

5 THE COURT: No, I read them, because we're going
6 to talk about -- we're going to -- I guess, because I got a
7 checklist too, and as far as merger goes and the contract
8 provision you all are arguing analogy, right? Analogy and
9 precedent, you all agree with that?

10 MR. BRUNER: Right.

11 MR. MENDOZA: Yes, sir. Could I add one other --

12 THE COURT: Yes.

13 MR. MENDOZA: -- final point. When I talk in
14 terms of merger, I'm talking in context of collecting what
15 is due. In some of those other cases which are not
16 applicable to this situation, there may be contract
17 provisions which, of course, may have looked to for other
18 issues and other things, but I would maintain that when it
19 comes to collecting on the damages that the amount due --
20 anyway, the merger does...

21 THE COURT: At a trial where attorney fees are at
22 issue, one side gets a judgment against the other side.
23 The trial judge has to then determine the damages and the
24 damages can consist of a lot of things, right? They could
25 be actual. They could be actual and nominal. They could

1 be actual, nominal, special. They could be all that and
2 they could be punitives plus attorney fees if it's
3 applicable. So the attorney fee clause is triggered in the
4 calculation of damages at the trial order. That's how it
5 occurs.

6 MR. BRUNER: I would draw a distinction there,
7 Your Honor, because in this case, in this case, it was the
8 jury that determined damages. The trial judge then, then
9 examined the jury verdict and entered judgment of the
10 damages returned by the jury plus the attorneys' fees. It
11 was part of the entire judgment.

12 THE COURT: Whether it's a jury that determines
13 it or it is a judge acting as the fact finder, you have
14 separate components of damages one of which is attorney
15 fees.

16 MR. BRUNER: Correct. Attorneys' fees are an
17 element of damages.

18 THE COURT: Element of damages at trial level.
19 At a minimum.

20 MR. BRUNER: I believe that's accurate to say.

21 THE COURT: I understand both of your arguments
22 on merger.

23 MR. BRUNER: I just would like to place this on
24 the record for merger. This is to oppose the notion that
25 all contract terms merge into the judgment, because there

1 is plenty of South Carolina case law that shows that is not
2 so. It shows in fact certain contract terms survive the
3 judgment and are enforceable beyond the judgment. The two
4 that first come to mind are the Sears versus Valler case
5 and the Turner Coleman case both of which say that even
6 though there is a statute that sets the rate for
7 prejudgment interest, if the parties have agreed otherwise
8 to a rate of interest, to a higher rate of interest, I
9 think in Turner Coleman it was doubled the statutory rate,
10 the court honored that agreement, it will honor that
11 provision of the contract and it will award post-judgment
12 interest at that higher contractual rate. And I'm not
13 aware in either case of the court examining the agreement
14 of the parties and saying, well, this only says prejudgment
15 or this does not say the parties expressly agree to
16 post-judgment interest at the higher contractual rate. So
17 we are only going to apply the prejudgment, because all the
18 contract rights and terms merge into the judgment.

19 THE COURT: First of all, what you've just stated
20 is black letter law to a point. If you got a statute,
21 statute controls, unless, we got a lot of cases that says
22 you got a statute, statute controls no matter what your
23 contract says. You got another set of -- a lot of cases
24 that say except in some contract stuff if you got a
25 contract we'll let you do that as long as it doesn't defeat

1 the public policy behind the state statute. So that's what
2 you're saying.

3 MR. BRUNER: That's right.

4 THE COURT: Then you're going on to extrapolate
5 that doesn't go on to say just to the trial order. It's
6 silent.

7 MR. BRUNER: Correct.

8 THE COURT: It's silent.

9 MR. BRUNER: Our courts regularly honor from a
10 credit agreement, if you have a credit agreement between
11 two parties, the one party doesn't pay, the judgment is
12 initially enrolled, our courts regularly apply the higher
13 contractual interest rate if it says prejudgment,
14 post-judgment or whatever. It's not required to --

15 THE COURT: If we don't, we got to --

16 MR. BRUNER: -- post-judgment for that term of
17 the contract to survive the judgment and that's the one
18 point I wanted to make is that our case law suggests that
19 if the Doctrine of Merger does apply, it doesn't extinguish
20 all terms of the contract.

21 THE COURT: I think that's a fair statement.

22 MR. BRUNER: And similarly, and I cited in my
23 correspondence with the Court and we submitted some case
24 law I believe that shows that there are other cases
25 similarly like the Renaissance case which was reversed on

1 other grounds. It's the best indication we have today of
2 how our appellate courts would rule on this issue, but it
3 was reversed on the grounds and that case indicates that
4 similarly attorneys' fees provision that's allowed -- it's
5 a fee-shifting provision in a contract, will be honored
6 post-judgment. The court will not require, will not
7 require the parties to specifically agree that provision
8 apply post-judgment.

9 THE COURT: All right.

10 MR. BRUNER: I'll allow Mr. Mendoza.

11 THE COURT: Yes, sir.

12 MR. MENDOZA: Thank you, Your Honor. I would
13 like to address those two points. First in regard to the
14 rate of interest, it's included in your order, Your Honor,
15 when you go to the statute regarding interest on judgments,
16 bear with me a second.

17 THE COURT: It's published every year.

18 MR. MENDOZA: Yes, sir. It is Section 34-31-20.
19 Subsection B, capital B of that statute, provides money,
20 decree or judgment of a court enrolled or entered, and I'm
21 adding emphasis, must draw interest according to law. What
22 the court has done is they've looked to see what is the
23 appropriate rate. They've construed the statute, the
24 different subsections as providing that if the contract
25 provides the rate pursuant to contracts of consultants that

1 the courts will use the contract rate, but in the absence
2 of the contract spelling out a rate, then the judgment, or
3 if there is no contract, the judgment is centered on open
4 account that the statute will dictate the interest rate.
5 That's a completely different situation we have with
6 attorneys' fees. There's no statute or rule that says that
7 the parties will get attorneys' fees. Your Honor, with
8 regard to the Renaissance case, again it's included, the
9 discussion is included in your order, there are
10 distinguishing characteristics. Not only is it not binding
11 precedence, because it was overruled, but even the
12 reasoning and rationale, it's distinguishable. For one
13 thing the court was noting that the attorneys' fees
14 provision be allowable, but actually a negligible amount in
15 relation to the judgment, and essentially thinking it
16 wasn't that big of effect, which is not at all the case
17 here. This case the prejudgment attorneys' fees awarded to
18 the Plaintiff constitute almost two-thirds of the judgment
19 amount. So that's not a negligible amount. In fact, Your
20 Honor, the addition of post-judgment attorneys' fees have
21 the effect of compounding the attorneys' fees in addition
22 to the interest that's accruing on the judgment. The
23 language of the employment agreement doesn't indicate any
24 attempt that kind of compounding or grossing of the amount
25 was to be applied under the contract, but most importantly,

1 Your Honor, I think note there is -- the Renaissance case
2 doesn't even mention the Doctrine of Merger and that
3 without any discussion or admission anyone may reasonably
4 read into it that there was no -- that maybe the judgment
5 debtor did not argue the point. Of course as Your Honor is
6 aware when something is not argued in lower court or not
7 addressed in an order, it's deemed abandoned for appeal.
8 It's not a matter as if the Renaissance court expressly
9 rejected or found that the Doctrine of Merger does not
10 apply to these situations, it doesn't even address it.
11 Doesn't mention it. So I don't think Renaissance is
12 actually precedent in any way with regard to the Doctrine
13 of Merger. Well, it's not legally precedent, but it's also
14 even not -- I don't believe it's an indication that they --
15 appellate court's decision.

16 THE COURT: Okay. Let me hear your next point.

17 MR. BRUNER: I'm moving on to a couple other
18 bullet points I have, Your Honor, but I think a lot of this
19 is intertwined. On the issue of the amount of the fee and
20 Mr. Mendoza is correct, the amount of the attorneys' fees
21 that the trial court awarded in this case were substantial,
22 but understand, Your Honor, number 1 the issue before this
23 court right now is whether there was a right to claim fees
24 Not the amount. It's a two-step process.

25 THE COURT: You can pass on that one, because I

1 agree with you.

2 MR. BRUNER: Right. There's a two-step process.

3 THE COURT: I'm not concerned with that. He was
4 raising it as a distinguishing point from Renaissance. So
5 I'm taking that for what that's worth, but you're right.
6 I'm not concerned with amount. I'm concerned with right to
7 or not right to.

8 MR. BRUNER: Right to or not to, that's right.
9 That's where you have to get to what the language was the
10 parties agreed to. But, Your Honor, also as to the
11 distinguishing Renaissance, to compare the prejudgment
12 attorneys' fees in this case, we're not applying for
13 prejudgment attorneys' fees right now. We are asking for
14 attorneys' fees and costs incurred after judgment. So if
15 you're going to use that as a distinguishing characteristic
16 and you're going to compare the amount of the fees
17 requested now, you have to compare what we are requesting
18 now when we haven't requested anything.

19 THE COURT: I'm not into dollar amount. All he
20 said was your trial judgment was a big amount of attorney
21 fees. Renaissance it was a little amount. So it's
22 different. I'm not concerned with what any post-judgment
23 amount might be, because I got questions about who would
24 have jurisdiction to determine that, whatever court you end
25 up in.

1 MR. BRUNER: Right.

2 THE COURT: So I'm not worried about that. We're
3 going to get to that. We'll circle back to that in my
4 checklist.

5 MR. BRUNER: I would say any amount today would
6 be negligible compared to the judgment that was obtained.
7 On compounding attorney the effects, there's some practical
8 concerns that Your Honor raises in his order about
9 compounding attorneys' fees again. The law has safeguards
10 in place, the Jackson v. Speed factors that I believe --
11 they came from an earlier precedent that Your Honor cited.
12 There are six factors that the Court weighs in determining
13 how much to award and those factors when the court weighs
14 those factors, the Court comes up with a reasonable fee
15 which prevents this concern that attorneys' fees provision
16 will be abused or taken advantage of or attorneys' fees
17 will be compounded from happening. It prevents that.
18 There are safeguards in place, but you get there after --

19 THE COURT: I think you misunderstand what he
20 said about compounding. I didn't understand when he argued
21 to say you're going to get a double recovery on attorney
22 fees. What I meant in my order was in your trial judgment
23 you have a dollar amount of award which includes an award
24 of attorney fees up to here.

25 MR. BRUNER: Up to the date of judgment.

1 THE COURT: Up to the date of judgment. If you
2 then get another award of attorneys' fees multiple times or
3 some time out in the next 10 or 15 years or however the
4 judgment lasts concerning on where you're litigating it,
5 it's got to relate back to that prior judgment which then
6 you have a problem of recalculating the judgment amount,
7 because your judgment amount starts compounding interest
8 from day one you got to go back and refigure.

9 MR. BRUNER: I would offer, and in all candor to
10 the Court, the way I approach this is not to roll my
11 monthly billings and supplemental proceedings into the
12 entire balance of the judgment, but rather take the same
13 approach that we do at the trial level. There's a judgment
14 which is an analogous to the jury verdict.

15 THE COURT: You're saying it's a separate --

16 MR. BRUNER: Separate element of damages.

17 THE COURT: It's a separate judgment of
18 attorneys' fees?

19 MR. BRUNER: It's a separate element of damages.
20 Separate element that has been added to the entire judgment
21 and interest so that at the supplemental proceedings level
22 when you calculate the balance due a year in or six months
23 in, when you get to a point of you see final payment
24 coming, then you look at the judgment plus post-judgment
25 interest and then you add attorneys' fees to the bottom of

1 that number rather than rolling interest on post-judgment
2 attorneys' fees.

3 THE COURT: We'll address that again on my
4 points, because I think we got an account -- we have a
5 possibility based on what an order could say of some
6 accounting nightmare issues.

7 MR. BRUNER: I understand that when I read Your
8 Honor's order the first time, I believe I misunderstood it,
9 but now I got a better idea and we have ways and my
10 intention has never been to lump attorneys' fees onto the
11 judgment right now and then compound interest on all that.
12 My intention is to collect the amount of the judgment,
13 post-judgment interest on that and then attorneys' fees.

14 THE COURT: At which point --

15 MR. BRUNER: It will be the sum of the three of
16 those.

17 THE COURT: I will address that when we get down
18 to my list.

19 MR. BRUNER: I'll move on.

20 THE COURT: Yes, sir.

21 MR. BRUNER: The next point I would raise, Your
22 Honor, the Court is bound to give effect to the plain
23 meaning of attorneys' agreement here and the plain meaning
24 that the trial court adopted when it entered judgment in
25 this case. There's nothing in South Carolina law that

1 requires the parties to agree to post-judgment interest or
2 attorneys' fees. If you look at the plain meaning, and
3 here the parties agree to any and all attorneys' fees.

4 THE COURT: Let's stop, because here is a
5 delicate English point.

6 MR. BRUNER: Right.

7 THE COURT: Was there any evidence in the trial
8 order or argued before me about who drafted the contract?

9 MR. BRUNER: I don't believe there was.

10 THE COURT: Okay. You all would agree with me
11 that if there's evidence of that, then you're into the who
12 drafted the contract, we construe it against them, right?

13 MR. BRUNER: If there's an ambiguity. I think we
14 only get there is there's an ambiguity.

15 THE COURT: Right. Okay.

16 MR. BRUNER: When I get back to my office, I can
17 look, but often there are provisions that the party will
18 not be -- the contract will not be construed against one
19 party or another.

20 THE COURT: I don't think that was argued in the
21 motion in front of me about who drafted it.

22 MR. BRUNER: I don't believe that's come up.

23 THE COURT: None of that contract law that says
24 it's presumed to be construed against the grantor if
25 there's a question on it, right? If it's ambiguous.

1 MR. BRUNER: I don't think that point has been
2 raised, Your Honor.

3 THE COURT: Right. Because what your argument
4 then is and what the trial order found was it was
5 unambiguous. Is that the argument you're making? Are you
6 saying that the trial order clearly construed and said this
7 attorney fee clause is unambiguous? Was that party --

8 MR. BRUNER: I think that was a necessary finding
9 of that order.

10 THE COURT: Was it even argued at the trial
11 level --

12 MR. BRUNER: I'm not sure.

13 THE COURT: I guess what I'm trying to say is,
14 why would you be arguing at the trial level whether you get
15 appellate fees and whether it's ambiguous or not. That's
16 like the cart before the horse. So in all probability that
17 issue wasn't raised. So the order, the order and there was
18 no argument and you all -- did you all argue to me if it
19 was ambiguous or unambiguous?

20 MR. BRUNER: I don't think the issue of ambiguity
21 was raised until my motion to reconsider.

22 MR. MENDOZA: Your Honor, certainly we did not
23 argue it.

24 THE COURT: That's what I thought. We will
25 address that in a little bit, but you continue.

1 MR. BRUNER: Of course, our position is the
2 agreement and the court's order, the trial court's order,
3 are clear and unambiguous and not for any and all, any and
4 all fees. No where is that term qualified to apply to only
5 prejudgment attorneys' fees and costs. In fact, in fact in
6 the Muller case.

7 THE COURT: Let me go back to language first. Do
8 any and all mean -- what does any and all mean? Does any
9 and all -- does any mean the same thing as all?

10 MR. BRUNER: I think any and all coupled together
11 mean the whole world of attorneys' fees and cost. It means
12 any singular, any singular part and all of them together.
13 Jointly and severally. Anything and everything.

14 THE COURT: And the trial court order didn't
15 mention anything about you're entitled to trial fees and
16 you're entitled to anything you appeal. Didn't
17 specifically say that, did he?

18 MR. BRUNER: Trial court said any and all.

19 THE COURT: That's not what I asked. The trial
20 court said the language -- any and all was the language of
21 the contract, right?

22 MR. BRUNER: Correct.

23 THE COURT: Right. There was never the issue
24 argued that meant any and all meant appellate fees.

25 MR. BRUNER: I don't think the parties raised --

1 I don't think specifically the Court held in its order you
2 get these fees today in addition to anything afterwards.

3 THE COURT: Right, because there's no -- I mean
4 just logic dictates it wouldn't have been argued.

5 MR. BRUNER: The issue really wasn't right then.

6 THE COURT: So again what we are back to, we are
7 back to the fundamental question is one question. What
8 does any and all mean. Because you say any and all means
9 it's -- what was the Pix -- to the galaxy and beyond. You
10 say it means anything collected.

11 MR. BRUNER: Any reasonable attorneys' fees --

12 THE COURT: Certainly. Certainly within the six
13 factor test, on all different levels we are going to talk
14 about. What the Defendant says it is any and all fees on
15 the trial level in this action.

16 MR. BRUNER: That's correct.

17 THE COURT: Right? That's what the fundamental
18 question is.

19 MR. MENDOZA: Up to the point of judgment.

20 THE COURT: Right, up to the point of judgment.
21 That's what we agree and we'd also agree trial order
22 doesn't address that issue.

23 MR. BRUNER: It does not specifically address it,
24 Your Honor.

25 THE COURT: Right.

1 MR. BRUNER: My belief is that there are -- the
2 phrasing in that order gives rise to our law, the case
3 argument that this issue has been decided, that the terms
4 --

5 THE COURT: The phrase that we all are trying to
6 figure out is what does any and all mean.

7 MR. BRUNER: Right.

8 THE COURT: It doesn't say any and all is limited
9 or doesn't say any and all is expanded. It just says it
10 tracks the language of the employment contract that we
11 don't know who drafted. Your guy is the employer. His guy
12 is -- is that right?

13 MR. BRUNER: His guy was the employee.

14 THE COURT: You're the employer, he's the
15 employee.

16 MR. BRUNER: And we don't know how it's
17 negotiated.

18 THE COURT: That's right, we don't know unless
19 there's some...

20 MR. BRUNER: If I leave the courthouse, and I
21 know this won't happen outside the courthouse, but if
22 somebody sticks a gun up in my back and says give me all
23 your money, I think we would all agree that doesn't mean
24 give me half the money in your wallet. I think we all know
25 it doesn't mean give me 15 percent or a third of the money

1 in your wallet. I think it means all.

2 THE COURT: All the money in your wallet.

3 MR. BRUNER: Give me all your money.

4 THE COURT: Let's use your example.

5 MR. BRUNER: If I got --

6 THE COURT: Does all mean that not only does he
7 take your money there, but he gets to go to the bank with
8 you and empty your savings account? Does all mean that you
9 are assigning him your future 401 things, because that's
10 all your money.

11 MR. BRUNER: Right.

12 THE COURT: Would you construe that to mean once
13 you handed him the money, would you say wait a minute, I
14 got ten million dollars in the bank, that's part of all my
15 money, let's go get it. It doesn't, does it?

16 MR. BRUNER: Well...

17 THE COURT: Your example.

18 MR. BRUNER: Give me all the money you have on
19 you. Give me all the money you have on you.

20 THE COURT: You just changed the terms. You just
21 changed it from --

22 MR. BRUNER: It does not mean give me all your
23 spare change. Give me some of the money. If we're talking
24 about what any and all means, any and all means any and
25 all, and your Honor would agree that means everything.

1 THE COURT: I don't know, because in your
2 argument, your argument was he came to me, he stuck a gun
3 out to me, he wanted all the money in my wallet.

4 MR. BRUNER: Right.

5 THE COURT: I don't know that that means he
6 wanted or you agree to give him your savings and your 401K
7 located in a different place and it's just due to you at a
8 different time. I think what he meant was all the money in
9 your wallet there in the robbery.

10 MR. BRUNER: Any and all as Your Honor --

11 THE COURT: That's on you.

12 MR. BRUNER: -- pointed out also includes future
13 entitlement to 401K and I can assure you it wouldn't do him
14 much good, but he would want it. What he's going to get is
15 a different point, right, talking about the first point.

16 THE COURT: Right, but I would hazard that you
17 would not volunteer or take a legal position if he came
18 back and sued you that he was entitled to that future
19 stuff.

20 MR. BRUNER: There are other reasons why.

21 THE COURT: I understand. We will move on. We
22 can move on.

23 MR. BRUNER: But for the point of determining
24 what any and all means, it's unqualified. When this
25 contract was negotiated, it was unqualified. Any and all.

1 And I don't know how else to interpret any and all.

2 THE COURT: We are going to talk about other
3 interpretations in a minute when I get to my points,
4 because I'm going to ask you all to address this in your
5 post-motion orders.

6 MR. BRUNER: I'll note on that whether South
7 Carolina courts and whether our appellate courts have
8 required specifically with attorneys' fees claims for the
9 attorneys' fees provision to be contractual or statutory
10 and whether they specifically required the words
11 post-judgment, I would say they have not. The Muller case,
12 I can give Your Honor a cite, I believe it's in one of my
13 letters to the Court. That's the case where the court held
14 that under the Mechanics Lien Statute -- under the
15 appellate court rules the party wasn't entitled to
16 attorneys' fees. However, under the Mechanics Lien Statute
17 which allows the prevailing party to recoup reasonable fees
18 and costs, under that statute the party was, the prevailing
19 party was entitled to recoup post-judgment attorneys' fees
20 and costs and there's nothing in the Mechanics Lien
21 Statute, I don't believe, that says this is prejudgment
22 attorneys' fees or post-judgment attorneys' fees or
23 something clearly either way. They construed that and they
24 said well the intent of this is to make sure that the
25 winning party gets all the attorneys' fees, right. When

1 you come out if you get your damages, once you collect your
2 judgment, you're made whole. The same thing applies here.
3 This contractual provision which the trial court then
4 rolled into its order and judgment is intended clearly, we
5 don't have to get to intent, because it's unambiguous, but
6 if we get there, clearly the intent was if I breach this
7 and if I go out and steal a bunch of contracts, which is
8 what happened, and if you get a judgment against me because
9 of that, which is what happened, then you're entitled to
10 collect everything and I'm going to pay any and all of your
11 attorneys' fees period. You're going to be made whole.
12 That's what we have here, Your Honor.

13 THE COURT: Let me ask you again just a question.
14 Would your argument be any different if the contract had
15 said I'll pay all attorney fees or would it have been any
16 different if it had said any attorney fees?

17 MR. BRUNER: I think, I think the two are
18 interchangeable in that context, Your Honor. All attorney
19 fees incurred typical language that...

20 THE COURT: All and any kind of the same thing.

21 MR. BRUNER: Right.

22 THE COURT: Right?

23 MR. BRUNER: That's right.

24 THE COURT: What's the difference between then
25 any and all and I will pay your reasonable attorney fees?

1 MR. BRUNER: I think any and all emphasizes I'm
2 going to pay anything and everything. This obligation is
3 far reaching. This obligation is not limited to I'm just
4 going to pay your attorneys' fees. I think it shows the
5 point --

6 THE COURT: Your argument is if the clause just
7 said if I have to sue to enforce this, you got to pay my
8 attorney fees, you would say if it was just that, then
9 you're limited to trial court, you can't get above it, that
10 any and all go vertical?

11 MR. BRUNER: I would not say that, Your Honor,
12 but I would think that the Respondent has a much better
13 argument if the provision that we are talking about does
14 not say any and all.

15 THE COURT: Right. Because any and all -- they
16 put words in there. They got to mean something.

17 MR. BRUNER: My belief, my belief is if you're
18 entitled to fees by contract or by statute and you get a
19 judgment against somebody that carries over, because if
20 they don't pay the judgment -- if you get your attorneys'
21 fees for pursuing them to get the claim, you get your
22 attorneys' fees for pursuing them to collect the judgment,
23 because all they have to do is come to the table and pay it
24 or negotiate some sort of form of payment. All they have
25 to do is stop and come to the table.

1 THE COURT: That's not part of the legal
2 analysis, though.

3 MR. BRUNER: I understand. That's more the
4 public policy aspect of it.

5 THE COURT: That's strategy and...

6 MR. BRUNER: But it shows the control is in the
7 debtor's hands to come to the table and make a good faith
8 effort for the judgment to stop, to stop a large amount of
9 attorneys' fees from becoming unreasonable, and that goes
10 to the second part of the test. If a debtor comes to the
11 table and says okay -- if Mr. Lucas had come before we
12 started supplemental proceedings and said let's work out
13 this agreement, we're going to work out a payment plan,
14 well, then it's hardly reasonable for me to go, initiate
15 supplemental proceedings if we have an agreements in place
16 with them and if he's following it, it's hardly reasonable
17 for me to initiate supplemental proceedings to conduct a
18 whole bunch of discovery, to take Your Honor's time --

19 THE COURT: Hold on, because you're getting into
20 an estoppel argument now it sounds like which is not --

21 MR. BRUNER: I'm more getting into an issue of
22 the reasonable of the fee and the necessity of the fee. I
23 think those two are intertwined. My point is that the
24 judgment -- I think Your Honor has concerns that creditor's
25 attorneys can take advantage of a ruling that allows

1 creditors to recoup all their post-judgment attorneys' fees
2 by reviving the supplemental proceedings case every year
3 and my point is there's no need to if the debtor pays the
4 judgment. There's absolutely no need to because charging
5 attorneys' fees --

6 THE COURT: If people all acted right, we'd have
7 no attorneys and no judges, right?

8 MR. BRUNER: That's true.

9 THE COURT: I understand your point, but it
10 almost sounds like an estoppel argument where you're saying
11 the debtor has to come in and do this or they can stop this
12 problem we're worried about if the debtor is reasonable.
13 It's always a point of view on who's reasonable, right?

14 MR. BRUNER: I understand, but all that would
15 come in the amount of attorneys' fees and Your Honor would
16 have that and say you incurred these fees at this time,
17 they say this was going on, I think your reasonable fees
18 are this and all that's within the debtor's control is my
19 point. Not that they have to do it, but the debtor --
20 Mr. Lucas could have come --

21 THE COURT: It's in the two parties control,
22 because if he comes in and offers something that you don't
23 deem is reasonable, you're not going to accept it.

24 MR. BRUNER: I take the risk.

25 THE COURT: It's both parties.

1 MR. BRUNER: But I take the risk in that case.

2 THE COURT: Next point.

3 MR. BRUNER: The last big bullet point I raise,
4 Your Honor, is on the practical concerns that Your Honor
5 and we discussed them briefly, but the fact of the matter
6 is there's nothing, there's nothing in South Carolina law
7 that says attorneys' fees cannot be more than, have to be
8 less than a judgment. There's no rule about that.

9 THE COURT: No. That's black letter law.

10 MR. BRUNER: As an illustration, as an
11 illustration in this case of the practical concerns and
12 addressing the course practical concerns with allowing
13 post-judgment attorneys' fees under these circumstances I
14 will tell you that we have an agreement in place. We're no
15 longer actively pursuing hearings before Your Honor other
16 than for this one isolated issue. We've carved that out
17 and we have something in place now and that is an
18 illustration of what Your Honor and I were just discussing
19 about the judgment debtor having the ability to come to the
20 table and prevent, prevent necessary attorneys' fees from
21 being incurred. Again I'll just cite the safeguards in the
22 six-factor test. And this is all -- it all revolves around
23 the concept that allowing post-judgment attorneys' fees is
24 piling on or compounding an issue, an element of damages,
25 that give rise to the possibility of manipulation or

1 creditor's attorneys taking advantage of debtors and I
2 don't know that's exactly the case and we certainly do not
3 have that here.

4 THE COURT: Right, but as an all law, especially
5 something like this, because this is fundamentally a big
6 question. I have -- this is a novel question. Never heard
7 it raised as an attorney or a judge until this case.
8 Fundamentally would change what happens at supplemental
9 proceedings, what happens at a lot of stuff we're going to
10 talk about on my checklist. Fundamental. What we all know
11 and what we all have to deal with is that you make a ruling
12 based on this set of facts. Good faith people, right?

13 MR. BRUNER: Right.

14 THE COURT: Next case not based on you all good
15 faith people. I have to craft whatever kind of order it
16 is. It's what I used to tell clients was assume the best,
17 draft for the worse. If you're going to make a ruling, you
18 can't say everything. That's like saying -- that's like an
19 analogy. I used to help at an unnamed local football team
20 and I'd run scout team. They would give me, the one day I
21 was allowed to do it, they gave me ten plays. Team ran an
22 I-formation. I started running reverses and sweeps and
23 we're scoring and they said stop, you're scoring every
24 time. I said okay, what's the point. We only saw these
25 ten plays on film. I said that doesn't mean they don't

1 have another 20 plays. Your point is well taken as to you
2 all and I don't doubt that. But the point is the ruling is
3 not only going to work for you all, it has to work for the
4 people who will try to take advantage of it. So that's
5 what I'm concerned with. Not concerned with you all. I'm
6 concerned with the people who will and people will. You
7 know that. Because that's what we do as lawyers. Law
8 never -- law never -- let me take that back. Law rarely
9 contracts, it always expands, because it has to, because
10 it's dealing with new facts. So that's what my concern is.
11 I'm not saying I think creditors are bad, because creditors
12 have a right to do what they do, because people got their
13 stuff, but you have to draft a rule that as much as you can
14 contemplates people who are not like you all. Does that
15 make sense?

16 MR. BRUNER: It does.

17 THE COURT: That's what I'm struggling with in
18 part of this.

19 MR. BRUNER: And that's why when I first read the
20 court's order on this issue, that's why I raised an eyebrow
21 to the references to family court cases, to bankruptcy
22 cases, to mortgage foreclosure cases, because this is none
23 of those. This is two people sat at a table and made a
24 contract. It's not a mortgage foreclosure case. There's a
25 whole other world --

1 THE COURT: Right. We are going to talk about
2 those other cases, because we don't have control and
3 authority. We do have some broad authority and we do have
4 some singular principles and my point of those other things
5 is is that these other kind of actions once our court set,
6 because some of them are contractual, some of them are
7 statutory.

8 MR. BRUNER: Right.

9 THE COURT: Anyway, I don't think creditors are
10 bad guys. That's not what I meant to convey. What I meant
11 to convey was, is you got to plan for the worse. You got
12 to plan for when there are bad guys.

13 MR. BRUNER: I don't think -- I know what I'm
14 asking for is not one size fits all rule. It is a ruling
15 based on these prior cases in South Carolina authority and
16 the parties' contract which is specific to the parties.

17 THE COURT: We are going to get back to that. We
18 are going to get to that.

19 MR. BRUNER: Those are my main bullet points,
20 Your Honor, and I know Mr. Mendoza wants to speak.

21 THE COURT: Yes, sir.

22 MR. MENDOZA: Thank you, Your Honor. I'll try to
23 cover a couple of points. In your discussion with
24 Mr. Bruner going over the same points as you noted in the
25 agreement between the parties requires both sides and

1 sometimes the debtor may not be able to reach an agreement
2 by timing or by meeting other people who help it or him do
3 what's necessary to reach an agreement and you noted those
4 peculiarities or actually the truth regarding reaching an
5 agreement. It's bilateral agreement. Sometimes an
6 agreement can be reached, sometimes it cannot, but will
7 note there's a policy consideration and I do represent a
8 lot of creditors. In fact, most of the time I am
9 representing creditors. Oftentimes parties can no longer
10 afford to pay for representation, judgment debtors, and
11 it's easy to foresee a future situation, a different case,
12 where a judgment debtor can no longer afford to have his
13 attorney present to oppose a claim for post-judgment
14 attorneys' fees. There are all matter potential
15 permutations for what could happen in other cases, but
16 again I'll drop that part for this discussion.

17 THE COURT: What did Professor Hubbard call that?
18 Slippery slope. Right? Slippery slope argument.

19 MR. MENDOZA: Yes, sir.

20 THE COURT: If I let you do this, God knows
21 what's going to happen. The slippery slope argument has
22 been made by all three of us and commented on.

23 MR. MENDOZA: Yes, sir. Your Honor, with regard
24 to the language of the contract provision, there is one
25 modifier I would like to note. It doesn't change Mr.

1 Bruner's argument as I understand, but the actual provision
2 which is cited in your -- it's quoted in your order states
3 that -- well, it says and all reasonable attorneys' fees,
4 expenses, and court costs incurred in connection with the
5 enforcement of employer's rights hereunder. It references
6 the employment agreement and I would note that it talks in
7 terms of enforcing the rights of employment agreement which
8 I contrast to enforcing rights under a judgment and, of
9 course, that circles back around to my merger argument and
10 I won't repeat it at this time, but I think that is an
11 important distinction and we had made it in our initial
12 finding and I think your order also includes some
13 discussion of that distinction.

14 THE COURT: All right.

15 MR. MENDOZA: Your Honor, there were many points
16 pointed about, but I'll be happy instead to go to any
17 particular issues of points you would like --

18 THE COURT: Here's what I want to do. If you all
19 would both sit down and I want to go through a grid I kind
20 of made out, because this is -- we're going to talk through
21 this, because I want you all to submit proposed orders
22 because this is a novel question. There's not clear
23 authority. We know some stuff that's clear. Some stuff we
24 don't know. So I'm going to ask you all some questions and
25 you all say yes I agree or no I don't agree.

1 This is a Rule 59 motion. Would you all agree that
2 there's no factual dispute you all are arguing about that
3 it's a legal issue, the interpretation of the contract? I
4 mean, because we don't have the question who drafted it,
5 right? Because that didn't come up at trial it. Wasn't
6 argued. This Rule 59 we are arguing about a legal
7 conclusion, what does attorney fees -- I mean, is there a
8 factual dispute?

9 MR. MENDOZA: Your Honor, I don't believe there
10 is a factual dispute.

11 THE COURT: Misinterpretation of the attorney fee
12 clause?

13 MR. BRUNER: Right. I think as far as
14 interpretation of a contract whether the contract is
15 ambiguous is a legal issue. I agree with that point.

16 THE COURT: I'm moving down to that. No
17 factual -- there's no he said/she said. There's no I
18 drafted it, she drafted it, none of that is buried in the
19 trial order that didn't come, so none of that is before me.

20 MR. BRUNER: I don't believe any of that is in
21 there, Your Honor.

22 THE COURT: And I don't recall any of that being
23 argued before me.

24 MR. BRUNER: Right.

25 THE COURT: So that would mean it's a legal

1 issue.

2 MR. BRUNER: Right. I want to make sure I
3 understand. I don't want to beat a dead horse, but if
4 there is ambiguity found in the contract, then I think we
5 get into factual issues.

6 THE COURT: I'm going to come to amb -- that's
7 number 5. That's two. Third thing I'm going to ask you
8 all to agree or disagree: In South Carolina we have -- we
9 follow the American Rule as to attorney fees which is what?
10 General Rule, American Rule of attorney fees is what? Each
11 side pays his own attorney fees, right?

12 MR. MENDOZA: Yes, sir.

13 THE COURT: The exceptions to that are:
14 Contract, right? If you have a fee-shifting contract or a
15 statute or there has been some case law on some strange
16 esoteric stuff that have created none of which apply,
17 because we are in basically the contract portion of it,
18 right?

19 MR. BRUNER: I believe that's correct, Your
20 Honor.

21 THE COURT: We're in the contract analysis --

22 MR. MENDOZA: I agree, Your Honor.

23 THE COURT: -- fee-shifting contract thing.
24 Okay. We're getting back to no evidence of who drafted the
25 contract, hadn't been argued, hadn't been it. Now the

1 argument then is as I understand what Plaintiff is arguing,
2 Plaintiff is arguing that the contract is unambiguous, any
3 and all means, and I'm paraphrasing, anything. Any and all
4 could mean, and I'm just going to do a bunch of examples.
5 My attorney writes a demand letter and we solve the case.
6 That's it, right?

7 MR. BRUNER: Right.

8 THE COURT: Related to the contract. I go to
9 mediation and don't file a lawsuit. I do a pre-suit
10 mediation, but I have an attorney sitting with me, that
11 would be any and all, agreed?

12 MR. BRUNER: Right.

13 THE COURT: Same thing for arbitration. Same
14 thing for any type of thing, I got a lawyer involved that
15 doesn't involve filing suit, right? Any and all would also
16 mean legal fees ordered by a court if I go to trial. If I
17 do depositions, if I do motions, if I go to trial, if I do
18 all this stuff and then we settle prior to trial, I'm still
19 entitled to it, right, because it didn't say I had to
20 prevail, it just said any and all.

21 MR. BRUNER: Generally, yes, Your Honor, unless
22 when you settle, unless there's some sort of claim to
23 preserve, right.

24 THE COURT: Okay. We are back to your argument
25 which we don't know who drafted, but what you're saying is

1 any and all means anything on the trial level horizontally,
2 any attorney activity this way, right?

3 MR. BRUNER: If you are required to -- if legal
4 services are rendered to you and you incur them.

5 THE COURT: Right.

6 MR. BRUNER: As part of defending yourself or
7 asserting your rights, yes. I think there's a claim there
8 unless it's -- well.

9 THE COURT: Other facts or other agreements
10 between the parties, things like that.

11 MR. BRUNER: Right.

12 THE COURT: All those things that would mean any
13 and all, right?

14 MR. BRUNER: I agree.

15 THE COURT: Because that's what he says.
16 Defendant says that's what that means. Trial level only,
17 because merger and all that, right?

18 MR. MENDOZA: Yes, sir, Your Honor.

19 THE COURT: What you're saying is any and all
20 also goes vertical.

21 MR. BRUNER: To appellate court.

22 THE COURT: Let me just -- and you can have a
23 seat. If you want to stand up, you feel more comfortable,
24 you can; if you want to sit.

25 Let's do some what ifs. Clearly if you go to our

1 appellate court there is a statute that says you get
2 bucks. Do you also get attorney fees for appealing a
3 case?

4 MR. BRUNER: In this case that actually happened.
5 This case went up on appeal before entry of final judgment
6 and the statute gives you one basis, right?

7 THE COURT: Then what happened after that?

8 MR. BRUNER: That's the Muller case. That's the
9 Muller case. There was a statutory basis in the appellate
10 court rules and then there's a separate basis for
11 attorneys' fees in the Mechanics Lien Statutes in the
12 Muller case. Here in this case we had statutory basis for
13 that, but we also had the contractual basis for any and
14 all. So in fact the procedural history of this case shows
15 that that provision actually did go up.

16 THE COURT: No, no, no. You're misapprehending
17 my question. Did you all appeal this to the Court of
18 Appeals or the Supreme Court?

19 MR. BRUNER: I became involved after entry of
20 judgment, Your Honor. Mr. Golding handled the trial court,
21 end of the trial and I think Mr. Mendoza got involved
22 afterward also. There was an appeal and I'm not sure if it
23 was summary judgment or another issue that went up, but
24 there was an appeal.

25 THE COURT: There was an appeal before the trial

1 court level was finalized.

2 MR. BRUNER: Before the trial, yes, sir. Right.

3 THE COURT: Because that's a distinction. That's
4 a distinction, because a bunch of these cases talk about if
5 you got an appeal before trial court finalized and you go
6 back, that's part of the trial level. Because all you've
7 done is a detour back to the trial court.

8 MR. BRUNER: Right.

9 THE COURT: There was not an appeal after trial
10 was finished and you appealed it and any of the Court of
11 Appeals or the Supreme Court, the only way you would've
12 gotten attorney fees was one of two ways then. Either
13 Chief Beatty and Few and all those folks would've then said
14 give me your attorney fee affidavit and they would have
15 held a hearing on that afterwards and he could have cross
16 examined you on the reasonableness of stuff. So did that
17 happen or did they send it back to the trial court and say,
18 oh, yeah, award them attorney fees as the trial judge and
19 listen to what they did in front of us and even though you
20 didn't hear him say it, you read the affidavits and you do
21 it, then that happened.

22 MR. BRUNER: Neither one of those happened.
23 Judgment was entered, the parties did file cross appeals.

24 THE COURT: On?

25 MR. BRUNER: After entry of final judgment, after

1 trial, after post-judgment motions, entry of final
2 judgment. After that, the parties did file, and I'm
3 assuming they were both timely, Your Honor, but there were
4 cross appeals that were ultimately -- the appeals were
5 dismissed by agreement of the parties.

6 THE COURT: We never got to the question?

7 MR. BRUNER: And, I don't want to misrepresent
8 anything to the Court, but I believe stipulations of
9 dismissal as part of that dismissal. As part of that
10 stipulation, the parties agree that their attorneys' fees
11 associated with that appeal would be borne by each
12 respective party.

13 THE COURT: The American Rule?

14 MR. BRUNER: The American Rule.

15 THE COURT: Limited to that situation.

16 MR. BRUNER: Which was in there, because we're
17 operating under the contract and, of course, my client's
18 belief and my belief that the attorneys' fee provision
19 survives. Had the appeal been pursued by both parties, had
20 it gone up to another level to the Supreme Court and had my
21 client prevailed and the case come back down for entry of
22 judgment consistent with that order or been affirmed or
23 admitted or filed, then absolutely, and I may be jumping
24 ahead to some of your hypotheticals, Your Honor, but in
25 that case had the appeal been pursued and gone up and come

1 all the way back down, absolutely, we would have or I would
2 think my client would've made -- if I were representing him
3 at that time, I would've made a motion for attorneys' fees.

4 THE COURT: Hadn't happened.

5 MR. BRUNER: That's correct.

6 THE COURT: Because it factually didn't happen.

7 MR. BRUNER: Correct.

8 THE COURT: You may have a seat. Here's the
9 thing about these cases. Family court, civil court, you're
10 doing a debt action, a foreclosure, they file bankruptcy,
11 come back here, get those attorney fees, they've gone to
12 different court, but they're still on trial level. Other
13 person took everybody on a detour and they're paying the
14 gas, because you're still on the trial level. Let's say
15 you went to federal court. Let's say it's a contractual
16 case, because again we're looking at big picture here.
17 It's a contractual case and you say there's a federal
18 question involved and the federal court takes it. Does any
19 and all mean that? You're finished at trial court.

20 MR. BRUNER: Right. I'm trying to remain seated,
21 Your Honor.

22 THE COURT: You can stand if you want. I'm
23 saying whatever you're comfortable. We don't have a jury.

24 MR. BRUNER: In that scenario --

25 THE COURT: Sometimes I would like to stand up

1 and walk around the room and talk with you all too, but not
2 supposed to do that.

3 MR. BRUNER: Understood. I know Mr. Mendoza and
4 I take that as a compliment. In the federal court scenario
5 where the court has -- where that court has federal
6 jurisdiction and you're still at the trial level, you're
7 the district court level, but you're in federal court, if
8 you have these claims for a contract that the court has
9 supplemental jurisdiction or some other variation and they
10 become part of that lawsuit, then any fees -- if you have
11 multiple claims in other words, you have multiple grounds
12 to collect against one party, any fees that are incurred in
13 connection with the assertion of these rights, I think are
14 recoverable.

15 THE COURT: Any and all means anything. It means
16 anything.

17 MR. BRUNER: That's right.

18 THE COURT: What you're arguing is, and I want to
19 make this very clear, you're arguing it not only means
20 horizontal, it not only means any and all means I think
21 quite correctly arbitration, mediation, we settle it, any
22 kind of trial stuff, any kind of detour we do which
23 includes somebody appeals it up, they remand it back for
24 trial.

25 MR. BRUNER: Right.

1 THE COURT: Right?

2 MR. BRUNER: Right.

3 THE COURT: Because that's all horizontal.

4 MR. BRUNER: That's right.

5 THE COURT: It's detour and horizontal. What I'm

6 taking your argument to mean that once this horizontal

7 thing is finished, if I go vertical, I get vertical too. I

8 get Court of Appeals, I get Supreme Court, I get Admiralty,

9 I get --

10 MR. BRUNER: Related to this case.

11 THE COURT: Related to this case, right. If I go

12 vertical, if I go vertical --

13 MR. BRUNER: If I appeal it up.

14 THE COURT: If I go vertical which means in order

15 for those attorney fees to be awarded then one of two

16 things has got to happen. The Admiralty Court, the

17 Bankruptcy Court, the Court of Appeals, the Supreme Court,

18 whatever federal lateral court either they got to say give

19 me your attorney fee affidavit and I'm going to have a

20 hearing after I've ruled and give you attorney fees that

21 either then becomes a separate judgment that you start the

22 interest clock on or it goes somehow, which we don't know

23 how it will work, but would somehow go back to the

24 underlying judgment and add on and then you, I guess, I

25 don't know if you do it like a mortgage where you advance

1 more money and then you start interest. Somehow you do
2 that, but you'd agree with me on your vertical thing, on
3 your vertical argument, a judge has to make that ruling for
4 finding of attorney fees.

5 MR. BRUNER: For finding of attorneys' fees
6 unless the other side concedes it.

7 THE COURT: Right.

8 MR. BRUNER: Unless it's undisputed.

9 THE COURT: Right.

10 MR. BRUNER: I do agree that if after final
11 judgment the case goes up on appeal to the Court of
12 Appeals, Supreme Court, and then comes back down, I do
13 agree that any and all, because that's all part of
14 enforcement of my rights.

15 THE COURT: Right. If it comes back on remand.

16 MR. BRUNER: Any and all on enforcement of my
17 rights.

18 THE COURT: Because it's still all horizontal.

19 MR. BRUNER: Bankruptcy is another animal.

20 THE COURT: See, I don't think it is, because
21 what happens is, generally what happens in bankruptcy is
22 you're suing somebody. You're playing horizontally, then
23 the defendant files and takes you to another court which
24 stops you here.

25 MR. BRUNER: That's correct.

1 THE COURT: Game is frozen.

2 MR. BRUNER: That's correct.

3 THE COURT: Then when you do your work to return
4 him back to your game, then you get fees from that because
5 it's all horizontal, right? It's all horizontal. It's the
6 same thing.

7 MR. BRUNER: I understand it being just a
8 diversion of sorts, but it depends on the chapter, Your
9 Honor. Mr. Mendoza is much more familiar with the
10 bankruptcy aspect than I am, but when bankruptcy is filed,
11 I file proof of claims and if I got a right to attorneys'
12 fees by statute or by contract, I absolutely roll that in
13 to my proof of claim and, yes, if you got a right, you can
14 try to amend later, but there are bankruptcy provisions
15 that limit that.

16 THE COURT: But let's go back to the judge
17 question I was asking. You'd agree with me then under your
18 scenario if you go vertical either the Supreme Court, the
19 Court of Appeals, the Admiralty or federal judge or
20 three-judge panel or something like that, they got to do an
21 attorney fee clause assuming based on that state's law to
22 do an award of attorney fees.

23 MR. BRUNER: I don't think it has to be done at
24 the appellate level. I think it comes down --

25 THE COURT: Or, the other option is either they

1 got to do it or they send it back to the original I guess
2 trial judge or any trial judge and say you have a separate
3 hearing for attorney fees to determine the reasonableness
4 of it, right?

5 MR. BRUNER: Right.

6 THE COURT: And then the decision would need to
7 be made is this a separate new judgment or is it added to
8 your original trial judgment which is your basis for being
9 there. That's mechanically what would have to happen under
10 your scenario.

11 MR. BRUNER: Right.

12 THE COURT: Are you familiar with doing this
13 anywhere?

14 MR. BRUNER: I have not -- let me think before I
15 start speaking.

16 THE COURT: Let me go to the next point. I'll
17 let you hold off on that one. I'll let you reserve
18 comment.

19 MR. BRUNER: Not off the top of my head.
20 However, I do have a case on appeal right now, mechanics
21 lien case on appeal right now. It's a supplemental.

22 THE COURT: We are going to talk about statutory
23 stuff. We also have a whole host of things about statutes.
24 For example, there's a statute that says if I win on
25 appeal, I get how many dollars, what is it? A thousand --

1 whatever it is.

2 MR. BRUNER: I believe it's a thousand. Right.

3 THE COURT: Now is that what you get?

4 MR. BRUNER: If that's the only basis for fees
5 that you have, yes.

6 THE COURT: If you got an attorney fee contract,
7 do you get to go get attorney fees?

8 MR. BRUNER: If you have a separate basis to
9 claim attorneys' fees, the Muller case says yes.

10 THE COURT: Under the statute. That was the
11 Mechanics Lien Statute.

12 MR. BRUNER: There was a separate basis which was
13 the Mechanics Lien Statute.

14 THE COURT: Right, it was Mechanics Lien Statute,
15 it wasn't contractual, right?

16 MR. BRUNER: There was no separate contract
17 provision that I'm aware of that allowed for attorneys'
18 fees.

19 THE COURT: Right. It was the Mechanics Lien
20 Statute which has a whole host of interesting stuff in it
21 as to attorney fees and what means prevailing and the
22 policy and all that, but the underlying basis in that case
23 was statutory.

24 MR. BRUNER: As opposed to contractual.

25 THE COURT: Right, it was statutory.

1 MR. BRUNER: One of the two exceptions to the
2 American or General.

3 THE COURT: Right. And it was Mechanics Lien.

4 MR. BRUNER: Right.

5 THE COURT: We're going horizontal, right. Some
6 of these cases that have been cited, what did the family
7 court say? What did these courts say when you all go back
8 and look at them? Look at action and see if it was
9 horizontal or vertical, okay, because while it says it's
10 appealed, it's important whether that appeal is really a
11 horizontal one or a vertical one.

12 MR. BRUNER: Posture similar to this one
13 post-judgment.

14 THE COURT: Right. Compare and contrast those
15 cases. Let's go to the ambiguous or unambiguous argument.

16 As I understand what Plaintiff is arguing, Plaintiff
17 is arguing that A. the contract is arguing two things.
18 The contract is unambiguous. Any and all means everything
19 that I have to do legally. Any and all means just what it
20 says, any and all. Defendant is arguing -- and since the
21 judge in his order said any and all, it's unambiguous that
22 he meant any and all also meant vertical also. Right?
23 Mr. Bruner, that's what I believe I understood you to
24 argue. I'm summarizing. The cliff note version, but.

25 MR. BRUNER: That's correct, Your Honor. It's an

1 unambiguous term, any and all attorneys' fees. I got it
2 right here, Your Honor.

3 THE COURT: It's unambiguous, right? But as
4 Mr. Mendoza said and what I've asked the order doesn't
5 directly say and by that I mean vertical because as you all
6 candidly admitted, don't think the vertical question was
7 argued at the trial level because there's no reason to have
8 argued vertical at the trial level. So we can say then the
9 order did not contemplate the vertical liftoff.

10 MR. BRUNER: I don't know that it expressly says
11 that.

12 THE COURT: Right.

13 MR. BRUNER: But again --

14 THE COURT: You can make an implied argument, you
15 can make an implied argument, you can make an inference,
16 but you all would agree there is no expressed finding that
17 it contemplated that either got argued or contemplated the
18 vertical argument.

19 MR. BRUNER: Right. There's no expressed
20 finding, but it says any and all related to course of
21 trial --

22 THE COURT: Your argument is that any and all
23 period end of discussion.

24 MR. BRUNER: Right. I would add, Your Honor,
25 that Mr. Mendoza mentioned that there's qualifier rights

1 under the employment agreement. My rebuttal to that would
2 be all of those rights were wrapped up in the judgment so
3 that you're enforcing those rights through the judgment.

4 THE COURT: Careful, because you're getting close
5 to his merger argument.

6 MR. BRUNER: Not necessarily.

7 THE COURT: I understand. I said that in jest.

8 MR. MENDOZA: Your Honor, I agree with everything
9 you were saying about the state court ruling. I would just
10 add that even the language that Mr. Bruner was citing was
11 in the context of the court making a review of the six
12 factors for the allowability of the asserted attorneys'
13 fees before the court and it would be taking the court's
14 wording out of context to imply that it would go beyond.

15 THE COURT: He didn't say come back if this gets
16 appealed?

17 MR. MENDOZA: That's correct.

18 THE COURT: Now. Now. If there's a finding that
19 the contract is -- attorney fees is ambiguous, all right.

20 MR. MENDOZA: Yes, sir.

21 THE COURT: If it's ambiguous, then you got to
22 argue vertical or horizontal, right? It could mean, we
23 could construe it to mean vertical as well as horizontal
24 trial level, he's saying just horizontal. We got to pay
25 any and all this stuff that could have occurred trial

1 level, but once it moves into an appeal or a supplemental
2 proceeding, because that's an entirely different statutory
3 action, same parties, but it's an entirely different
4 statutory set. You file it, pay a filing fee, have to do a
5 new order of reference. It's an entirely new legal action.
6 Related, but it's a different legal action, because it's a
7 collection action. He's saying that it's just limited to
8 this. It don't go vertical.. So if you're arguing
9 ambiguous and unambiguous, then this is how I want you to
10 make your arguments. I want you to go back to the South
11 Carolina laws we talked about, see the fact stuff. Was it
12 this way or was it that way. Because I think they do --
13 they do give us some guidance. I think you also have to
14 say the big thing that we're also looking for is what's the
15 basic rule. Basic rule is what?

16 MR. MENDOZA: Each side has to --

17 THE COURT: Pays their own.

18 MR. MENDOZA: Right.

19 THE COURT: Unless the exception applies, right?
20 Unless the exception applies. You're saying this is why we
21 want the exception to apply, because we ain't got a case
22 right now that I've seen that says if you go vertical, it's
23 got to be paid and this is how we do it, right? You can
24 also address then how it would happen, because if you are
25 right, there's got to be a how do we do it. You just don't

1 want to say you leave the house, this is an example, but
2 you leave the house, you learn quick, don't say be good,
3 you give a specific 28 point checklist, don't do this,
4 don't do this, don't do this, don't do this, right? So I'm
5 concerned with if this rule was adopted, how to do it,
6 because I don't know if the Supreme Court or all these
7 other courts then are going to have to have a contested
8 attorney fee hearing or if they're going to send it back to
9 the trial judge or a trial judge and then the real killer
10 or the real problem, because I'm not a math guy, I'm
11 English history guy, is how do you go back once you've had
12 a judgment that's been entered at trial and it's been
13 accruing at seven and a quarter for a year, two years,
14 three years, does this come back and get added to it just
15 like a principal payment, like it gets added to it and then
16 you do seven and a quarter more or, I mean, how do you do
17 it, how do you do that physically.

18 MR. MENDOZA: Right.

19 THE COURT: And again then --

20 MR. BRUNER: -- interest.

21 THE COURT: Right. How does it go? How do you
22 do it. Tell me mechanically how you do this thing. The
23 concern about this specific aspect in supplemental
24 proceeding is, as you all know, in supplemental proceedings
25 we have the Rule of the Diligent Creditor, right? The

1 Diligent Creditor is the guy or the girl who's on the ball
2 who's out there working to take care of its client,
3 checking for assets, doing stuff, right? The Diligent
4 Creditor. A judgment is good for ten years with an
5 asterisk unless the ball's in the air. Unless as I
6 construe it, it left his fingertips or her fingertips
7 before the buzzer sounded, right? Let's just say ten years
8 with an asterisk with active energy, right? You all would
9 agree with me in supplemental proceedings, which is what we
10 are talking about, you can bring as many supplemental
11 proceedings as you want to, as you deem necessary as a
12 diligent creditor's attorney so long as it wasn't
13 harassment.

14 MR. BRUNER: Right.

15 THE COURT: Theoretically one a year, because as
16 a diligent creditor you're concerned with my guy just won
17 the lottery or my guy won the lottery a year ago, well, his
18 judgment expired three months later, why didn't we get it.
19 Because the diligent creditor's talking to his client
20 saying we got to go in and check, right?

21 MR. BRUNER: Right.

22 THE COURT: Because it's going to expire. You're
23 in a no-win situation in some -- I mean, you have to go do
24 it to be the diligent creditor. So then you do run into
25 that problem, but even it being good faith and diligent,

1 does that mean once a year I got ten more cracks at it,
2 just one time a year, before it expires to try to get it
3 and then do we do a six-factor test each time then and then
4 again is it a new judgment, do we end up with ten new
5 judgments or does it go back in and add to this amount. I
6 don't know how that works if you're right about going
7 vertical, but I sure want to think about it. Does that
8 make any sense?

9 MR. MENDOZA: It does, Your Honor.

10 THE COURT: Sometimes when you're in your office
11 by yourself wandering around talking to yourself, you think
12 you make sense and when you're typing on your checklist you
13 think you make sense and then you start talking to people
14 and they're... Does the checklist that I went through on
15 kind of how I want you all to do the order, does that make
16 sense?

17 MR. BRUNER: It does.

18 MR. MENDOZA: Yes, sir.

19 THE COURT: Because, I mean, boiling it down.
20 Any and all means I go vertically anywhere in the universe.
21 He says you can go anywhere horizontally in the universe,
22 but not vertical. Is that a fair cliff note paraphrase of
23 the arguments?

24 MR. MENDOZA: Yes, sir, I believe so.

25 MR. BRUNER: I think it is. Yes, sir.

1 THE COURT: What normally happens is is Madame
2 Court Reporter is going to file -- she's going to mail me
3 the transcript. She's going to copy you all. That's going
4 to trigger your three week period to get your transcript
5 and submit a Word order and what I want you all to do is I
6 don't have a law clerk. So I want you all to help me do
7 the best I can and do a timely order which means both send
8 me a Word order, send it the same day. Send it in at the
9 same time and kind of follow this checklist and I would
10 kind of ask you all to confer a little bit before you start
11 drafting that says Number 1 we're going to argue this,
12 Number 2 is going to be this, Number 3 is going to be this
13 so I can look at it, because what I want your orders to say
14 is is this issue. I want Plaintiff's argument to say I
15 believe this, he argued this, here's why you should believe
16 me. And the same thing for Defendant so I can cut and
17 paste between the two Word documents.

18 Again they got to be done the same time, because the
19 worse thing in the world is one person sending it in,
20 reads the other person saying and then they wait seven
21 days and say I need to reply. I know you all aren't going
22 to do that. Just get together on that and your structure
23 and that will be very helpful to me so I can make a
24 cleaner thing. Include both of your arguments in this
25 thing so if you appeal or whoever appeals, because it's a

1 good appeal case, because it's a brand new question,
2 whoever appeals has a good argument where we said we
3 argued this, this is what he said, this is what he said,
4 this is what we ruled and then the smarter people will
5 decide that point. But that's kind of how I would like
6 you all to handle it post-trial. Can you all think of
7 anything else?

8 MR. MENDOZA: Your Honor, what was the -- I know
9 you mentioned three week period, are you talking about for
10 ordering the transcript or three weeks from when we receive
11 the transcript?

12 THE COURT: No. It's three weeks from when you
13 order it. What she does is she sends the original to me.
14 You got to pay for it, because you're the moving party.
15 She copies you all. So that let's me know when I get the
16 transcript, because it's my responsibility to file it,
17 because sometimes the attorneys forget it, because they go
18 home and there's the next fire, right? That's going to
19 trigger your three-week period to contact her, say send me
20 the e-version, the condensed version, the long version, but
21 you got three weeks from the date of that letter to send it
22 in. And then if there's a problem, just do a joint e-mail.
23 We got the thing, we need a little extra time, whatever, we
24 both agree we're going to get in our thing to you this day,
25 and as long as you're not going way out into the

1 ionosphere, I'm fine. What I want is compatible proposed
2 orders submitted at the same time.

3 MR. MENDOZA: I understand.

4 MR. BRUNER: We can do that.

5 THE COURT: Anything else from either of you?

6 MR. MENDOZA: I have nothing else, Your Honor.

7 MR. BRUNER: That's all we have, Your Honor.

8 Thank you. If it does go up, I think it's going to put a
9 very clear record together.

10 THE COURT: Good. Thanks. We're off the record.

11

12

13

14

15 (At this time, this concludes the hearing.)

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

I, Kathryn J. Lindler, certified court reporter and
notary public for the State of South Carolina at large,
hereby certify that I reported the foregoing proceeding
at the time and place hereinabove set forth;
and that the foregoing pages, inclusive, constitute a true
and correct transcription of my stenographic report of the
proceeding.

I further certify that I am neither attorney nor
counsel for, nor related to or employed by any of the
parties connected to the action, nor am I financially
interested in the action.

Witness my hand and seal at West Columbia, South
Carolina this 24th day of April 2017.



Kathryn J. Lindler, Court Reporter
Notary Public, State of South Carolina at large
My commission expires: June 4, 2018

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
CIRCUIT COURT
EUGENE C. GRIFFITH, JR., CIRCUIT COURT JUDGE

RECEIVED

DEC 29 2015

SC Court of Appeals

Case No.: 2009-CP-32-1078

Team 1A, Inc.....Respondent.

vs.

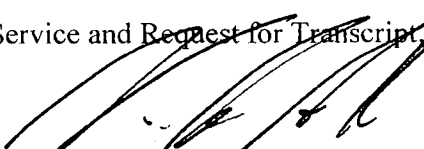
Cicero Lucas, George Lawson, IV and 5 Point Solutions, LLC; Appellants,

NOTICE OF APPEAL

Cicero Lucas, George Lawson, IV and 5 Point Solutions, LLC appeal the Jury Verdict dated March 27, 2015 and the Order of The Honorable Eugene C. Griffith, Jr. dated November 27, 2015.

This notice is being filed within 30 days of receipt of the Order. The Jury Verdict and the Order are attached hereto along with a copy of the Proof of Service and Request for Transcript.

December 22, 2015


W. ANDREW ARNOLD
SC Bar # 65311
Law Office of W. Andrew Arnold, P.C.
712 East Washington Street
Greenville, SC 29601
(864) 242-4800
Attorney for Appellants Cicero Lucas,
George Lawson, IV and
5 Point Solutions, LLC

Other counsel of record:

Robert F. Goings, Esquire
Goings Law Firm, LLC
Post Office Box 436
Columbia, South Carolina 29202

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
CIRCUIT COURT
EUGENE C. GRIFFITH, JR., CIRCUIT COURT JUDGE

RECEIVED

DEC 29 2015

SC Court of Appeals

Case No.: 2009-CP-32-1078

Team IA, Inc.....Respondent.

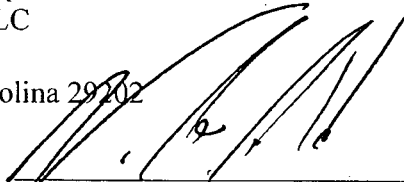
vs.

Cicero Lucas, George Lawson, IV and 5 Point Solutions, LLC, ...Appellants,

PROOF OF SERVICE

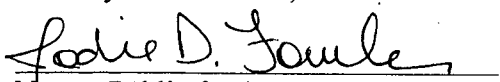
I certify that I have served the Notice of Appeal on Team IA, Inc. by depositing a copy of it in the United States Mail, postage prepaid, on December 22, 2015, addressed to its attorney of record:

Robert F. Goings, Esquire
Goings Law Firm, LLC
Post Office Box 436
Columbia, South Carolina 29202



W. Andrew Arnold
SC Bar # 65311
Law Office of W. Andrew Arnold, P.C.
712 East Washington Street
Greenville, SC 29601
(864) 242-4800
Attorney for Appellants

SWORN to before me this
22st day of December, 2015.


Notary Public for South Carolina
My Commission Expires: 8-12-24



December 22, 2015

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

RECEIVED

DEC 29 2015

SC Court of Appeals

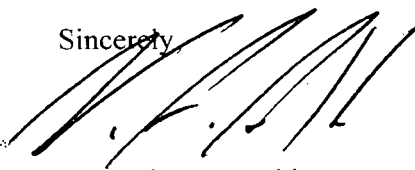
Re: Team IA, Inc. v. Cicero Lucas, George Lawson, IV and 5 Point Solutions, LLC
C.A. No.: 2009-CP-32-1078

Dear Ms. Kitchings:

Please find enclosed the original and two copies of Appellants' Notice of Appeal in the above-referenced matter. Also enclosed are the following:

- (1) Proof of Service of the Notice of Appeal on the Respondent;
- (2) A copy of the Jury Verdict that is being challenged on appeal;
- (3) A copy of the order that is to be challenged on appeal; and
- (4) A filing fee of \$100.

Sincerely,



W. Andrew Arnold

Enclosures

cc: The Honorable Beth Carrigg
Robert F. Goings, Esquire

P

US POSTAGE AND FEES PAID

DEC 22 2015 Mailed from ZIP 29601
1 lb Priority Mail Rate Zone 2
Commercial Base Pricing



endicia.com/mac

071M00671947

PRIORITY MAIL 2-DAY™

LAW OFFICE OF
W. ANDREW ARNOLD, P.C.
712 E WASHINGTON ST
GREENVILLE SC 29601-3035

B012

0024

Ship To:

THE HONORABLE JENNY ABBOTT KITCHINGS
CLERK OF COURT
S.C. COURT OF APPEALS
PO BOX 11629
COLUMBIA SC 29211-1629

USPS TRACKING #



9405 5102 0088 3893 3285 21

RECEIVED

DEC 29 2015

SC Court of Appeals

78264

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
Eugene C. Griffith, Circuit Court Judge

RECEIVED
DEC 29 2015
SC Court of Appeals

Case No. 2009-CP-32-1078

Team IA, Inc., ... Respondent-Appellant,

v.

Cicero Lucas, George Lawson, IV, and
5 Point Solutions, LLC, ... Appellant-Respondents,

Cicero Lucas and George Lawson, IV Third-Party Plaintiffs,

v.

Brent Yarborough and Team IA, Inc. Third-Party Defendants.

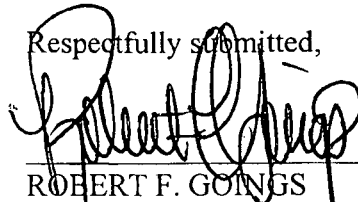
NOTICE OF CROSS-APPEAL

Respondent-Appellant Team IA, Inc. appeals the Order on Post Trial Motions dated November 20, 2015, filed on November 24, 2015, a copy of which is attached. Counsel for the Respondent-Appellant received the filed Order on Post Trial Motions on November 24, 2015.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

By:



ROBERT F. GOINGS
GOINGS LAW FIRM, LLC
914 Richland Street, Suite A-101
Post Office Box 436 (29202)
Columbia, South Carolina 29201
Email: rgoings@goingslawfirm.com
Phone: (803) 350-9230
Facsimile: (877) 789-6340

ATTORNEY FOR RESPONDENT-
APPELLANT TEAM IA, INC.

Columbia, South Carolina
December 22, 2015

Other Counsel of Record:

W. Andrew Arnold
Law Office of W. Andrew Arnold
712 East Washington Street
Greenville, SC 29601
Email: aarnold@aallawfirm.com
Phone: (864) 242-4800
Facsimile: (864) 242-4885

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
Eugene C. Griffith, Circuit Court Judge

Case No. 2009-CP-32-1078

Team IA, Inc., ... Respondent-Appellant,

v.

Cicero Lucas, George Lawson, IV, and
5 Point Solutions, LLC, ... Appellant-Respondents,

Cicero Lucas and George Lawson, IV Third-Party Plaintiffs,

v.

Brent Yarborough and Team IA, Inc. Third-Party Defendants.

PROOF OF SERVICE

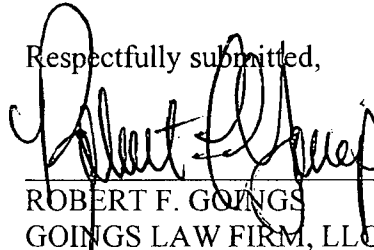
I certify that I have served the Notice of Cross-Appeal on Appellant-Respondents by
mailing a copy of the same, via United States Mail, on December 22, 2015, to the following:

W. Andrew Arnold, Esquire
Law Office of W. Andrew Arnold
712 East Washington Street
Greenville, SC 29601

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

By:



ROBERT F. GOINGS

GOINGS LAW FIRM, LLC

914 Richland Street, Suite A-101

Post Office Box 436 (29202)

Columbia, South Carolina 29201

Email: rgoings@goingslawfirm.com

Phone: (803) 350-9230

Facsimile: (877) 789-6340

ATTORNEY FOR RESPONDENT-
APPELLANT TEAM IA, INC.

Columbia, South Carolina
December 22, 2015

**PROOF OF SERVICE – NOTICE OF
CROSS-APPEAL**



914 RICHLAND STREET
SUITE A-101
POST OFFICE BOX 436 (29202)
COLUMBIA, SC 29201
P 803.350.9230
F 877.789.6340
E rgoings@goingslawfirm.com

December 22, 2015

VIA UNITED STATES MAIL

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

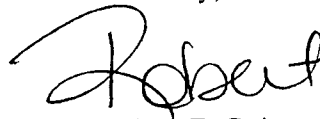
Re: Team, IA, Inc. v. Cicero Lucas, George Lawson, IV, and 5 Point Solutions, LLC
and Cicero Lucas and George Lawson, IV v. Brenty Yarborough and Team IA,
Inc.
C/A No: 2009-CP-32-1078

Dear Ms. Kitchings:

Please find enclosed for filing the original and one (1) copy of the Notice of Cross-Appeal, Proof of Service, and a check in the amount of \$100.00 for the required filing fee in the above-referenced matter. Please file the original and return the clocked copy to me in the envelope provided herein.

Thank you for your assistance in this matter. Please feel free to contact me if you have any questions.

Sincerely,


Robert F. Goings

RFG:lcc
Enclosures

cc: W. Andrew Arnold, Esquire
The Honorable Eugene C. Griffith
The Honorable Beth Carrigg, Lexington County Clerk of Court

RECEIVED

DEC 29 2015

SC Court of Appeals

80121

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
Eugene C. Griffith, Circuit Court Judge**

**Appellate Case No. 2015-002629
Lower Case No. 2009-CP-32-1078**

RECEIVED
JUL 05 2016
SC Court of Appeals

Team IA, Inc., Respondent-Appellant,

v.

Cicero Lucas, George Lawson, IV, and 5 Point Solutions, LLC, Appellant-Respondents,

and

Cicero Lucas and George Lawson, IV, Third-Party Plaintiffs

v.

Brent Yarborough and Team IA, Inc., Third-Party Defendants.

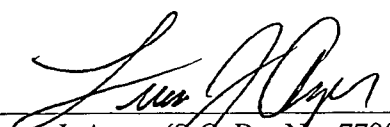
CONSENT MOTION TO DISMISS APPEAL

The Parties to this appeal have agreed to the dismissal of the appeal, in its entirety. Therefore, the Parties respectfully request that the Court dismiss the appeal in accordance with Rule 260(b), SCACR, with no costs assessed to any Party under Rule 222, SCACR.

This request has been discussed with and agreed to by all parties to this appeal and the underlying action.

I SO MOVE:

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

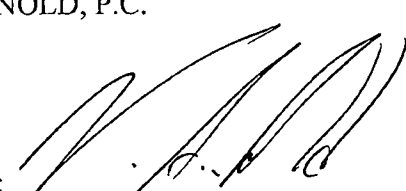
BY: 

Lucas J. Asper (S.C. Bar No. 77902)
300 North Main Street, Suite 500
Greenville, SC 29601
Phone: (864) 271-1300
Fax: (864) 235-4754
lucas.asper@odnss.com
Attorney for Respondent-Appellant

June 30, 2016
Greenville, South Carolina

I CONSENT:

LAW OFFICE OF W. ANDREW
ARNOLD, P.C.

BY: 

W. Andrew Arnold (S.C. Bar No. 65311)
712 E. Washington Street
Greenville, SC 29601
Phone: (864) 242-4800
Fax: (864) 242-4885
andy@aalawfirm.com
Attorney for Appellant-Respondents

June 27, 2016
Greenville, South Carolina

25131587.1

Ogletree Deakins

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

Attorneys at Law

The Ogletree Building
300 North Main Street, Suite 500
Greenville, SC 29601
Telephone: 864.271.1300
Facsimile: 864.235.8806
www.ogletreedeakins.com

Lisa A. Harrison
864.240.8338
lisa.harrison@ogletreedeakins.com

June 30, 2016

The Hon. Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

RE: **Team IA, Inc. v. Cicero Lucas**
C.A. No. 2009-CP-32-1078
Appellate Case No. 2015-002629

RECEIVED
JUL 05 2016
SC Court of Appeals

Dear Ms. Kitchings:

Please find enclosed the original and seven copies of the Consent Motion to Dismiss Appeal in the above-referenced matter. Also enclosed is our check in the amount of \$25.00 for the motion filing fee. Please file the original and return the filed copy to us in the self-addressed, stamped envelope enclosed.

If you have any questions or concerns, please do not hesitate to contact our office. Thank you for your assistance with this matter.

Sincerely,



Lisa A. Harrison
Practice Assistant

/lah

Enclosures

cc: W. Andrew Arnold, Esq.

25322367.1

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Team IA, inc.

Plaintiff

v.

Cicero Lucas

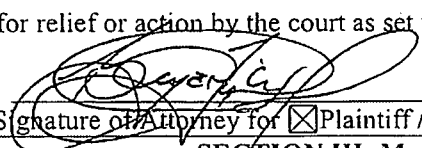
Defendant

COPY

IN THE COURT OF COMMON PLEAS

CASE NO. 2009-CP-10-1651

MOTION INFORMATION FORM
AND COVER SHEET

Plaintiff's Attorney: Bryan M. J. Triplett Bar No.: 102427 Address: P.O. Box 61110 Columbia, SC 29260 phone: 803-252-7693 fax: 803-254-5719 e-mail: btriplett@brunerpowell.com		Defendant's Attorney: Julio E. Mendoz, Jr. Bar No. Address: PO Drawer 2426 Columbia, SC 29202 phone: fax: e-mail:	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: Motion to Reconsider, Alter or Amend Estimated Time Needed: 15 minutes Court Reporter Needed: YES / NO			
SECTION II: Motion Type			
☒ Written motion attached ☐ Form Motion -- I hereby move for relief or action by the court as set forth in the attached proposed order.			
 Signature of Attorney for ☒ Plaintiff / ☐ Defendant		2017 JAN 13 PM 3:17 FILED CLERK OF COURT JAN 13 2017 Date submitted	
SECTION III: Motion Fee			
☒ PAID - AMOUNT: 25.00 ☐ EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support (check reason) ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order: ☐ Other:		JUDGE _____ CODE: _____ Date: _____	
CLERK'S VERIFICATION			
Collected by: _____		Date Filed: _____	
☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED - AMOUNT DUE: _____			

STATE OF SOUTH CAROLINA)

BEFORE THE MASTER-IN-EQUITY

COUNTY OF LEXINGTON)

C/A No.: 2009-CP-32-01078

Team IA, Inc.,)

Petitioner,)

v.)

Cicero Lucas,)

Respondent.)

**MOTION TO RECONSIDER,
ALTER OR AMEND**

Petitioner Team AI, Inc. ("Petitioner"), by and through its undersigned counsel, hereby moves this Honorable Court pursuant to Rules 52 and 59, SCRCP, to reconsider, alter or amend the Order issued December 15, 2016 and filed December 22, 2016 in the above-referenced matter denying Petitioner's post-judgment attorney's fees and costs (hereinafter, "the Order"). Counsel for Petitioner received written notice of entry of the Order on January 3, 2017. This motion is made upon the following grounds:

- (1) The Court erred in ruling Petitioner's claim for post-judgment attorney's fees and costs is not supported by the law of the case.
- (2) The Court erred when it interpreted the trial court's prior ruling that Petitioner is entitled to "any and all reasonable attorney's fees, expenses, and court costs incurred in connection with the enforcement of Team IA's rights" to mean "any and all reasonable attorney's fees, expenses, and court costs incurred *prior to entry of judgment* in connection with the enforcement of Team IA's rights." Nothing in the trial court's ruling limited its finding to attorney's fees and costs incurred prior to entry of judgment, and the Court erred by inserting that limitation on the trial court's order.
- (3) The Court erred in finding the trial court's prior ruling made no ruling, discussion or mention about the allowability of post-judgment attorney's fees and expenses.
- (4) The Court erred when it declined to ascertain and give legal effect to the parties' intentions as determined by the clear and unambiguous contract language. "If its

language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect." Ellie, Inc. v. Miccichi, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004). The Court made no finding that the Employment Agreement was ambiguous and, therefore, was bound to give effect to the parties' agreement based upon the contract terms. However, the Court failed to give effect to the phrase "any and all" based upon the plain, ordinary and popular meaning of those words. Rather, the Court construed the parties' agreement to include a limitation in the fee-shifting provision to which neither party agreed and which construction finds no support in the record.

- (5) The Court erred when it interpreted the fee-shifting provision in the Employment Agreement to mean "any and all reasonable attorney's fees, expenses, and court costs incurred *prior to entry of judgment* in connection with the enforcement of Employer's rights." By interpreting the contract in that manner, the Court rewrote a clear and unambiguous term in the parties' agreement and injected a limitation into the parties' agreement when the record contains no evidence or indication either party intended such a limitation as part of the agreement.
- (6) The Court erred in finding the fee-shifting provision in the Employment Agreement indicates no intent that it would apply to attorney's fees and costs incurred in pursuing collection of a judgment rendered against Respondent for breaching the Employment Agreement. To the contrary, the Employment Agreement clearly and unambiguously allows Petitioner to recover "any and all reasonable attorney's fees, expenses, and court costs" Petitioner incurred in connection with the enforcement of the Employment Agreement.
- (7) The Court erred when it denied Petitioner post-judgment fees and costs based upon the Court's reasoning that a fee-shifting provision in a contract does not apply to fees and costs incurred in connection with an appeal due to Rule 222, SCACR. The Court's reasoning was based upon Thornton v. Thornton, 328 S.C. 96, 492 S.E.2d 86 (1997), a family court case where the fee award was based upon S.C. Code Ann. § 20-7-420(2) (Supp. 1995), not a contractual provision.

Contrary to this Court's reasoning, the Supreme Court has expressly held, "Rule 222 'does not preempt an award of attorney's fees to which one is otherwise entitled.'" Muller v. Myrtle Beach Golf & Yacht Club, 313 S.C. 412, 416, 438 S.E.2d 248, 250 (1993) (quoting McDowell v. S.C.D.S.S., 304 S.C. 539, 543, 405 S.E.2d 830 (1991)). Furthermore, Muller Court held the mechanic's lien statute, S.C. Code Ann. § 29-5-10 allowing a prevailing party to recover "[t]he costs which may arise in enforcing or defending against the lien under this chapter, including a reasonable attorney's fee," extended to allow recovery of appellate and post-appellate fees and costs:

[A]lthough Winters may not recover the \$ 750 fee under Rule 222, he may recover appellate costs under § 29-5-10.

Third, the post-appellate fees incurred in the collection of trial and appellate fees may also be recoverable under § 29-5-10. See Bowen & Smoot v. Plumlee, ___ S.C. ___, 417 S.E.2d 855 (1992) (trial court had authority to determine award of attorney's fees as a result of case being remanded).

Accordingly, § 29-5-10 entitles Winters to all costs incurred in defending the mechanic's lien action up to the amount of the lien being foreclosed. Since Circuit Court erroneously failed to exercise jurisdiction, we reverse and remand for a final determination of attorney's fees.

Muller v. Myrtle Beach Golf & Yacht Club, 313 S.C. 412, 416, 438 S.E.2d 248, 250 (1993). Therefore, the Court's erroneously denied Petitioner's claim for post-judgment attorney's fees and costs based on Rule 222, SCACR and Thornton.

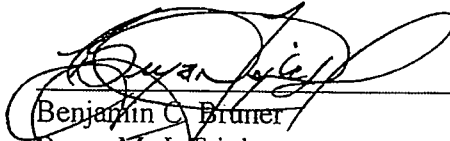
- (8) The Court erred in denying Petitioner's claim for post-judgment attorney's fees and costs based upon the reasoning that some notes in real estate foreclosure actions contain separate fee provisions for fees and costs incurred in connection with proceedings under the United States Bankruptcy Code.
- (9) The Court erred in taking judicial notice *sua sponte* of "various attorney fee clauses in notes in foreclosure actions." This case is not a foreclosure, and no mortgage or note is involved. Neither party introduced any evidence related to the fee clauses of which the Court took judicial notice; Petitioner has never seen the notes or clauses to which the Court refers; and Petitioner has no way of knowing what terms are contained in those notes.
- (10) The Court erred in denying Petitioner's claim for post-judgment fees and costs because the trial court had already awarded attorney's fees and costs of \$526,334.52. By denying Petitioner's claim on that basis, the Court not only misconstrued the record and overlooked the fact that this lawsuit endured over seven years and an appeal prior to trial, the Court failed to even consider the amount Petitioner is currently seeking in connection with Respondent's refusal to pay the judgment. The Court committed error when it determined the viability of Petitioner's request for post-judgment fees and costs by weighing the trial court's prior award of fees and costs against the actual damage award entered after Petitioner elected its remedy. Rather, the Court should weigh the amount of the current fee request against the \$804,471.86 judgment, consistent with Renaissance Enters. v. Ocean Resorts, 326 S.C. 460, 464, 483 S.E.2d 796, 798 (Ct. App. 1997), *rev'd on other grounds*, 334 S.C. 324, 513 S.E.2d 617 (1999).

- (11) The Court erred when it denied Petitioner's claim for post-judgment attorney's fees and costs because awarding those fees and costs would have the effect of compounded attorney's fees. Contrary to the Court's reasoning, awarding Petitioner reasonable fees and costs necessarily incurred in the collection of the judgment only reimburse Petitioner for those fees that have been incurred, consist. Furthermore, such an award provides the judgment debtor incentive to apply his non-exempt assets to toward satisfaction of the judgment, rather than hide assets and unnecessarily delay or obstruct a judgment creditor's collection efforts.
- (12) The Court erred when it denied Petitioner's request for post-judgment attorney's fees and costs based on the potential the Court sees for abuse of such an award. The Court's fear of abuse must yield to the clear and unambiguous terms of the parties' agreement, which must be enforced as written. Where a judgment debtor agreed to pay any and all costs related to the judgment creditor enforcing its rights, and where the judgment debtor neither pays the judgment nor surrenders his non-exempt assets to the judgment creditor, the judgment creditor has a right to recover attorney's fees and costs necessarily incurred in connection with enforcement of its rights.
- (13) The Court erred in denying Petitioner's claim for post-judgment attorney's fees and costs based on the doctrine of merger because the doctrine of merger does not apply.
- (14) The Court erred in finding Petitioner's claim for attorney's fees and costs incurred after entry of judgment is barred by the doctrine of merger. Petitioner's claim survived entry of judgment because both the parties' agreement and the judgment so provide. For the Court to find Petitioner's claim for those post-judgment attorney's fees and costs is precluded based upon the doctrine of merger constitutes reversible error.
- (15) If the Court did not err in finding the law of the case doctrine does not apply because the trial court did not address post-judgment attorney's fees and costs, then it was reversible error for the Court to hold Petitioner's claim is precluded based upon the doctrine of merger because Petitioner's claim is not barred by the doctrine of res judicata.
- (16) The Court's denial of Petitioner's claim for post-judgment attorney's fees and costs constitutes a change in the law that substantially impairs the obligations of contracts and, therefore, violates Article I, Section 4 of the South Carolina Constitution, as Article I, Section 10 of the United States Constitution. See S.C. Const. Art. I, § 4; U.S. Const. Art. I § 10.

WHEREFORE, Petitioner moves this Court to reconsider, alter and amend its Order denying Petitioner's claim for post-judgment attorney's fees and costs and to issue an Order finding Petitioner

entitled to recover any and all reasonable attorney's fees, expenses, and court costs necessarily incurred in connection with these supplemental proceedings.

BRUNER, POWELL, WALL & MULLINS, LLC



Benjamin C. Bruner
Bryan M. J. Triplett
Post Office Box 61110
Columbia, SC 29260-1110
803-252-7693
Attorneys for the Petitioner

January 13, 2017
Columbia, South Carolina

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.

JAMES L. BRUNER, P.A.
OF COUNSEL

ANN F. ALLISON

CAITLIN C. HEYWARD

ROBERT C. OSBORNE III

BRYAN M.J. TRIPLETT

** Also Admitted in District of Columbia

AUTHOR'S E-MAIL: BBRUNER@BRUNERPOWELL.COM

December 2, 2016

The Honorable James O. Spence
205 E Main Street, Suite 204
Lexington, SC 29072-3557

Re: Team IA, Inc. v. Cicero Lucas, et. al.
Civil Action No.: 2009-CP-32-01078
BPWM File No.: 11-2795.100

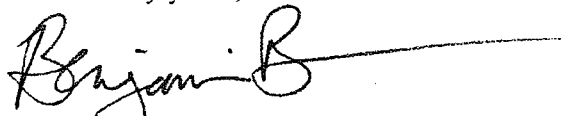
Dear Judge Spence:

Following the conference call in this matter, the parties advised the Court of a specific dispute in this case over Team IA, Inc.'s claim to recover attorney's fees and costs necessarily incurred in connection with these supplemental proceedings. The parties have agreed to request a ruling from the Court on the issue and, to that end, submit proposed orders.

Since the proceedings have not yet concluded, fees and costs are still being incurred. Therefore, I have not yet prepared an affidavit of attorney's fees and costs. If you would like, however, I will be happy to submit an affidavit setting forth the specific amount of fees and costs claimed to date.

With my highest regards, I remain

Sincerely yours,



Benjamin C. Bruner

BCB/gh

cc: The Honorable Beth Carrigg
Julio E. Mendoza, Jr., Esquire
Team IA, Inc.

STATE OF SOUTH CAROLINA)

BEFORE THE MASTER-IN-EQUITY

COUNTY OF LEXINGTON)

C/A No.: 2009-CP-32-01078

Team IA, Inc.,)

Petitioner,)

v.)

Cicero Lucas,)

Respondent.)

ORDER

THIS MATTER came before the Court for supplemental proceedings on November 3, 2016. Present at the hearing were Benjamin C. Bruner, Esquire on behalf of Petitioner Team IA, Inc. ("Petitioner"). Julio E. Mendoza, Jr. appeared on behalf of Respondent Cicero Lucas ("Respondent").

During the hearing, the Respondent appeared and was examined under oath. After the hearing, the Court carried over the matter for further proceedings to be scheduled after the Court held a scheduling conference with counsel. Following the scheduling conference, Counsel for both parties advised the Court that the Parties continue to dispute whether Petitioner is entitled to recoup attorney's fees, costs, and expenses incurred in these supplemental proceedings. Petitioner bases its claim on upon the Employment Agreement and the trial court's award of pre-judgment attorney's fees and costs. Respondent denies that claim. The Court notes the parties have requested that the Court rule on this issue. Having carefully considered the arguments and submissions of counsel, the Court finds Petitioner is entitled to recover its post-judgment attorney's fees and expenses necessarily incurred in the collection of its judgment for the following reasons.

“Generally, attorneys’ fees and costs are not recoverable unless authorized by contract or statute.” *Maybank v. BB&T Corp.*, 416 S.C. 541, 580, 787 S.E.2d 498, 518 (2016). In this case, the trial court previously held Petitioner was entitled to recover attorney’s fees and costs pursuant to the Employment Agreement between Petitioner and Respondent. The trial court held,

Paragraph VII, (G) of the Employment Agreement provides:

Fees, Costs, and Expenses: In the event Employer must enforce any of the rights herein granted to it through an attorney, Employee shall be liable for any and all reasonable attorney's fees, expenses, and court costs incurred in connection with the enforcement of Employer’s rights hereunder.

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's rights.

(Order on Post-Trial Motions p. 29.) After applying the six-factor test to determine the reasonableness of fees requested, the trial court awarded Petitioner fees and costs in the amount of \$526,334.52.

The record in this case reveals that while the parties did file cross-appeals following entry of that order, they subsequently agreed to dismiss those cross-appeals. (Order of Dismissal, entered August 2, 2016 in Appellate Case No. 2015-002629.) With the appellate case dismissed, the trial court’s ruling on the attorney’s fee issue is the law of the case, and this Court is bound by it. *See Atl. Coast Builders & Contrs., LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (“[A]n unappealed ruling, right or wrong, is the law of the case.”). Therefore, the issue in this case is not whether Petitioner is entitled to recover attorney’s fees and costs. Rather, this Court must decide whether Petitioner’s right to recover attorney’s fees and costs is limited to those fees and costs incurred prior to entry of judgment.

A review of South Carolina jurisprudence reveals no controlling case law clearly discussing whether a party's contractual right to recover attorney's fees and costs extends to supplemental proceedings. In *Renaissance Enterprises v. Ocean Resort*, however, a case subsequently reversed on other grounds, this precise issue was one of the many the Court of Appeals was asked to decide. *Renaissance Enters. v. Ocean Resorts*, 326 S.C. 460, 464, 483 S.E.2d 796, 798 (Ct. App. 1997), *rev'd on other grounds*, 334 S.C. 324, 513 S.E.2d 617 (1999).¹ While the case is not controlling, the Court of Appeals' analysis of the issue is illuminating.

In *Renaissance Enterprises*, the contract between the parties included the following fee-shifting provision:

If arbitration and/or litigation shall become necessary, [Renaissance] shall be entitled to recover from [Ocean Resorts], reasonable attorney's fees . . . and all other costs of such arbitration and/or litigation.

326 S.C. at 469, 483 S.E.2d at 801. Ocean Resorts argued that Renaissance Enterprises failed to establish its entitlement to attorney's fees incurred in supplemental proceedings because the fee-shifting provision did not clearly allow for post-judgment fees. The Court rejected that argument, reasoning,

The contract between the parties clearly provided for the recovery of reasonable attorney's fees for necessary litigation. The supplemental proceeding was brought to collect on the debt owed pursuant to the contract. We find no reason that the agreement would not encompass fees incurred in this supplemental proceeding, brought in order to determine the amount due from the underlying proceeding. See *McDowell v. South Carolina Department of Social Services*, 304 S.C. 539, 405 S.E.2d 830 (1991) (wherein the Supreme Court found, where party was entitled to attorney's fees in underlying action pursuant to statute, that party was likewise entitled to attorney's fees for subsequent litigation over such fees incurred in supplemental proceeding). Accordingly, we find no error.

¹ The Supreme Court reviewed "the Court of Appeals' decision holding that the deposit of money into court as provided in Rule 67, SCRCP, stops the accrual of interest pursuant to the contract between the parties," and reversed that holding.

Id. In addition to *Renaissance Enterprises*, other cases indicate the award of attorney's fees and costs associated with supplemental proceedings is nothing novel in South Carolina. See, e.g., *Linda Mc Co. v. Shore*, 390 S.C. 543, 550, 703 S.E.2d 499, 502 (2010) (noting special referee awarded attorney's fees pursuant to confession of judgment during supplemental proceedings).

In this case, Respondent argues these proceedings do not constitute "enforcement of the Employment Agreement." Stated otherwise, Respondent contends "enforcement of the Employment Agreement" ceased upon entry of the judgment. I disagree. It is indisputable that these supplemental proceedings were brought to collect on the judgment rendered as a result of Respondent's breach of the Employment Agreement. Respondent could have avoided the need for supplemental proceedings (and mitigated his liability for attorney's fees and costs related to these proceedings) by paying the judgment or, at a minimum, by delivering his non-exempt assets to Petitioner to be applied to the judgment. Respondent chose instead to withhold those assets, necessitating further action by Petitioner. Indeed, Respondent paid Petitioner over \$18,000 of non-exempt funds being held in a checking account only after Petitioner discovered the money during the November 3, 2016 hearing. As the trial court held, Respondent "is responsible for the attorney's fees, costs, and expenses incurred in Team IA, Inc. enforcing the terms of the Employment Agreement." These proceedings, which have been necessary only as a result of Respondent's conduct, clearly qualify as "enforcing the terms of the Employment Agreement."

Furthermore, nothing in the Employment Agreement limits Respondent's liability to pre-judgment fees and costs only. Rather, the agreement clearly and unequivocally states that if action becomes necessary Respondent will liable for "for any and all reasonable attorney's fees," regardless of whether the fees were incurred pre- or post-judgment. Had the parties wished to qualify that provision by limiting it only to pre-judgment fees and cost—or by excluding post-

judgment fees and costs—they certainly could have. They did not. As a result, the Court is bound to enforce the contract as written. *See Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 22, 738 S.E.2d 480, 492 (Ct. App. 2013) ("When the language of a contract is clear, explicit, and unambiguous, the language of the contract alone determines the contract's force and effect and the court must construe it according to its plain, ordinary, and popular meaning."); *Laser Supply & Servs. v. Orchard Park Assocs.*, 382 S.C. 326, 334, 676 S.E.2d 139, 144 (Ct. App. 2009) ("A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully.")

For these reasons, the Court finds both the trial court's prior ruling, which is the law of the case, and the clear and unambiguous language of the Employment Agreement force the conclusion that Respondent be held liable for Petitioner's reasonable attorney's fees, costs and expenses incurred in these proceedings.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Petitioner shall be and hereby is entitled to reimbursement for reasonable post-judgment attorney's fees and costs incurred in these supplemental proceedings. Petitioner or its counsel may submit a request at any time during these proceedings for attorney's fees and costs, together with supporting documents, for the Court to review.

AND IT IS SO ORDERED.

James O. Spence
Lexington County Master-in-Equity

December _____, 2016
Lexington, South Carolina

Julio E. Mendoza, Jr.
Member
Admitted in SC

December 2, 2016

The Honorable James O. Spence
Master-in-Equity
Lexington County Judicial Center
205 E. Main Street, Suite 204
Lexington, SC 29072-3557

Re: Team IA, Inc. v. Cicero Lucas, Case No. 2009-CP-32-1078, Supplementary
Proceedings

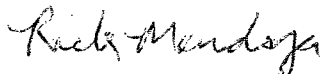
Dear Judge Spence:

Enclosed please find the proposed Order Denying Team IA, Inc.'s Claim for Post-Judgment Attorney's Fees, Expenses and Costs, which I am submitting to you as the attorney for Mr. Lucas in the above-referenced supplementary proceedings case. Ben Bruner is submitting a proposed order allowing post-judgment attorney's fees, expenses and costs for his client, Team IA, Inc.

I will also e-mail the proposed order to you in Word, in the event that you would like to make changes to it.

Please let me know if you have any questions that I can address.

With best regards,



Julio E. Mendoza, Jr.

cc: Benjamin C. Bruner, Esquire
Mr. Cicero G. Lucas, IV

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

Team IA, Inc.,

Petitioner,

vs.

Cicero Lucas,

Respondent.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2009-CP-32-1078

**ORDER DENYING TEAM IA, INC.'S
CLAIM FOR
POST-JUDGMENT ATTORNEY'S
FEES, EXPENSES AND COSTS**

This matter comes before the Court upon the asserted right and claim of Petitioner Team IA, Inc. ("Team IA") for the addition of post-judgment attorney's fees and expenses to the amount of the indebtedness due under the judgment it holds against Respondent Cicero G. Lucas, IV ("Lucas"). The matter arises in connection with supplementary proceedings Team IA commenced against Lucas upon Team IA's judgment, which supplementary proceedings are pending in this Court. The parties requested that the Court rule upon Team IA's right to add its post-judgment attorney's fees and expenses to the judgment. As set forth below, the Court holds that Team IA is not entitled to include its post-petition attorney's fees and costs in the outstanding indebtedness under the judgment.

BACKGROUND

Team IA brought action and obtained a judgment against Lucas for breach of an Employment Agreement (the "Employment Agreement"). Team IA obtained a jury verdict on March 27, 2015, after which the parties filed post-trial motions. The Circuit Court filed its Order on Post Trial Motions on November 24, 2015, and judgment was entered on December 1, 2015 (the "Judgment"). Pursuant to the Order on Post Trial Motions, the Judgment was entered for Team IA in the amount of \$278,137.34 for breach of contract damages, and in the amount of

\$526,334.52 for attorney's fees, expenses and costs incurred by Team IA in enforcing its rights under the Employment Agreement, for a total judgment amount of \$804,471.86.

In awarding Team IA attorney's fees, expenses and costs as part of the Judgment, the Circuit Court stated, "In the Employment Agreement between Team IA, Inc. and Cicero Lucas, Lucas is responsible for the attorney's fees, costs, and expenses incurred in Team IA, Inc. enforcing the terms of the Employment Agreement." See Order on Post Trial Motions, page 28. The Circuit Court cited Paragraph VII (G) of the Employment Agreement as providing:

Fees, Costs, and Expenses: In the event Employer must enforce any of the rights herein granted to it through an attorney, Employee shall be liable for any and all reasonable attorney's fees, expenses, and court costs incurred in connection with the enforcement of Employer's rights hereunder.

Id., page 29.

As set forth in the Order on Post Trial Motions, the Circuit Court awarded Team IA attorney's fees, expenses and costs after consideration of the six factors identified in *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993), applicable to a request for attorney's fees, expenses and costs. The Circuit Court awarded Team IA \$526,334.52 for the attorney's fees, expenses and costs it incurred in enforcing its rights under the Employment Agreement. This amount constitutes over 65% of the total Judgment amount.

Team IA asserts that it is entitled to add attorney's fees and expenses it incurs post-judgment in pursuing collection of the Judgment to the amount due upon the Judgment. Lucas asserts that Team IA is not entitled to add post-judgment attorney's fees and expenses to the Judgment.

ANALYSIS

In making its argument for post-judgment attorney's fees and expenses, Team IA relies upon the same provision in the Employment Agreement cited by the Circuit Court, which is

quoted above. The contract provision, by its literal wording, applies to attorney's fees, expenses and court costs "*incurred in connection with the enforcement of [Team IA's] rights hereunder.*" (emphasis added). See Order on Post Trial Motions, page 29, quoting Paragraph VII (G) of the Employment Agreement. However, Team IA's post-judgment attorney's fees and expenses are not attributable to enforcement of Team IA's rights under the Employment Agreement; instead, they are incurred in enforcing rights as a judgment creditor, which rights were obtained as a result of the Judgment. The contract provision does not state that Lucas is liable for post-judgment attorney's fees and costs incurred on account of, or in attempting to collect on, a judgment awarded to Team IA.

Upon entry of the Judgment, Team IA's rights under the Employment Agreement merged into the Judgment; under the doctrine of merger, the original claim under the contract is extinguished, and Team IA's remedy is upon the Judgment. See *Ryan v. Southern Mutual Building & Loan Association*, 50 S.C. 185, 27 S.E. 618, 619-620 (1897) (merger of the contract into the judgment precluded a post-judgment claim that the contract was usurious); *Monarc Construction, Inc. v. Aris Corporation, et al.*, 188 Md.App. 377, 392-398, 981 A.2d 822, 831-834 (2009) (doctrine of merger precluded claim for post-judgment attorney's fees, in the absence of a contract provision expressly providing for post-judgment attorney's fees and expenses); *Youngman, Trustee v. Fleet Bank, N.A. (In re A&P Diversified Technologies Realty, Inc.)*, 467 F.3d 337, 343 (3rd Cir. 2005) (merger of mortgage into the foreclosure judgment precluded mortgagee's claim for post-judgment attorney's fees in the bankruptcy case of the borrower); *Allison v. John M. Biggs, Inc., et al.*, 121 Idaho 567, 568, 826 P.2d 916, 917 (1992) ("While I.C. § 12-120(3) provides for an award of attorney fees in a civil action to recover on a promissory note, it is also elementary that after judgment a cause of action based on a note is merged into the judgment thereby extinguishing the note as the basis for the post-judgment collection

proceedings.”); and *Woodcraft Construction, Inc. v. Hamilton*, 56 Wash.App 885, 887-888, 786 P.2d 307, 308 (1990) (“Here, as in *Caine*, the judgment based upon the promissory note extinguished the note and the debtor then became obligated on the judgment. The attorney fee provision in the note merged into the judgment and ceased to exist. Therefore, there was no contractual basis upon which to award attorney fees and costs to either party.”). *See also Kanawha-Gauley Coal & Coke Company v. Pittston Minerals Group, Incorporated*, 501 Fed.Appx. 247, 254-255 (4th Cir. 2012) (“Without the necessary clear, unambiguous, and unequivocal language indicating the parties’ express intent to agree on a post-judgment interest rate,” the doctrine of merger eliminated the contract interest rate provision, and interest would not accrue on the judgment at the contract rate.).¹

The merger doctrine has long been recognized in South Carolina, and was explained in the *Moore v. Holland*, 16 S.C. 15, 27 (1881), as follows: “A judgment of this sort involves two ideas, - the contract upon which it is rendered, and the judgment itself. The one is the act of the parties, the other is the act of the court. They are entirely separate and distinct.” *Accord, Ryan v. Southern Mutual Building & Loan Association*, 27 S.E. at 620.

The Court notes that post-judgment attorney’s fees and expenses were allowed in *Renaissance Enterprises, Inc. v. Ocean Resorts, Inc.*, 326 S.C. 460, 483 S.E.2d 796 (Ct.App. 1997), on the basis of a contract provision stating that, “[i]f arbitration and/or litigation shall become necessary,” the prevailing party would be entitled to recovery of “reasonable attorney’s fees and all other costs of such arbitration and/or litigation.” *Id.*, 326 S.C. at 469, 483 S.E.2d at

¹ The Court notes that post-judgment attorney’s fees have been allowed where the contract provision expressly provided for post-judgment attorney’s fees and expenses, e.g., *Arbor Lake, LLC v. Enterprise Bank & Trust*, 334 P.3d 344 (2014), or where a statute specifically provides for post-judgment attorney’s fees, e.g., Cal. Civ. Pro. Code § 685.040 and Idaho Code Ann. § 12-120(5). In South Carolina, there is neither a statute nor a rule providing that judgment creditors are entitled to receive post-judgment attorney’s fees and expenses incurred in pursuing collection of a judgment.

801. However, several points must also be noted. First, this decision was reversed (on other grounds) by the South Carolina Supreme Court in *Renaissance Enterprises, Inc. v. Ocean Resorts, Inc.*, 334 S.C. 324, 513 S.E.2d 617 (1999), and thus it has no precedential effect. Second, the contract provision specifically references litigation “and all . . . costs of such . . . litigation.” In finding the provision should include post-judgment fees, the Court of Appeals stated, in footnote 2, “Further the amount of fees awarded appears to be negligible in consideration of the amount of money in dispute and the fact that not all issues have been resolved in favor of Ocean Resorts.” 326 S.C. at 469, 483 S.E.2d at 801. In this case, over 65% of the Judgment amount, \$526,334.52, is for attorney’s fees and expenses incurred by Team IA in enforcing its rights under the Employment Agreement, and in light of the size and scope of that award, the addition of post-judgment fees and expenses cannot be deemed negligible. In this regard, allowing additional attorney’s fees and expenses for post-judgment collection efforts would have the effect of compounded attorney’s fees. The provision in the Employment Agreement indicates no intent that it should be given this effect. Third, the doctrine of merger is not discussed, or even mentioned, in *Renaissance Enterprises, Inc. v. Ocean Resorts, Inc.*, *supra.*, raising the question of whether the non-prevailing party argued the merger doctrine. Without discussion, or even mention, of the merger doctrine it is not proper to assume that the Court of Appeals rejected the doctrine or found it inapplicable to the facts of that case.² This Court finds that the decision in *Renaissance Enterprises, Inc. v. Ocean Resorts, Inc.*, *supra.*, is inapplicable to this case.

The doctrine of merger is applicable to this case. The Employment Agreement provision

² It is well settled that issues not preserved for appeal are deemed abandoned in the appeal and the appellate court need not rule upon them. *See, e.g., Degenhart v. Knights of Columbus*, 309 S.C. 114, 118, 420 S.E.2d 495, 497 (1992).

does not expressly provide for post-judgment attorney's fees and expenses, and South Carolina does not have a statute or rule providing that judgment creditors are entitled to post-judgment attorney's fees and expenses. Team IA's claims under the Employment Agreement merged into the Judgment, and the contract provision for attorney's fees and expenses was extinguished by entry of the Judgment.

CONCLUSION

Team IA's remedy is upon its Judgment, not upon the Employment Agreement. The doctrine of merger applies to this case, to the effect that the claims under the Employment Agreement are merged into the Judgment and the contract provisions are extinguished. The attorney's fee and expense provision in the Employment Agreement does not expressly include post-judgment attorney's fees and expenses, so as to survive merger into the Judgment, and it is now extinguished by merger into the Judgment. Team IA's request for post-judgment attorney's fees, expenses and costs must be denied.

Therefore, it is ORDERED, ADJUDGED AND DECREED that Team IA is not entitled to include post-judgment attorney's fees and expenses as part of Lucas' indebtedness under the Judgment, and its claim for post-judgment attorney's fees and expenses is hereby denied.

AND IT IS SO ORDERED.

December __, 2016

Lexington, South Carolina

James O. Spence
Master-in-Equity for Lexington County

From: SPENCE, JAMES <JSPENCE@lex-co.com>
Sent: Monday, December 05, 2016 1:37 PM
To: Mendoza, Rick; Ben Bruner
Cc: Ro Lucas (RLucas@myfivepoint.com); Bridget Steele
Subject: RE: Team IA, Inc. v. Cicero Lucas, Case No. 2009-CP-32-1078 [IWOV-NPCOL1.FID1722223]

Got it-thanks to all.

JOS

Judge James O. Spence
Lexington County Master-In-Equity
Special Circuit Court Judge
205 E. Main Street, Suite 204
Lexington, SC 29072
ph: 803-785-8291 fax: 803-785-0609

JUDGE CONTACT GUIDELINES: Please note that ethically a judge can not communicate by phone, letter or email with one party to a law suit nor can a judge give anyone legal advice. Lawsuits must be resolved by our rules of law, court, evidence and civil procedure--not by phone calls, letters, or emails. Please contact a lawyer to advise you of your legal rights. Thank-you for your consideration.

CONFIDENTIALITY NOTICE: This e-mail message, including any attachments, is for the sole use of the intended recipient(s) and may contain confidential, proprietary, and/or privileged information protected by law. If you are not the intended recipient, you may not read, use, copy, or distribute this e-mail message or its attachments. If you believe you have received this e-mail message in error, please contact the sender by reply e-mail or telephone immediately and destroy all copies of the original message.

From: Mendoza, Rick [mailto:RMendoza@nexsenpruet.com]
Sent: Monday, December 05, 2016 1:36 PM
To: Ben Bruner; SPENCE, JAMES
Cc: Ro Lucas (RLucas@myfivepoint.com); Bridget Steele
Subject: RE: Team IA, Inc. v. Cicero Lucas, Case No. 2009-CP-32-1078 [IWOV-NPCOL1.FID1722223]

Dear Judge Spence,

Mr. Bruner is correct – Mr. Lucas is not challenging the reasonableness of specific fees and expenses at this time. The issue is the right of Team IA to include the post-judgment fees and expenses in the judgment indebtedness.

With best regards,
Rick

Julio E. Mendoza, Jr.
Member
Nexsen Pruet, LLC
1230 Main Street, Suite 700
Columbia, SC 29201
Post Office Box 2426 (29202)

T: 803.540.2026, F: 8037271478
RMendoza@nexsenpruet.com

www.nexsenpruet.com

From: Ben Bruner [<mailto:BBruner@brunerpowell.com>]
Sent: Monday, December 5, 2016 1:31 PM
To: 'SPENCE, JAMES' <JSPENCE@lex-co.com>
Cc: Mendoza, Rick <RMendoza@nexsenpruet.com>; Ro Lucas (RLucas@myfivepoint.com) <RLucas@myfivepoint.com>; Bridget Steele <bstele@brunerpowell.com>
Subject: RE: Team IA, Inc. v. Cicero Lucas, Case No. 2009-CP-32-1078 [IWOV-NPCOL1.FID1722223]

Dear Judge Spence,

As part of the communications I have had with Mr. Mendoza, I gave him a specific dollar amount we were claiming up to that time. I will be happy to submit an affidavit of attorney's fees and costs so the Court has the specific number, but the amount is not yet certain because these proceedings have not concluded. Any additional fees and costs incurred in collecting the judgment will be added to the amount claimed.

Frankly, I am not sure the amount claimed affects the positions the parties have taken in the proposed orders the parties submitted. Mr. Lucas is not contesting the reasonableness of the fees claimed yet, just my client's right to recoup them. If any fees and costs are awarded, Mr. Lucas will certainly have the right to challenge the amount awarded if he so choose. As an initial matter, however, the parties simply need a decision on Team IA's right to post-judgment fees and costs.

I hope this explanation helps.

With my highest regards,

Ben

Benjamin C. Bruner
BrunerPowell
Bruner, Powell, Wall & Mullins, LLC
P.O. Box 61110
Columbia, SC 29260-1110
(p) 803.252.7693
(f) 803.254.5719
www.BrunerPowell.com

From: SPENCE, JAMES [<mailto:JSPENCE@lex-co.com>]
Sent: Monday, December 05, 2016 12:39 PM
To: Ben Bruner <BBruner@brunerpowell.com>
Cc: 'Mendoza, Rick' <RMendoza@nexsenpruet.com>; Ro Lucas (RLucas@myfivepoint.com) <RLucas@myfivepoint.com>; Bridget Steele <bstele@brunerpowell.com>
Subject: RE: Team IA, Inc. v. Cicero Lucas, Case No. 2009-CP-32-1078 [IWOV-NPCOL1.FID1722223]

Dec. 5, 2016

Hope all well at home and work & that everyone has a blessed Holidays.

- (1) Your memos slowly moving forward in the "to do" box.
- (2) Would that if claim involves right to attorney fees, that parties would want to know actually dollar amount in dispute.

Thanks to all,

JOS

Judge James O. Spence
Lexington County Master-In-Equity
Special Circuit Court Judge
205 E. Main Street, Suite 204
Lexington, SC 29072
ph: 803-785-8291 fax: 803-785-0609

JUDGE CONTACT GUIDELINES: Please note that ethically a judge can not communicate by phone, letter or email with one party to a law suit nor can a judge give anyone legal advice. Lawsuits must be resolved by our rules of law, court, evidence and civil procedure--not by phone calls, letters, or emails. Please contact a lawyer to advise you of your legal rights. Thank-you for your consideration.

CONFIDENTIALITY NOTICE: This e-mail message, including any attachments, is for the sole use of the intended recipient(s) and may contain confidential, proprietary, and/or privileged information protected by law. If you are not the intended recipient, you may not read, use, copy, or distribute this e-mail message or its attachments. If you believe you have received this e-mail message in error, please contact the sender by reply e-mail or telephone immediately and destroy all copies of the original message.

From: Ben Bruner [<mailto:BBruner@brunerpowell.com>]

Sent: Friday, December 02, 2016 3:30 PM

To: SPENCE, JAMES

Cc: 'Mendoza, Rick'; Ro Lucas (RLucas@myfivepoint.com); Bridget Steele

Subject: RE: Team IA, Inc. v. Cicero Lucas, Case No. 2009-CP-32-1078 [IWOV-NPCOL1.FID1722223]

Dear Judge Spence:

Please find attached a copy of my cover letter and proposed order on the attorney's fee issue in this case. Like Mr. Mendoza, I am also attaching a copy in Word.

For ease of reference, I am also attaching a copy of Judge Griffith's order on post-trial motions, to which my proposed order refers.

If you have trouble opening any of these attachments or need anything further from my office, please do not hesitate to ask.

Best,

Ben

Benjamin C. Bruner
BrunerPowell
Bruner, Powell, Wall & Mullins, LLC
P.O. Box 61110
Columbia, SC 29260-1110
(p) 803.252.7693
(f) 803.254.5719
www.BrunerPowell.com

From: Mendoza, Rick [<mailto:RMendoza@nexsenpruet.com>]
Sent: Friday, December 02, 2016 2:22 PM
To: 'Jspence@lex-co.com' <Jspence@lex-co.com>
Cc: Ben Bruner <BBruner@brunerpowell.com>; Ro Lucas (RLucas@myfivepoint.com) <RLucas@myfivepoint.com>
Subject: Team IA, Inc. v. Cicero Lucas, Case No. 2009-CP-32-1078 [IWOV-NPCOL1.FID1722223]

Dear Judge Spence:

Attached is a copy of my letter to you with the proposed Order Denying Team IA, Inc.'s Claim for Post-Judgment Attorney's Fees, Expenses and Costs that I submit to you on behalf of Mr. Lucas. As explained in Ben Bruner's e-mail message to you of November 18, 2016, the parties request that you rule on the issue of Team IA, Inc.'s claim of right to post-judgment attorney's fees and expenses, and the parties are each submitting a proposed order to you on the issue.

Also attached is my proposed order in Word, in the event that you would like to revise it.

Please let me know if you have any questions that I can address.

With best regards,
Rick

Julio E. Mendoza, Jr.
Member
Nexsen Pruet, LLC
1230 Main Street, Suite 700
Columbia, SC 29201
Post Office Box 2426 (29202)
T: 803.540.2026, F: 803.727.1478
RMendoza@nexsenpruet.com

www.nexsenpruet.com



*** CONFIDENTIAL COMMUNICATION *** The information contained in this message may contain legally privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or duplication of this transmission is strictly prohibited. If you have received this communication in error, please notify us by telephone or email immediately and return the original message to us or destroy all printed and electronic copies. Nothing in this transmission is intended to be an electronic signature nor to constitute an agreement of any kind under applicable law unless otherwise expressly indicated. Intentional interception or dissemination of electronic mail not belonging to you may violate federal or state law.

From: SPENCE, JAMES <JSPENCE@lex-co.com>
Sent: Tuesday, December 06, 2016 9:16 AM
To: Ben Bruner
Cc: 'Mendoza, Rick'; Ro Lucas (RLucas@myfivepoint.com); Bridget Steele
Subject: RE: Team IA, Inc. v. Cicero Lucas, Case No. 2009-CP-32-1078 [IWOV-NPCOL1.FID1722223]

Dec. 6, 2016

Hope all well at home and work.

I ask both of you to:

- (1) Resubmit WORD Orders with your case law attached. I don't have law clerk nor access to all cases.
- (2) Review Dilling v Foster 21. S.C. 334 (1884) Not sure how applicable, but take a look.

Please review cases to ensure when cases discuss Supplemental Proceeding it means the statutory legal process to collect assets to satisfy a debt, not a second or additional hearing held to clarify underlying trial matter(s).

Seems legal process to obtain a judgment and collect assets to satisfy the judgment can consist of the following steps:

- (1) Trial
- (2) Appeal
- (3) Statutory Supplemental Proceeding.
- (4) Bankruptcy.

Am I correct that basic positions are that (1) Plaintiff argues contractual attorney fees cover all situations from trial to collection while (2) Defendant argues, contractual attorney fees end with trial? No ability to collect attorney fees in other situations unless by statute or court rule?

Thanks to all,

P.S. Friday response be great.

JOS

Judge James O. Spence
Lexington County Master-In-Equity
Special Circuit Court Judge
205 E. Main Street, Suite 204
Lexington, SC 29072
ph: 803-785-8291 fax: 803-785-0609

JUDGE CONTACT GUIDELINES: Please note that ethically a judge can not communicate by phone, letter or email with one party to a law suit nor can a judge give anyone legal advice. Lawsuits must be resolved by our rules of law, court, evidence and civil procedure--not by phone calls, letters, or emails. Please contact a lawyer to advise you of your legal rights. Thank-you for your consideration.

CONFIDENTIALITY NOTICE: This e-mail message, including any attachments, is for the sole use of the intended recipient(s) and may contain confidential, proprietary, and/or privileged information protected by law. If you are not the intended recipient, you may not read, use, copy, or distribute this e-mail message or its attachments. If you believe you have received this e-mail message in error, please contact the sender by reply e-mail or telephone immediately and destroy all copies of the original message.

From: Ben Bruner [mailto:BBruner@brunerpowell.com]
Sent: Friday, December 02, 2016 3:30 PM
To: SPENCE, JAMES
Cc: 'Mendoza, Rick'; Ro Lucas (RLucas@myfivepoint.com); Bridget Steele
Subject: RE: Team IA, Inc. v. Cicero Lucas, Case No. 2009-CP-32-1078 [IWOV-NPCOL1.FID1722223]

Dear Judge Spence:

Please find attached a copy of my cover letter and proposed order on the attorney's fee issue in this case. Like Mr. Mendoza, I am also attaching a copy in Word.

For ease of reference, I am also attaching a copy of Judge Griffith's order on post-trial motions, to which my proposed order refers.

If you have trouble opening any of these attachments or need anything further from my office, please do not hesitate to ask.

Best,

Ben

Benjamin C. Bruner
BrunerPowell
Bruner, Powell, Wall & Mullins, LLC
P.O. Box 61110
Columbia, SC 29260-1110
(p) 803.252.7693
(f) 803.254.5719
www.BrunerPowell.com

From: Mendoza, Rick [mailto:RMendoza@nexsenpruet.com]
Sent: Friday, December 02, 2016 2:22 PM
To: 'Jspence@lex-co.com' <Jspence@lex-co.com>
Cc: Ben Bruner <BBruner@brunerpowell.com>; Ro Lucas (RLucas@myfivepoint.com) <RLucas@myfivepoint.com>
Subject: Team IA, Inc. v. Cicero Lucas, Case No. 2009-CP-32-1078 [IWOV-NPCOL1.FID1722223]

Dear Judge Spence:

Attached is a copy of my letter to you with the proposed Order Denying Team IA, Inc.'s Claim for Post-Judgment Attorney's Fees, Expenses and Costs that I submit to you on behalf of Mr. Lucas. As explained in Ben Bruner's e-mail message to you of November 18, 2016, the parties request that you rule on the issue of Team IA, Inc.'s claim of right to post-judgment attorney's fees and expenses, and the parties are each submitting a proposed order to you on the issue.

Also attached is my proposed order in Word, in the event that you would like to revise it.

Please let me know if you have any questions that I can address.

With best regards,
Rick

Julio E. Mendoza, Jr.
Member
Nexsen Pruet, LLC
1230 Main Street, Suite 700
Columbia, SC 29201
Post Office Box 2426 (29202)
T: 803.540.2026, F: 803.727.1478
RMendoza@nexsenpruet.com

www.nexsenpruet.com



*** CONFIDENTIAL COMMUNICATION *** The information contained in this message may contain legally privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or duplication of this transmission is strictly prohibited. If you have received this communication in error, please notify us by telephone or email immediately and return the original message to us or destroy all printed and electronic copies. Nothing in this transmission is intended to be an electronic signature nor to constitute an agreement of any kind under applicable law unless otherwise expressly indicated. Intentional interception or dissemination of electronic mail not belonging to you may violate federal or state law.

From: Ben Bruner
Sent: Friday, December 09, 2016 3:08 PM
To: 'SPENCE, JAMES'
Cc: 'Mendoza, Rick'; Ro Lucas (RLucas@myfivepoint.com); Bridget Steele
Subject: RE: Team IA, Inc. v. Cicero Lucas, Case No. 2009-CP-32-1078 [IWOV-NPCOL1.FID1722223]
Attachments: doc07003720161209151413.pdf; Proposed Order on Atty Fees.docx; Post-Trial Order, Cases.pdf

Dear Judge Spence,

Please find attached a letter, proposed order and authority in response to the Court's December 6th e-mail.

Best,

Ben

Benjamin C. Bruner
BrunerPowell
Bruner, Powell, Wall & Mullins, LLC
P.O. Box 61110
Columbia, SC 29260-1110
(p) 803.252.7693
(f) 803.254.5719
www.BrunerPowell.com

From: SPENCE, JAMES [mailto:JSPENCE@lex-co.com]
Sent: Tuesday, December 06, 2016 9:16 AM
To: Ben Bruner <BBruner@brunerpowell.com>
Cc: 'Mendoza, Rick' <RMendoza@nexsenpruet.com>; Ro Lucas (RLucas@myfivepoint.com) <RLucas@myfivepoint.com>; Bridget Steele <bsteale@brunerpowell.com>
Subject: RE: Team IA, Inc. v. Cicero Lucas, Case No. 2009-CP-32-1078 [IWOV-NPCOL1.FID1722223]

Dec. 6, 2016

Hope all well at home and work.

I ask both of you to:

- (1) Resubmit WORD Orders with your case law attached. I don't have law clerk nor access to all cases.
- (2) Review Dilling v Foster 21. S.C. 334 (1884) Not sure how applicable, but take a look.

Please review cases to ensure when cases discuss Supplemental Proceeding it means the statutory legal process to collect assets to satisfy a debt, not a second or additional hearing held to clarify underlying trial matter(s).

Seems legal process to obtain a judgment and collect assets to satisfy the judgment can consist of the following steps:

- (1) Trial
- (2) Appeal

- (3) Statutory Supplemental Proceeding.
- (4) Bankruptcy.

Am I correct that basic positions are that (1) Plaintiff argues contractual attorney fees cover all situations from trial to collection while (2) Defendant argues, contractual attorney fees end with trial? No ability to collect attorney fees in other situations unless by statute or court rule?

Thanks to all,

P.S. Friday response be great.

JOS

Judge James O. Spence
Lexington County Master-In-Equity
Special Circuit Court Judge
205 E. Main Street, Suite 204
Lexington, SC 29072
ph: 803-785-8291 fax: 803-785-0609

JUDGE CONTACT GUIDELINES: Please note that ethically a judge can not communicate by phone, letter or email with one party to a law suit nor can a judge give anyone legal advice. Lawsuits must be resolved by our rules of law, court, evidence and civil procedure--not by phone calls, letters, or emails. Please contact a lawyer to advise you of your legal rights. Thank-you for your consideration.

CONFIDENTIALITY NOTICE: This e-mail message, including any attachments, is for the sole use of the intended recipient(s) and may contain confidential, proprietary, and/or privileged information protected by law. If you are not the intended recipient, you may not read, use, copy, or distribute this e-mail message or its attachments. If you believe you have received this e-mail message in error, please contact the sender by reply e-mail or telephone immediately and destroy all copies of the original message.

From: Ben Bruner [<mailto:BBruner@brunerpowell.com>]
Sent: Friday, December 02, 2016 3:30 PM
To: SPENCE, JAMES
Cc: 'Mendoza, Rick'; Ro Lucas (RLucas@myfivepoint.com); Bridget Steele
Subject: RE: Team IA, Inc. v. Cicero Lucas, Case No. 2009-CP-32-1078 [IWOV-NPCOL1.FID1722223]

Dear Judge Spence:

Please find attached a copy of my cover letter and proposed order on the attorney's fee issue in this case. Like Mr. Mendoza, I am also attaching a copy in Word.

For ease of reference, I am also attaching a copy of Judge Griffith's order on post-trial motions, to which my proposed order refers.

If you have trouble opening any of these attachments or need anything further from my office, please do not hesitate to ask.

Best,

Ben

Benjamin C. Bruner
BrunerPowell
Bruner, Powell, Wall & Mullins, LLC
P.O. Box 61110
Columbia, SC 29260-1110
(p) 803.252.7693
(f) 803.254.5719
www.BrunerPowell.com

From: Mendoza, Rick [<mailto:RMendoza@nexsenpruet.com>]
Sent: Friday, December 02, 2016 2:22 PM
To: 'Jspence@lex-co.com' <Jspence@lex-co.com>
Cc: Ben Bruner <BBruner@brunerpowell.com>; Ro Lucas (RLucas@myfivepoint.com) <RLucas@myfivepoint.com>
Subject: Team IA, Inc. v. Cicero Lucas, Case No. 2009-CP-32-1078 [IWOV-NPCOL1.FID1722223]

Dear Judge Spence:

Attached is a copy of my letter to you with the proposed Order Denying Team IA, Inc.'s Claim for Post-Judgment Attorney's Fees, Expenses and Costs that I submit to you on behalf of Mr. Lucas. As explained in Ben Bruner's e-mail message to you of November 18, 2016, the parties request that you rule on the issue of Team IA, Inc.'s claim of right to post-judgment attorney's fees and expenses, and the parties are each submitting a proposed order to you on the issue.

Also attached is my proposed order in Word, in the event that you would like to revise it.

Please let me know if you have any questions that I can address.

With best regards,
Rick

Julio E. Mendoza, Jr.
Member
Nexsen Pruet, LLC
1230 Main Street, Suite 700
Columbia, SC 29201
Post Office Box 2426 (29202)
T: 803.540.2026, F: 803.727.1478
RMendoza@nexsenpruet.com

www.nexsenpruet.com



*** CONFIDENTIAL COMMUNICATION *** The information contained in this message may contain legally privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or duplication of this transmission is strictly prohibited. If you have received this communication in error, please notify us by telephone or email immediately and return the original message to us or destroy all printed and electronic copies. Nothing in this transmission is intended to be an electronic signature nor to constitute an agreement of any kind under applicable law unless otherwise expressly indicated. Intentional interception or dissemination of electronic mail not belonging to you may violate federal or state law.

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.

JAMES L. BRUNER, P.A.
OF COUNSEL

ANN F. ALLISON
CAITLIN C. HEYWARD
ROBERT C. OSBORNE III
BRYAN M.J. TRIPLETT

** Also Admitted in District of Columbia

AUTHOR'S E-MAIL: B@BRUNER@BRUNERPOWELL.COM

December 9, 2016

VIA E-MAIL AND U.S. MAIL

The Honorable James O. Spence
205 E Main Street, Suite 204
Lexington, SC 29072-3557

Re: *Team IA, Inc. v. Cicero Lucas, et. al.*
Civil Action No.: 2009-CP-32-01078
BPWM File No.: 11-2795.100

Dear Judge Spence:

Please allow this letter to serve as Team IA, Inc.'s response to the Court's correspondence of December 6th. In that e-mail, the Court asked the parties to resubmit their respective proposed orders in Word format with the supporting case law. Those documents are being included with this letter. For ease of reference I am also submitting a bound hard copy of the authorities.

The Court also asked that the parties review the opinion in *Dilling, Baker & Co. v. Foster*, 21 S.C. 33 (1884). In *Dilling*, the trial court ordered post-judgment attorney's fees and costs pursuant to a statute currently codified as S.C. Code Ann. § 15-39-480 ("Costs of Proceeding"). Based on that order, the clerk of court entered a post-judgment award of attorney's fees and costs in the amount of \$15. No hearing was held, nor any evidence submitted as to the reasonableness of the fee sought. On appeal, the Court held the trial court erred when it construed the term "costs" in the statute to include attorney's fees. The Court further held the amount of fees and costs should have been determined by the court, not the clerk of court. 21 S.C. at 340. Notably, the Court did not hold the doctrine of merger prevented recovery of post-judgment fees. Rather, the Court reversed the award of fees based solely on statutory interpretation.

In this case, the basis for Team IA's claim is not based on a statute; it is based on the law of the case and on a contract. Furthermore, the applicable provision in the contract does not merely allow "costs" but clearly and unequivocally allows recovery of "any and all reasonable attorney's fees, expenses, and court costs incurred in connection with the enforcement of [Team IA]'s rights hereunder." Had the *Dilling* Court been faced with the facts of this case, we believe it would have enforced the contract and allowed for recovery of post-judgment attorney's fees.

Your Honor also asked that the parties review the authorities on which they rely to ensure any discussion of supplemental proceedings refers to a statutory proceeding like the one before the

Court, rather than a supplemental hearing to clarify a prior ruling. In its proposed order, Team IA cites two cases for propositions specific to supplemental proceedings. Those cases are *Renaissance Enterprises v. Ocean Resorts*, 326 S.C. 460, 483 S.E.2d 796 (Ct. App. 1997), *rev'd on other grounds*, 334 S.C. 324, 513 S.E.2d 617 (1999), and *Linda Mc Co. v. Shore*, 390 S.C. 543, 703 S.E.2d 499 (2010). In both cases, the supplemental proceedings were initiated to collect on a judgment. See *Renaissance Enterprises*, 326 S.C. at 463 (supplemental proceedings commenced after affirmation of arbitration award), and *Linda Mc Co. v. Shore*, 390 S.C. at 549 (supplemental proceedings commenced by judgment creditor's petition "alleging that [debtors] possessed assets subject to execution on the judgment."). The remaining cases in Team IA's proposed order are cited as authorities for the general law on a party's right to recover attorney's fees, the law of the case doctrine, and the enforcement of a contract's clear and unambiguous terms.

As I indicated in my e-mail response to you on Tuesday, Team IA's position is based on the law of the case and the Employment Agreement. Mr. Lucas's liability for "any and all reasonable attorney's fees, expenses, and court costs incurred in connection with the enforcement of [Team IA]'s rights" under the Employment Agreement means just that. Any and all fees, expenses and court costs. The trial court's ruling is the law of the case. While final judgment has been entered, and while that judgment did include pre-judgment fees and costs, the entry of that judgment did not extinguish Team IA's claim for additional fees and costs that my client subsequently incurred in the collection of the debt. Mr. Lucas could have avoided those fees and costs by either paying the judgment or, at a minimum, surrendering all of his non-exempt assets.

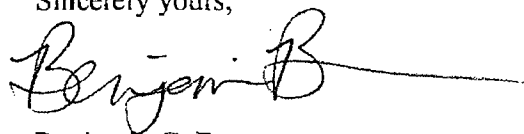
If the law in South Carolina is, as the Respondent suggests, that all contractual rights a party has merge into a final judgment, then entry of final judgment would not only extinguish a party's contractual right to attorney's fees; it would also extinguish a party's right to collect interest on the judgment at a higher, contractual rate. In other words, if the Respondent is correct that all terms of the contract merge into the judgment, then all judgments should accrue interest at the default, statutory rate set forth in S.C. Code Ann. § 34-31-20(B). However, that is not the law in South Carolina. It is well-established that a contract provision setting an interest rate supersedes Section 34-31-20(B) and continues in full force and effect post-judgment. *Sears v. Fowler*, 293 S.C. 43, 45, 358 S.E.2d 574, 575 (1987) ("The statute [31-34-20(B)] does not apply, for example, to judgments when the parties have contracted for a different rate."); *Turner Coleman, Inc. v. Ohio Constr. & Engineering, Inc.*, 272 S.C. 289, 251 S.E.2d 738 (1979) (holding judgment accrues interest at the same rate as set forth in contract). These cases directly contravene Respondent's argument that all contractual rights merge into the judgment, and they demonstrate that contract terms continue to be in full force and effect post-judgment. In this case, the parties' contract clearly provided for reimbursement for "any and all" attorney's fees.

I trust this response provides Your Honor all of the documents and information Your Honor requested. However, if you need anything further from my office, please do not hesitate to ask.

Julio E. Mendoza, Jr., Esquire
December 9, 2016
Page 3 of 3

With my highest regards, I remain

Sincerely yours,

A handwritten signature in black ink, appearing to read "Benjamin B", with a long horizontal line extending to the right.

Benjamin C. Bruner

BCB/gh

cc: The Honorable Beth Carrigg
Julio E. Mendoza, Jr., Esquire
Team IA, Inc.

STATE OF SOUTH CAROLINA	)	BEFORE THE MASTER-IN-EQUITY
	)	
COUNTY OF LEXINGTON	)	C/A No.: 2009-CP-32-01078
	)	
Team IA, Inc.,	)	
	)	
Petitioner,	)	
	)	
v.	)	ORDER
	)	
Cicero Lucas,	)	
	)	
Respondent.	)	
	)	

THIS MATTER came before the Court for supplemental proceedings on November 3, 2016. Present at the hearing were Benjamin C. Bruner, Esquire on behalf of Petitioner Team IA, Inc. ("Petitioner"). Julio E. Mendoza, Jr. appeared on behalf of Respondent Cicero Lucas ("Respondent").

During the hearing, the Respondent appeared and was examined under oath. After the hearing, the Court carried over the matter for further proceedings to be scheduled after the Court held a scheduling conference with counsel. Following the scheduling conference, Counsel for both parties advised the Court that the Parties continue to dispute whether Petitioner is entitled to recoup attorney's fees, costs, and expenses incurred in these supplemental proceedings. Petitioner bases its claim on upon the Employment Agreement and the trial court's award of pre-judgment attorney's fees and costs. Respondent denies that claim. The Court notes the parties have requested that the Court rule on this issue. Having carefully considered the arguments and submissions of counsel, the Court finds Petitioner is entitled to recover its post-judgment attorney's fees and expenses necessarily incurred in the collection of its judgment for the following reasons.

“Generally, attorneys' fees and costs are not recoverable unless authorized by contract or statute.” *Maybank v. BB&T Corp.*, 416 S.C. 541, 580, 787 S.E.2d 498, 518 (2016). In this case, the trial court previously held Petitioner was entitled to recover attorney’s fees and costs pursuant to the Employment Agreement between Petitioner and Respondent. The trial court held,

Paragraph VII, (G) of the Employment Agreement provides:

Fees, Costs, and Expenses: In the event Employer must enforce any of the rights herein granted to it through an attorney, Employee shall be liable for any and all reasonable attorney's fees, expenses, and court costs incurred in connection with the enforcement of Employer’s rights hereunder.

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's rights.

(Order on Post-Trial Motions p. 29.) After applying the six-factor test to determine the reasonableness of fees requested, the trial court awarded Petitioner fees and costs in the amount of \$526,334.52.

The record in this case reveals that while the parties did file cross-appeals following entry of that order, they subsequently agreed to dismiss those cross-appeals. (Order of Dismissal, entered August 2, 2016 in Appellate Case No. 2015-002629.) With the appellate case dismissed, the trial court’s ruling on the attorney’s fee issue is the law of the case, and this Court is bound by it. *See Atl. Coast Builders & Contrs., LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (“[A]n unappealed ruling, right or wrong, is the law of the case.”). Therefore, the issue in this case is not whether Petitioner is entitled to recover attorney’s fees and costs. Rather, this Court must decide whether Petitioner’s right to recover attorney’s fees and costs is limited to those fees and costs incurred prior to entry of judgment.

A review of South Carolina jurisprudence reveals no controlling case law clearly discussing whether a party's contractual right to recover attorney's fees and costs extends to supplemental proceedings. In *Renaissance Enterprises v. Ocean Resort*, however, a case subsequently reversed on other grounds, this precise issue was one of the many the Court of Appeals was asked to decide. *Renaissance Enters. v. Ocean Resorts*, 326 S.C. 460, 464, 483 S.E.2d 796, 798 (Ct. App. 1997), *rev'd on other grounds*, 334 S.C. 324, 513 S.E.2d 617 (1999).¹ While the case is not controlling, the Court of Appeals' analysis of the issue is illuminating.

In *Renaissance Enterprises*, the contract between the parties included the following fee-shifting provision:

If arbitration and/or litigation shall become necessary, [Renaissance] shall be entitled to recover from [Ocean Resorts], reasonable attorney's fees . . . and all other costs of such arbitration and/or litigation.

326 S.C. at 469, 483 S.E.2d at 801. Ocean Resorts argued that Renaissance Enterprises failed to establish its entitlement to attorney's fees incurred in supplemental proceedings because the fee-shifting provision did not clearly allow for post-judgment fees. The Court rejected that argument, reasoning,

The contract between the parties clearly provided for the recovery of reasonable attorney's fees for necessary litigation. The supplemental proceeding was brought to collect on the debt owed pursuant to the contract. We find no reason that the agreement would not encompass fees incurred in this supplemental proceeding, brought in order to determine the amount due from the underlying proceeding. *See McDowell v. South Carolina Department of Social Services*, 304 S.C. 539, 405 S.E.2d 830 (1991) (wherein the Supreme Court found, where party was entitled to attorney's fees in underlying action pursuant to statute, that party was likewise entitled to attorney's fees for subsequent litigation over such fees incurred in supplemental proceeding). Accordingly, we find no error.

¹ The Supreme Court reviewed "the Court of Appeals' decision holding that the deposit of money into court as provided in Rule 67, SCRCp, stops the accrual of interest pursuant to the contract between the parties," and reversed that holding.

Id. In addition to *Renaissance Enterprises*, other cases indicate the award of attorney's fees and costs associated with supplemental proceedings is nothing novel in South Carolina. *See, e.g., Linda Mc Co. v. Shore*, 390 S.C. 543, 550, 703 S.E.2d 499, 502 (2010) (noting special referee awarded attorney's fees pursuant to confession of judgment during supplemental proceedings).

In this case, Respondent argues these proceedings do not constitute "enforcement of the Employment Agreement." Stated otherwise, Respondent contends "enforcement of the Employment Agreement" ceased upon entry of the judgment. I disagree. It is indisputable that these supplemental proceedings were brought to collect on the judgment rendered as a result of Respondent's breach of the Employment Agreement. Respondent could have avoided the need for supplemental proceedings (and mitigated his liability for attorney's fees and costs related to these proceedings) by paying the judgment or, at a minimum, by delivering his non-exempt assets to Petitioner to be applied to the judgment. Respondent chose instead to withhold those assets, necessitating further action by Petitioner. Indeed, Respondent paid Petitioner over \$18,000 of non-exempt funds being held in a checking account only after Petitioner discovered the money during the November 3, 2016 hearing. As the trial court held, Respondent "is responsible for the attorney's fees, costs, and expenses incurred in Team IA, Inc. enforcing the terms of the Employment Agreement." These proceedings, which have been necessary only as a result of Respondent's conduct, clearly qualify as "enforcing the terms of the Employment Agreement."

Furthermore, nothing in the Employment Agreement limits Respondent's liability to pre-judgment fees and costs only. Rather, the agreement clearly and unequivocally states that if action becomes necessary Respondent will liable for "for any and all reasonable attorney's fees," regardless of whether the fees were incurred pre- or post-judgment. Had the parties wished to qualify that provision by limiting it only to pre-judgment fees and cost—or by excluding post-

judgment fees and costs—they certainly could have. They did not. As a result, the Court is bound to enforce the contract as written. *See Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 22, 738 S.E.2d 480, 492 (Ct. App. 2013) ("When the language of a contract is clear, explicit, and unambiguous, the language of the contract alone determines the contract's force and effect and the court must construe it according to its plain, ordinary, and popular meaning."); *Laser Supply & Servs. v. Orchard Park Assocs.*, 382 S.C. 326, 334, 676 S.E.2d 139, 144 (Ct. App. 2009) ("A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully.")

For these reasons, the Court finds both the trial court's prior ruling, which is the law of the case, and the clear and unambiguous language of the Employment Agreement force the conclusion that Respondent be held liable for Petitioner's reasonable attorney's fees, costs and expenses incurred in these proceedings.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Petitioner shall be and hereby is entitled to reimbursement for reasonable post-judgment attorney's fees and costs incurred in these supplemental proceedings. Petitioner or its counsel may submit a request at any time during these proceedings for attorney's fees and costs, together with supporting documents, for the Court to review.

AND IT IS SO ORDERED.

James O. Spence
Lexington County Master-in-Equity

December _____, 2016
Lexington, South Carolina

**Index of Additional Attachments to
December 9, 2016 e-mail from Bruner to Court**

1. Trial Court's Order on Post-Trial Motions
2. Atl. Coast Builders & Contrs., LLC v. Lewis, 398 S.C. 323, 730 S.E.2d 282 (2012)
3. Baugh v. Columbia Heart Clinic, P.A., 402 S.C. 1, 738 S.E.2d 480 (Ct. App. 2013)
4. Laser Supply & Servs. v. Orchard Park Assocs., 382 S.C. 326 *; 676 S.E.2d 139 (Ct. App. 2009)
5. Linda Mc Co. v. Shore, 390 S.C. 543, 703 S.E.2d 499 (2010)
6. Maybank v. BB&T Corp., 416 S.C. 541, 787 S.E.2d 498 (2016)
7. Renaissance Enters., Inc. v. Ocean Resorts, Inc., 326 S.C. 460, 483 S.E.2d 796 (Ct. App. 1997)
8. Renaissance Enters., Inc. v. Ocean Resorts, Inc., 334 S.C. 324, 513 S.E.2d 617 (1999)
9. Sears v. Fowler, 293 S.C. 43, 358 S.E.2d 574 (1987)
10. Turner Coleman, Inc. v. Ohio Constr. & Engineering, Inc., 272 S.C. 289, 251 S.E.2d 738 (1979)

From: Mendoza, Rick <RMendoza@nexsenpruet.com>
Sent: Friday, December 09, 2016 11:01 AM
To: 'SPENCE, JAMES'
Cc: Ben Bruner; Ro Lucas (RLucas@myfivepoint.com)
Subject: Team IA, Inc. v. Lucas, Case No. 2009-CP-32-1078 - Proposed Order on Post-Judgment Attorney's Fees and Expenses [IWOV-NPCOL1.FID1722223]
Attachments: 2ND VERSION -- Order Denying Team IA, Inc. Post-Judgment Attorney_s Fees and Expenses-c.DOCX; Case Law and Statutes-c.pdf

Dear Judge Spence,

Attached is the proposed order submitted on behalf of Mr. Lucas on the issue of the claim of right by Team IA, Inc. to add post-judgment attorney's fees, expenses and costs to the judgment indebtedness. It is in Word.

Also attached are copies of the legal authorities cited in the proposed order. This attachment consists of 90 pages. In your message on Tuesday, you asked that we attach copies of the authorities. However, if you will then need to print them (I personally still prefer to read printed copies of cases), I will be happy to have printed copies of the authorities delivered to you.

With best regards,

Rick

Julio E. Mendoza, Jr.
Member
Nexsen Pruet, LLC
1230 Main Street, Suite 700
Columbia, SC 29201
Post Office Box 2426 (29202)
T: 803.540.2026, F: 803.727.1478
RMendoza@nexsenpruet.com

www.nexsenpruet.com

NEXSEN PRUET

*** CONFIDENTIAL COMMUNICATION *** The information contained in this message may contain legally privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or duplication of this transmission is strictly prohibited. If you have received this communication in error, please notify us by telephone or email immediately and return the original message to us or destroy all printed and electronic copies. Nothing in this transmission is intended to be an electronic signature nor to constitute an agreement of any kind under applicable law unless otherwise expressly indicated. Intentional interception or dissemination of electronic mail not belonging to you may violate federal or state law.

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Team IA, Inc.,

Petitioner,

vs.

Cicero Lucas,

Respondent.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2009–CP-32-1078

**ORDER DENYING TEAM IA, INC.’S
CLAIM FOR
POST-JUDGMENT ATTORNEY’S
FEES, EXPENSES AND COSTS**

This matter comes before the Court upon the asserted right and claim of Petitioner Team IA, Inc. (“Team IA”) for the addition of post-judgment attorney’s fees and expenses to the amount of the indebtedness due under the judgment it holds against Respondent Cicero G. Lucas, IV (“Lucas”). The matter arises in connection with supplementary proceedings Team IA commenced against Lucas upon Team IA’s judgment, which supplementary proceedings are pending in this Court. The parties requested that the Court rule upon Team IA’s right to add its post-judgment attorney’s fees and expenses to the judgment. As set forth below, the Court holds that Team IA is not entitled to include its post-judgment attorney’s fees and expenses in the outstanding indebtedness under the judgment.

BACKGROUND

Team IA brought action and obtained a judgment against Lucas for breach of an Employment Agreement (the “Employment Agreement”). Team IA obtained a jury verdict on March 27, 2015, after which the parties filed post-trial motions. The Circuit Court filed its Order on Post Trial Motions on November 24, 2015, and judgment was entered on December 1, 2015 (the “Judgment”). Pursuant to the Order on Post Trial Motions, the Judgment was entered for Team IA in the amount of \$278,137.34 for breach of contract damages, and in the amount of

\$526,334.52 for attorney's fees, expenses and costs incurred by Team IA in enforcing its rights under the Employment Agreement, for a total judgment amount of \$804,471.86.

In awarding Team IA attorney's fees, expenses and costs as part of the Judgment, the Circuit Court stated, "In the Employment Agreement between Team IA, Inc. and Cicero Lucas, Lucas is responsible for the attorney's fees, costs, and expenses incurred in Team IA, Inc. enforcing the terms of the Employment Agreement." *See* Order on Post Trial Motions, page 28. The Circuit Court cited Paragraph VII (G) of the Employment Agreement as providing:

Fees, Costs, and Expenses: In the event Employer must enforce any of the rights herein granted to it through an attorney, Employee shall be liable for any and all reasonable attorney's fees, expenses, and court costs incurred in connection with the enforcement of Employer's rights hereunder.

Id., page 29.

In the Order on Post Trial Motions, the Circuit Court awarded Team IA attorney's fees, expenses and costs after consideration of the six factors identified in *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993), as applicable to a request for attorney's fees and expenses. As noted above, the Circuit Court determined that Team IA was entitled to an award of \$526,334.52 for the legal expenses it incurred in enforcing its rights under the Employment Agreement. This amount constitutes over 65% of the total Judgment amount.

Team IA asserts that it is entitled to add attorney's fees and expenses it incurs post-judgment in pursuing collection of the Judgment to the amount due upon the Judgment. Lucas asserts that Team IA is not entitled to add post-judgment attorney's fees and expenses to the Judgment.

ANALYSIS

Team IA argues that it is entitled to post-judgment attorney's fees and expenses based on (1) the Circuit Court's ruling, as a matter of the law of the case, and (2) the same provision in the

Employment Agreement cited by the Circuit Court, which is quoted above. Team IA also argues that the doctrine of merger does not apply to the contract provision for attorney's fees and expenses. Lucas argues that the Circuit Court made no ruling on post-judgment attorney's fees and expenses, and that the doctrine of merger provides that, upon entry of the Judgment, the Employment Agreement merged into the Judgment, the contract provision – which did not expressly provide for post-judgment attorney's fees and expenses – was extinguished, and Team IA's remedy is upon the Judgment, not the contract. Lucas also argues that there is no statute or rule in South Carolina providing that a judgment creditor is entitled to post-judgment attorney's fees and expenses.

For the reasons discussed below, this Court finds that Team IA is not entitled to post-judgment attorney's fees and expenses.

1. The Claim for Post-Judgment Attorney's Fees and Expenses Is Not Supported by the Law of the Case.

The Circuit Court's Order on Post Trial Motions does not include a ruling upon, and makes no mention of, post-judgment attorney's fees and expenses. The language in the Order on Post Trial Motions cited by Team IA for its law of the case argument is as follows: "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. I find that the attorney's fees, costs, and expenses incurred by Team IA were reasonable and necessary." *See* Order on Post Trial Motions, page 29. The language immediately follows the quoted Paragraph VII (G) of the Employment Agreement (quoted above), and is stated in the context of reviewing Team IA's claimed attorney's fees and expenses for purposes of determining the amount of the Judgment. The Circuit Court then proceeds to apply the *Blumberg*

v. Nealco, Inc., supra., factors to determine the allowability of the claimed attorney's fees and expenses as part of the judgment to be entered.

There is no ruling on the allowability of post-judgment attorney's fees and expenses in the Order on Post Trial Motions, or upon the survival of the contract provision following entry of the Judgment. "The law of the case applies both to those issues explicitly decided and to those issues which were necessarily decided in the former case." *Sloan Construction Company, Inc. v. Southco Grassing, Inc.*, 395 S.C. 164, 170, 717 S.E.2d 603, 606 (2011) (quoting *Nelson v. Charleston & Western Carolina Railway Co.*, 231 S.C. 351, 357, 98 S.E.2d 798, 800 (1957)). The issue before the Circuit Court was the allowability and amount of attorney's fees, expenses and costs to be included in the judgment to be entered. No ruling, discussion or mention of the allowability of post-judgment attorney's fees and expenses is made in the Order on Post Trial Motions, and Team IA's claim for post-judgment attorney's fees and expenses is not deemed decided under the case of the law doctrine.

2. The Doctrine of Merger Precludes Reliance Upon Paragraph VII (G) of The Employment Agreement.

Team IA's claim for post-judgment attorney's fees and expenses is premised upon application of Paragraph VII (G) of the Employment Agreement. The contract provision, by its literal wording, applies to attorney's fees, expenses and court costs "*incurred in connection with the enforcement of [Team IA's] rights hereunder.*" (emphasis added). See Order on Post Trial Motions, page 29, quoting Paragraph VII (G) of the Employment Agreement. However, the doctrine of merger precludes this claim. Team IA's post-judgment attorney's fees and expenses are incurred in enforcing rights as a judgment creditor, which rights were obtained as a result of the Judgment. Although an exception to the merger doctrine may exist if the contract expressly provides for *post-judgment* attorney's fees and expenses, Paragraph VII (G) does not state that

Lucas is liable for post-judgment attorney's fees and costs incurred on account of, or in attempting to collect on, a judgment awarded to Team IA. Paragraph VII (G) states that it applies to enforcement of rights existing under the Employment Agreement.

Upon entry of the Judgment, Team IA's rights under the Employment Agreement merged into the Judgment; under the doctrine of merger, the original claim under the contract is extinguished, and Team IA's remedy is upon the Judgment. *See Ryan v. Southern Mutual Building & Loan Association*, 50 S.C. 185, 27 S.E. 618, 619-620 (1897) (merger of the contract into the judgment precluded a post-judgment claim that the contract was usurious); *Monarc Construction, Inc. v. Aris Corporation, et al.*, 188 Md.App. 377, 392-398, 981 A.2d 822, 831-834 (2009) (doctrine of merger precluded claim for post-judgment attorney's fees, in the absence of a contract provision expressly providing for post-judgment attorney's fees and expenses); *Youngman, Trustee v. Fleet Bank, N.A. (In re A&P Diversified Technologies Realty, Inc.)*, 467 F.3d 337, 343 (3rd Cir. 2005) (merger of mortgage into the foreclosure judgment precluded mortgagee's claim for post-judgment attorney's fees in the bankruptcy case of the borrower); *Allison v. John M. Biggs, Inc., et al.*, 121 Idaho 567, 568, 826 P.2d 916, 917 (1992) ("While I.C. § 12-120(3) provides for an award of attorney fees in a civil action to recover on a promissory note, it is also elementary that after judgment a cause of action based on a note is merged into the judgment thereby extinguishing the note as the basis for the post-judgment collection proceedings."); and *Woodcraft Construction, Inc. v. Hamilton*, 56 Wash.App 885, 887-888, 786 P.2d 307, 308 (1990) ("Here, as in *Caine*, the judgment based upon the promissory note extinguished the note and the debtor then became obligated on the judgment. The attorney fee provision in the note merged into the judgment and ceased to exist. Therefore, there was no contractual basis upon which to award attorney fees and costs to either party."). *See also Kanawha-Gauley Coal & Coke Company v. Pittston Minerals Group, Incorporated*, 501 Fed.Appx. 247, 254-255 (4th Cir. 2012) ("Without the

necessary clear, unambiguous, and unequivocal language indicating the parties' express intent to agree on a post-judgment interest rate," the doctrine of merger eliminated the contract interest rate provision, and interest would not accrue on the judgment at the contract rate.).¹

The merger doctrine has long been recognized in South Carolina, and was explained in the *Moore v. Holland*, 16 S.C. 15, 27 (1881), as follows: "A judgment of this sort involves two ideas, - the contract upon which it is rendered, and the judgment itself. The one is the act of the parties, the other is the act of the court. They are entirely separate and distinct." *Accord, Ryan v. Southern Mutual Building & Loan Association*, 27 S.E. at 620.

The Court notes that post-judgment attorney's fees and expenses were allowed in *Renaissance Enterprises, Inc. v. Ocean Resorts, Inc.*, 326 S.C. 460, 483 S.E.2d 796 (Ct.App. 1997), on the basis of a contract provision stating that, "[i]f arbitration and/or litigation shall become necessary," the prevailing party would be entitled to recovery of "reasonable attorney's fees and all other costs of such arbitration and/or litigation." *Id.*, 326 S.C. at 469, 483 S.E.2d at 801. However, several points must also be noted. First, this decision was reversed (on other grounds) by the South Carolina Supreme Court in *Renaissance Enterprises, Inc. v. Ocean Resorts, Inc.*, 334 S.C. 324, 513 S.E.2d 617 (1999), and thus it has no precedential effect. Second, the contract provision specifically references litigation "and all . . . costs of such . . . litigation." In finding the provision should include post-judgment fees, the Court of Appeals stated, in footnote 2, "Further the amount of fees awarded appears to be negligible in consideration of the amount of money in dispute and the fact that not all issues have been resolved in favor of Ocean Resorts."

¹ The Court notes that post-judgment attorney's fees have been allowed where the contract provision expressly provided for post-judgment attorney's fees and expenses, *e.g.*, *Arbor Lake, LLC v. Enterprise Bank & Trust*, 334 P.3d 344 (2014), or where a statute specifically provides for post-judgment attorney's fees, *e.g.*, Cal. Civ. Pro. Code § 685.040 and Idaho Code Ann. § 12-120(5). In South Carolina, there is neither a statute nor a rule providing that judgment creditors are entitled to receive post-judgment attorney's fees and expenses incurred in pursuing collection of a judgment.

326 S.C. at 469, 483 S.E.2d at 801. In this case, over 65% of the Judgment amount, \$526,334.52, is for attorney's fees and expenses incurred by Team IA in enforcing its rights under the Employment Agreement, and in light of the size and scope of that award, the addition of post-judgment fees and expenses cannot be deemed negligible. In this regard, allowing additional attorney's fees and expenses for post-judgment collection efforts would have the effect of compounded attorney's fees. The provision in the Employment Agreement indicates no intent that it should be given this effect. Third, the doctrine of merger is not discussed, or even mentioned, in *Renaissance Enterprises, Inc. v. Ocean Resorts, Inc.*, *supra.*, raising the question of whether the non-prevailing party argued the merger doctrine. Without discussion, or even mention, of the merger doctrine it is not proper to assume that the Court of Appeals rejected the doctrine or found it inapplicable to the facts of that case.² This Court finds that the decision in *Renaissance Enterprises, Inc. v. Ocean Resorts, Inc.*, *supra.*, is inapplicable to this case.

The doctrine of merger is applicable to this case. The Employment Agreement provision does not expressly provide for post-judgment attorney's fees and expenses, and South Carolina does not have a statute or rule providing that judgment creditors are entitled to post-judgment attorney's fees and expenses. In this regard, the decision in *Dilling, Baker & Co. v. Foster*, 21 S.C. 334 (1884), is instructive in this matter. The decision was in the context of a receivership, and included the issue of the allowance of an attorney's fee for the attorneys for the plaintiff. The Court found that the statute involved in the receivership matters did not provide for the allowance of attorney's fees for a judgment creditor, and that no other basis existed for the attorney's fee for the plaintiff. *Id.*, at 340. There was no authority supporting the award of an attorney's fee to the

² It is well settled that issues not preserved for appeal are deemed abandoned in the appeal and the appellate court need not rule upon them. *See, e.g., Degenhart v. Knights of Columbus*, 309 S.C. 114, 118, 420 S.E.2d 495, 497 (1992).

plaintiff.

Likewise, in the present case, there is no statutory authority or rule providing for post-judgment attorney's fees and expenses, and any claim made by Team IA based upon Paragraph VII (G), which was extinguished by merger upon entry of the Judgment, is without valid basis. Team IA's claim must be denied.

3. No Statutory Basis for Post-Judgment Attorney's Fees and Expenses.

Team IA argues that the doctrine of merger is inapplicable because, in the same manner that interest may accrue on a judgment at the contract rate instead of the legal rate established for judgments, the contract provision for attorney's fees and expenses should survive the judgment. However, this argument overlooks the fact that the accrual of interest on a judgment is authorized and provided by statute, S.C. Code Ann. §34-31-20 (Supp. 2015). This statute states, "A money decree or judgment of a court enrolled or entered *must* draw interest according to law." S.C. Code Ann. §34-31-20(B) (emphasis added). The statutory rate under this statute is applicable only in the absence of a written agreement between the parties setting a different rate of interest. *Turner Coleman, Inc. v. Ohio Construction & Engineering, Inc.*, 272 S.C. 289, 293, 251 S.E.2d 738, 741 (1979). There is no comparable statutory provision in South Carolina providing for post-judgment attorney's fees and expenses on a judgment.

CONCLUSION

Team IA's remedy is upon its Judgment, not upon the Employment Agreement. The doctrine of merger applies to this case, to the effect that the claims under the Employment Agreement are merged into the Judgment and the contract provisions are extinguished. The attorney's fee and expense provision in the Employment Agreement does not expressly include post-judgment attorney's fees and expenses, so as to survive merger into the Judgment, and it is now extinguished by merger into the Judgment. Team IA's request for post-judgment attorney's

fees, expenses and costs must be denied.

Therefore, it is ORDERED, ADJUDGED AND DECREED that Team IA is not entitled to include post-judgment attorney's fees and expenses as part of Lucas' indebtedness under the Judgment, and its claim for post-judgment attorney's fees and expenses is hereby denied.

AND IT IS SO ORDERED.

December __, 2016

Lexington, South Carolina

James O. Spence
Master-in-Equity for Lexington County

**Index of Additional Attachments to
December 9, 2016 e-mail from Mendoza to Court**

1. Blumberg v. Nealco, Inc., 310 S.C. 492, 427 S.E.2d 659 (1993)
2. Sloan Const. Co., Inc. v. Southco Grassing, Inc., 395 S.C. 164, 717 S.E.2d 603 (2011)
3. Ryan v. Southern Mut. Building & Loan Ass'n, 50 S.C. 185, 27 S.E. 618, (1897)
4. Monarc Constr., Inc. v. Aris Corp., 188 Md.App. 377, 981 A.2d 822 (2009).
5. In re A & P Diversified Technologies Realty, Inc., 467 F.3d 337 (3rd Cir. 2006)
6. Allison v. John M. Biggs, Inc., 121 Idaho 567, 826 P.2d 916 (1992)
7. Woodcraft Constr., Inc. v. Hamilton, 56 Wash.App. 885, 786 P.2d 307 (1990)
8. Kanawha-Gauley Coal & Coke Co. v. Pittston Minerals Group, 501 Fed.Appx. 247 (4th Cir. 2012)
9. Arbor Lake, LLC v. Enterprise Bank & Trust, 334 P.3d 344 (KS Ct. App. 2014)
10. Moore v. Holland, 16 S.C. 15 (1881)
11. Renaissance Enterprises, Inc. v. Ocean Resorts, Inc., 326 S.C. 460, 483 S.E.2d 796 (Ct. App. 1997)
12. Renaissance Enterprises, Inc. v. Ocean Resorts, Inc., 335 S.C. 324, 513 S.E.2d 617 (1999)
13. Dilling, Baker & Co. v. Foster, 21 S.C. 334 (1884)
14. Degenhart v. Knights of Columbus, 309 S.C. 114, 420 S.E.2d 495 (1992)
15. Turner Coleman, Inc. v. Ohio Constr. & Engineering, Inc., 272 S.C. 289, 251 S.E.2d 738 (1979)
16. Cal. Civ. Proc. Code § 685.040.
17. Idaho Code § 12-120.
18. S.C. Code Ann. § 34-31-120

From: Mendoza, Rick <RMendoza@nexsenpruet.com>
Sent: Friday, December 09, 2016 3:34 PM
To: 'SPENCE, JAMES'
Cc: Ben Bruner; Ro Lucas (RLucas@myfivepoint.com)
Subject: RE: Team IA, Inc. v. Lucas, Case No. 2009-CP-32-1078 - Proposed Order on Post-Judgment Attorney's Fees and Expenses [IWOV-NPCOL1.FID1722223]
Attachments: 2ND VERSION -- Order Denying Team IA, Inc. Post-Judgment Attorney_s Fees and Expenses-c.DOCX

Dear Judge Spence,

I failed to note in my message below that I discuss the *Dilling, Baker & Co. v. Foster* decision on page 7 of my proposed order. I also address Team IA's arguments in this proposed order.

Please let me know if you have any questions, or if there is something else we can provide that would be of help to you.

With best regards,
Rick

From: Mendoza, Rick
Sent: Friday, December 9, 2016 11:01 AM
To: 'SPENCE, JAMES' <JSPENCE@lex-co.com>
Cc: 'Ben Bruner' <BBruner@brunerpowell.com>; Ro Lucas (RLucas@myfivepoint.com) <RLucas@myfivepoint.com>
Subject: Team IA, Inc. v. Lucas, Case No. 2009-CP-32-1078 - Proposed Order on Post-Judgment Attorney's Fees and Expenses [IWOV-NPCOL1.FID1722223]

Dear Judge Spence,

Attached is the proposed order submitted on behalf of Mr. Lucas on the issue of the claim of right by Team IA, Inc. to add post-judgment attorney's fees, expenses and costs to the judgment indebtedness. It is in Word.

Also attached are copies of the legal authorities cited in the proposed order. This attachment consists of 90 pages. In your message on Tuesday, you asked that we attach copies of the authorities. However, if you will then need to print them (I personally still prefer to read printed copies of cases), I will be happy to have printed copies of the authorities delivered to you.

With best regards,

Rick

Julio E. Mendoza, Jr.
Member
Nexsen Pruet, LLC
1230 Main Street, Suite 700
Columbia, SC 29201
Post Office Box 2426 (29202)
T: 803.540.2026, F: 803.727.1478
RMendoza@nexsenpruet.com

www.nexsenpruet.com

NEXSEN PRUET

*** CONFIDENTIAL COMMUNICATION *** The information contained in this message may contain legally privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or duplication of this transmission is strictly prohibited. If you have received this communication in error, please notify us by telephone or email immediately and return the original message to us or destroy all printed and electronic copies. Nothing in this transmission is intended to be an electronic signature nor to constitute an agreement of any kind under applicable law unless otherwise expressly indicated. Intentional interception or dissemination of electronic mail not belonging to you may violate federal or state law.

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Team IA, Inc.,

Petitioner,

vs.

Cicero Lucas,

Respondent.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2009–CP-32-1078

**ORDER DENYING TEAM IA, INC.’S
CLAIM FOR
POST-JUDGMENT ATTORNEY’S
FEES, EXPENSES AND COSTS**

This matter comes before the Court upon the asserted right and claim of Petitioner Team IA, Inc. (“Team IA”) for the addition of post-judgment attorney’s fees and expenses to the amount of the indebtedness due under the judgment it holds against Respondent Cicero G. Lucas, IV (“Lucas”). The matter arises in connection with supplementary proceedings Team IA commenced against Lucas upon Team IA’s judgment, which supplementary proceedings are pending in this Court. The parties requested that the Court rule upon Team IA’s right to add its post-judgment attorney’s fees and expenses to the judgment. As set forth below, the Court holds that Team IA is not entitled to include its post-judgment attorney’s fees and expenses in the outstanding indebtedness under the judgment.

BACKGROUND

Team IA brought action and obtained a judgment against Lucas for breach of an Employment Agreement (the “Employment Agreement”). Team IA obtained a jury verdict on March 27, 2015, after which the parties filed post-trial motions. The Circuit Court filed its Order on Post Trial Motions on November 24, 2015, and judgment was entered on December 1, 2015 (the “Judgment”). Pursuant to the Order on Post Trial Motions, the Judgment was entered for Team IA in the amount of \$278,137.34 for breach of contract damages, and in the amount of

\$526,334.52 for attorney's fees, expenses and costs incurred by Team IA in enforcing its rights under the Employment Agreement, for a total judgment amount of \$804,471.86.

In awarding Team IA attorney's fees, expenses and costs as part of the Judgment, the Circuit Court stated, "In the Employment Agreement between Team IA, Inc. and Cicero Lucas, Lucas is responsible for the attorney's fees, costs, and expenses incurred in Team IA, Inc. enforcing the terms of the Employment Agreement." See Order on Post Trial Motions, page 28.

The Circuit Court cited Paragraph VII (G) of the Employment Agreement as providing:

Fees, Costs, and Expenses: In the event Employer must enforce any of the rights herein granted to it through an attorney, Employee shall be liable for any and all reasonable attorney's fees, expenses, and court costs incurred in connection with the enforcement of Employer's rights hereunder.

Id., page 29.

In the Order on Post Trial Motions, the Circuit Court awarded Team IA attorney's fees, expenses and costs after consideration of the six factors identified in *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993), as applicable to a request for attorney's fees and expenses. As noted above, the Circuit Court determined that Team IA was entitled to an award of \$526,334.52 for the legal expenses it incurred in enforcing its rights under the Employment Agreement. This amount constitutes over 65% of the total Judgment amount.

Team IA asserts that it is entitled to add attorney's fees and expenses it incurs post-judgment in pursuing collection of the Judgment to the amount due upon the Judgment. Lucas asserts that Team IA is not entitled to add post-judgment attorney's fees and expenses to the Judgment.

ANALYSIS

Team IA argues that it is entitled to post-judgment attorney's fees and expenses based on (1) the Circuit Court's ruling, as a matter of the law of the case, and (2) the same provision in the

Employment Agreement cited by the Circuit Court, which is quoted above. Team IA also argues that the doctrine of merger does not apply to the contract provision for attorney's fees and expenses. Lucas argues that the Circuit Court made no ruling on post-judgment attorney's fees and expenses, and that the doctrine of merger provides that, upon entry of the Judgment, the Employment Agreement merged into the Judgment, the contract provision – which did not expressly provide for post-judgment attorney's fees and expenses – was extinguished, and Team IA's remedy is upon the Judgment, not the contract. Lucas also argues that there is no statute or rule in South Carolina providing that a judgment creditor is entitled to post-judgment attorney's fees and expenses.

For the reasons discussed below, this Court finds that Team IA is not entitled to post-judgment attorney's fees and expenses.

1. The Claim for Post-Judgment Attorney's Fees and Expenses Is Not Supported by the Law of the Case.

The Circuit Court's Order on Post Trial Motions does not include a ruling upon, and makes no mention of, post-judgment attorney's fees and expenses. The language in the Order on Post Trial Motions cited by Team IA for its law of the case argument is as follows: "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. I find that the attorney's fees, costs, and expenses incurred by Team IA were reasonable and necessary." *See* Order on Post Trial Motions, page 29. The language immediately follows the quoted Paragraph VII (G) of the Employment Agreement (quoted above), and is stated in the context of reviewing Team IA's claimed attorney's fees and expenses for purposes of determining the amount of the Judgment. The Circuit Court then proceeds to apply the *Blumberg*

v. Nealco, Inc., supra., factors to determine the allowability of the claimed attorney's fees and expenses as part of the judgment to be entered.

There is no ruling on the allowability of post-judgment attorney's fees and expenses in the Order on Post Trial Motions, or upon the survival of the contract provision following entry of the Judgment. "The law of the case applies both to those issues explicitly decided and to those issues which were necessarily decided in the former case." *Sloan Construction Company, Inc. v. Southco Grassing, Inc.*, 395 S.C. 164, 170, 717 S.E.2d 603, 606 (2011) (quoting *Nelson v. Charleston & Western Carolina Railway Co.*, 231 S.C. 351, 357, 98 S.E.2d 798, 800 (1957)). The issue before the Circuit Court was the allowability and amount of attorney's fees, expenses and costs to be included in the judgment to be entered. No ruling, discussion or mention of the allowability of post-judgment attorney's fees and expenses is made in the Order on Post Trial Motions, and Team IA's claim for post-judgment attorney's fees and expenses is not deemed decided under the case of the law doctrine.

2. The Doctrine of Merger Precludes Reliance Upon Paragraph VII (G) of The Employment Agreement.

Team IA's claim for post-judgment attorney's fees and expenses is premised upon application of Paragraph VII (G) of the Employment Agreement. The contract provision, by its literal wording, applies to attorney's fees, expenses and court costs "*incurred in connection with the enforcement of [Team IA's] rights hereunder.*" (emphasis added). See Order on Post Trial Motions, page 29, quoting Paragraph VII (G) of the Employment Agreement. However, the doctrine of merger precludes this claim. Team IA's post-judgment attorney's fees and expenses are incurred in enforcing rights as a judgment creditor, which rights were obtained as a result of the Judgment. Although an exception to the merger doctrine may exist if the contract expressly provides for *post-judgment* attorney's fees and expenses, Paragraph VII (G) does not state that

Lucas is liable for post-judgment attorney's fees and costs incurred on account of, or in attempting to collect on, a judgment awarded to Team IA. Paragraph VII (G) states that it applies to enforcement of rights existing under the Employment Agreement.

Upon entry of the Judgment, Team IA's rights under the Employment Agreement merged into the Judgment; under the doctrine of merger, the original claim under the contract is extinguished, and Team IA's remedy is upon the Judgment. *See Ryan v. Southern Mutual Building & Loan Association*, 50 S.C. 185, 27 S.E. 618, 619-620 (1897) (merger of the contract into the judgment precluded a post-judgment claim that the contract was usurious); *Monarc Construction, Inc. v. Aris Corporation, et al.*, 188 Md.App. 377, 392-398, 981 A.2d 822, 831-834 (2009) (doctrine of merger precluded claim for post-judgment attorney's fees, in the absence of a contract provision expressly providing for post-judgment attorney's fees and expenses); *Youngman, Trustee v. Fleet Bank, N.A. (In re A&P Diversified Technologies Realty, Inc.)*, 467 F.3d 337, 343 (3rd Cir. 2005) (merger of mortgage into the foreclosure judgment precluded mortgagee's claim for post-judgment attorney's fees in the bankruptcy case of the borrower); *Allison v. John M. Biggs, Inc., et al.*, 121 Idaho 567, 568, 826 P.2d 916, 917 (1992) ("While I.C. § 12-120(3) provides for an award of attorney fees in a civil action to recover on a promissory note, it is also elementary that after judgment a cause of action based on a note is merged into the judgment thereby extinguishing the note as the basis for the post-judgment collection proceedings."); and *Woodcraft Construction, Inc. v. Hamilton*, 56 Wash.App 885, 887-888, 786 P.2d 307, 308 (1990) ("Here, as in *Caine*, the judgment based upon the promissory note extinguished the note and the debtor then became obligated on the judgment. The attorney fee provision in the note merged into the judgment and ceased to exist. Therefore, there was no contractual basis upon which to award attorney fees and costs to either party."). *See also Kanawha-Gauley Coal & Coke Company v. Pittston Minerals Group, Incorporated*, 501 Fed.Appx. 247, 254-255 (4th Cir. 2012) ("Without the

necessary clear, unambiguous, and unequivocal language indicating the parties' express intent to agree on a post-judgment interest rate," the doctrine of merger eliminated the contract interest rate provision, and interest would not accrue on the judgment at the contract rate.).¹

The merger doctrine has long been recognized in South Carolina, and was explained in the *Moore v. Holland*, 16 S.C. 15, 27 (1881), as follows: "A judgment of this sort involves two ideas, - the contract upon which it is rendered, and the judgment itself. The one is the act of the parties, the other is the act of the court. They are entirely separate and distinct." *Accord, Ryan v. Southern Mutual Building & Loan Association*, 27 S.E. at 620.

The Court notes that post-judgment attorney's fees and expenses were allowed in *Renaissance Enterprises, Inc. v. Ocean Resorts, Inc.*, 326 S.C. 460, 483 S.E.2d 796 (Ct.App. 1997), on the basis of a contract provision stating that, "[i]f arbitration and/or litigation shall become necessary," the prevailing party would be entitled to recovery of "reasonable attorney's fees and all other costs of such arbitration and/or litigation." *Id.*, 326 S.C. at 469, 483 S.E.2d at 801. However, several points must also be noted. First, this decision was reversed (on other grounds) by the South Carolina Supreme Court in *Renaissance Enterprises, Inc. v. Ocean Resorts, Inc.*, 334 S.C. 324, 513 S.E.2d 617 (1999), and thus it has no precedential effect. Second, the contract provision specifically references litigation "and all . . . costs of such . . . litigation." In finding the provision should include post-judgment fees, the Court of Appeals stated, in footnote 2, "Further the amount of fees awarded appears to be negligible in consideration of the amount of money in dispute and the fact that not all issues have been resolved in favor of Ocean Resorts."

¹ The Court notes that post-judgment attorney's fees have been allowed where the contract provision expressly provided for post-judgment attorney's fees and expenses, *e.g.*, *Arbor Lake, LLC v. Enterprise Bank & Trust*, 334 P.3d 344 (2014), or where a statute specifically provides for post-judgment attorney's fees, *e.g.*, Cal. Civ. Pro. Code § 685.040 and Idaho Code Ann. § 12-120(5). In South Carolina, there is neither a statute nor a rule providing that judgment creditors are entitled to receive post-judgment attorney's fees and expenses incurred in pursuing collection of a judgment.

326 S.C. at 469, 483 S.E.2d at 801. In this case, over 65% of the Judgment amount, \$526,334.52, is for attorney's fees and expenses incurred by Team IA in enforcing its rights under the Employment Agreement, and in light of the size and scope of that award, the addition of post-judgment fees and expenses cannot be deemed negligible. In this regard, allowing additional attorney's fees and expenses for post-judgment collection efforts would have the effect of compounded attorney's fees. The provision in the Employment Agreement indicates no intent that it should be given this effect. Third, the doctrine of merger is not discussed, or even mentioned, in *Renaissance Enterprises, Inc. v. Ocean Resorts, Inc.*, *supra.*, raising the question of whether the non-prevailing party argued the merger doctrine. Without discussion, or even mention, of the merger doctrine it is not proper to assume that the Court of Appeals rejected the doctrine or found it inapplicable to the facts of that case.² This Court finds that the decision in *Renaissance Enterprises, Inc. v. Ocean Resorts, Inc.*, *supra.*, is inapplicable to this case.

The doctrine of merger is applicable to this case. The Employment Agreement provision does not expressly provide for post-judgment attorney's fees and expenses, and South Carolina does not have a statute or rule providing that judgment creditors are entitled to post-judgment attorney's fees and expenses. In this regard, the decision in *Dilling, Baker & Co. v. Foster*, 21 S.C. 334 (1884), is instructive in this matter. The decision was in the context of a receivership, and included the issue of the allowance of an attorney's fee for the attorneys for the plaintiff. The Court found that the statute involved in the receivership matters did not provide for the allowance of attorney's fees for a judgment creditor, and that no other basis existed for the attorney's fee for the plaintiff. *Id.*, at 340. There was no authority supporting the award of an attorney's fee to the

² It is well settled that issues not preserved for appeal are deemed abandoned in the appeal and the appellate court need not rule upon them. *See, e.g., Degenhart v. Knights of Columbus*, 309 S.C. 114, 118, 420 S.E.2d 495, 497 (1992).

plaintiff.

Likewise, in the present case, there is no statutory authority or rule providing for post-judgment attorney's fees and expenses, and any claim made by Team IA based upon Paragraph VII (G), which was extinguished by merger upon entry of the Judgment, is without valid basis. Team IA's claim must be denied.

3. No Statutory Basis for Post-Judgment Attorney's Fees and Expenses.

Team IA argues that the doctrine of merger is inapplicable because, in the same manner that interest may accrue on a judgment at the contract rate instead of the legal rate established for judgments, the contract provision for attorney's fees and expenses should survive the judgment. However, this argument overlooks the fact that the accrual of interest on a judgment is authorized and provided by statute, S.C. Code Ann. §34-31-20 (Supp. 2015). This statute states, "A money decree or judgment of a court enrolled or entered *must* draw interest according to law." S.C. Code Ann. §34-31-20(B) (emphasis added). The statutory rate under this statute is applicable only in the absence of a written agreement between the parties setting a different rate of interest. *Turner Coleman, Inc. v. Ohio Construction & Engineering, Inc.*, 272 S.C. 289, 293, 251 S.E.2d 738, 741 (1979). There is no comparable statutory provision in South Carolina providing for post-judgment attorney's fees and expenses on a judgment.

CONCLUSION

Team IA's remedy is upon its Judgment, not upon the Employment Agreement. The doctrine of merger applies to this case, to the effect that the claims under the Employment Agreement are merged into the Judgment and the contract provisions are extinguished. The attorney's fee and expense provision in the Employment Agreement does not expressly include post-judgment attorney's fees and expenses, so as to survive merger into the Judgment, and it is now extinguished by merger into the Judgment. Team IA's request for post-judgment attorney's

fees, expenses and costs must be denied.

Therefore, it is ORDERED, ADJUDGED AND DECREED that Team IA is not entitled to include post-judgment attorney's fees and expenses as part of Lucas' indebtedness under the Judgment, and its claim for post-judgment attorney's fees and expenses is hereby denied.

AND IT IS SO ORDERED.

December __, 2016

Lexington, South Carolina

James O. Spence
Master-in-Equity for Lexington County

From: Ben Bruner
Sent: Friday, May 26, 2017 4:17 PM
To: SPENCE, JAMES
Cc: Mendoza, Rick; Kathryn Lindler; Bridget Steele; Brannon, Kyle A.
Subject: RE: MIE Hearing: Team IA, Inc. vs. Cicero Lucas [IWOV-NPCOL1.FID1722223]
Attachments: Proposed Order on Mot. to Reconsider Atty Fees.docx; Proposed Order on Mot. to Reconsider Atty Fees.pdf

Dear Judge Spence:

Please find attached Team IA's proposed Order in the above-referenced case. I have attached copies in PDF and in Word. If you have any trouble opening either file, please let me know and I will re-send it.

Have a great Memorial Day Weekend,

Ben

Benjamin C. Bruner
BrunerPowell
Bruner, Powell, Wall & Mullins, LLC
P.O. Box 61110
Columbia, SC 29260-1110
(p) 803.252.7693
(f) 803.254.5719
www.BrunerPowell.com

STATE OF SOUTH CAROLINA	)	BEFORE THE MASTER-IN-EQUITY
	)	
COUNTY OF LEXINGTON	)	C/A No.: 2009-CP-32-01078
	)	
Team IA, Inc.,	)	
	)	
Petitioner,	)	
	)	
v.	)	ORDER
	)	
Cicero Lucas,	)	
	)	
Respondent.	)	
	)	

THIS MATTER came before the Court for a hearing on March 29, 2017 on a motion for reconsideration filed by Team IA, Inc. ("Team IA" or "Petitioner") on January 13, 2017. Present at the hearing were Benjamin C. Bruner, Esquire on behalf of Petitioner and Julio E. Mendoza, Jr. on behalf of Respondent Cicero Lucas ("Lucas" or "Respondent"). Having carefully considered the arguments and submissions of counsel, the Court finds the motion should be granted and Petitioner should be entitled to recover its reasonable fees incurred in these proceedings for the following reasons.

FACTUAL AND PROCEDURAL HISTORY

These proceedings follow a Lexington County jury's factual findings that Lucas, a former employee of Team IA, unlawfully interfered with Team IA's contractual relations after leaving his employment there and breached the non-solicitation and non-compete provisions in his employment contract. (Jury Verdict dated March 27, 2015 and filed March 30, 2015.) After hearing post-trial motions and after Team IA elected its remedy, the Circuit Court entered judgment for Team IA in the amount the jury awarded for breach of contract, \$278,137.34, plus \$526,334.52 for attorney's fees, expenses and costs pursuant to the Parties' contract, for a total

judgment amount of \$804,471.86. (Order on Post-Trial Motions, signed November 24, 2015 and entered as Judgment on December 2, 2015.) In its order entering judgment, the Circuit Court wrote,

In the Employment Agreement between Team IA, Inc. and Cicero Lucas, Lucas is responsible for the attorney's fees, costs, and expenses incurred in Team IA, Inc. enforcing the terms of the Employment Agreement. Based on the jury's verdict determining that Cicero Lucas breached the Employment Agreement, Team IA Inc. is entitled to reimbursement of attorney's fees, expenses, and costs incurred. Paragraph VII, (G) of the Employment Agreement provides:

Fees, Costs, and Expenses: In the event Employer must enforce any of the rights herein granted to it through an attorney, Employee shall be liable for any and all reasonable attorney's fees, expenses, and court costs incurred in connection with the enforcement of Employer's rights hereunder.

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. I find that the attorney's fees, costs, and expenses incurred by Team IA were reasonable and necessary.

Id. at 28-29.

Although the parties timely filed cross-appeals, they later agreed to dismiss those appeals. (Order of Dismissal, August 2, 2016, S.C. Ct. App. Case No. 2015-002629.)

On August 8, 2016, the Circuit Court issued a Rule to Show Cause and Order of Reference commencing these supplemental proceedings at Team IA's request pursuant to S.C. Code Ann. §§15-39-310, *et seq.* (Rule to Show Cause signed August 8, 2016 and filed August 9, 2016.) A supplemental hearing was held before this Court on November 3, 2016. Mr. Lucas appeared and was examined under oath.

Following the hearing and a conference with the Court, counsel for both parties advised the Court that the Parties continued to dispute whether Team IA may recover post-judgment attorney's fees, costs, and expenses incurred in these supplemental proceedings. Although no

written motion has been filed, the parties stipulated on the record to place the issue before this Court.

Petitioner argues it is entitled to recover post-judgment attorney's fees and costs incurred in these proceedings pursuant to the parties' contract and the trial court's order entering judgment. Respondent denies that claim and argues the doctrine of merger bars the claim. On December 9, 2016, the parties submitted proposed orders on the narrow issue of whether Team IA is entitled to recover post-judgment attorney's fees. In an Order signed December 15, 2016 and filed December 22, 2016, this Court answered that question in the negative. Team IA timely filed and served a motion to reconsider pursuant to Rule 59, SCRPC, which is the motion at bar now. (Motion to Reconsider, Alter or Amend, January 13, 2017.)

During an extended hearing on March 29, 2017, the Court heard arguments on the motion and on the Parties' respective arguments.

ARGUMENT

The parties agree this case presents a novel issue under South Carolina law: whether a contract provision entitling a prevailing party to "any and all reasonable attorney's fees, expenses, and court costs" means that party may also recover reasonable attorney's fees, expenses and court costs necessarily incurred after entry of judgment.

At the outset, it must be noted that South Carolina follows the American Rule. Therefore, "[g]enerally, attorneys' fees and costs are not recoverable unless authorized by contract or statute." *Maybank v. BB&T Corp.*, 416 S.C. 541, 580, 787 S.E.2d 498, 518 (2016). Team IA concedes its claim for attorney's fees is not based on any statute. Therefore, this Court must decide whether the contract provides a basis for the Court to award post-judgment fees in these proceedings.

I. The Parties' Agreement is Unambiguous

“The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language. *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009). “Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect.” *Id.* “A contract is read as a whole document so that one may not create an ambiguity by pointing out a single sentence or clause. *Id.* It is a question of law for the court whether the language of a contract is ambiguous. *S.C. Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302-03 (2001).

If the Court finds an ambiguity in a contract, then “the intent of the parties controls.” *Prestwick Golf Club v. Prestwick Ltd. Pshp.*, 331 S.C. 385, 390, 503 S.E.2d 184, 187 (Ct. App. 1998) (citing *Holcombe v. Orkin Exterminating Co., Inc.*, 282 S.C. 104, 317 S.E.2d 458 (Ct. App. 1984). “Although the interpretation of a contract is generally a matter of law, the intent of the parties becomes a question of fact . . . when the contract is ambiguous.” *Id.* (citing *Kumpf v. United Tel. Co.*, 311 S.C. 533, 429 S.E.2d 869 (Ct. App. 1993)).

Team IA contends the parties' contract is unambiguous and clearly provides for the recovery of “any and all reasonable attorney's fees, expenses, and court costs,” whether incurred before entry of judgment, after entry of judgment, or on appeal. I agree.

The provision in its entirety states,

In the event Employer must enforce any of the rights herein granted to it through an attorney, Employee shall be liable for any and all reasonable attorney's fees, expenses, and court costs incurred in connection with the enforcement of Employer's rights hereunder.

In essence, the issue is whether the phrase “any and all” is ambiguous. I find it is not. It is evident that the purpose of this provision is that if Lucas breached the contract, he would be liable not only for damages resulting from the breach but also for any and all attorney's fees, expense and costs

Team IA incurred in enforcing its rights. As demonstrated by the Circuit Court's order entering judgment, Team IA's rights under the employment agreement certainly included the recovery of fees from Lucas for trial, as well as fees from a successful appeal during that pursuit. That was so because Team IA had a right under the agreement to recover payment from Lucas for the damages Lucas caused it. The parties clearly intended the fee-shifting provision to be broad as an additional mechanism to deter Lucas from breaching the contract (which he did anyway). The plain language of the parties' agreement is capable of only one reasonable interpretation: that in the event Lucas breached the contract, which he did, and in the event Team IA needed to engage counsel to enforce its rights, which it did, then Lucas would pay "and all reasonable attorney's fees, expenses, and court costs." The agreement did not read, "Employee will pay Employer's attorney's fees," or, "Employee will pay Employer's attorney's fees and costs incurred in obtaining a judgment." Rather, the agreement specifically and clearly provides Lucas agreed to pay "**any and all** reasonable attorney's fees, expenses, and court costs..." The phrase "any and all" means just that: any and all, whether prejudgment or post-judgment, without qualification. Had the parties wished to place any qualification that Lucas would only be obligated to pay fees and costs until entry of a judgment, they certainly could have negotiated that. They did not. To the contrary, the inclusion of the phrase "any and all," which must be given effect, suggests the fee-shifting provision to which the parties agreed is unqualified. The Court cannot assign any other reasonable interpretation of that phrase without effectively removing the phrase "any and all" from the agreement.

"When the language of a contract is clear, explicit, and unambiguous, the language of the contract alone determines the contract's force and effect and the court must construe it according to its plain, ordinary, and popular meaning." *Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1,

22, 738 S.E.2d 480, 492 (Ct. App. 2013); *see also Laser Supply & Servs. v. Orchard Park Assocs.*, 382 S.C. 326, 334, 676 S.E.2d 139, 144 (Ct. App. 2009) (“A court must enforce an unambiguous contract according to its terms regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully.”).

Furthermore, the language of the fee-shifting provision shows the parties were focuses on rights which arose from the employment agreement, rather than the agreement itself. Team IA’s right to recover payment for damages from Lucas for breach of contract existed originally under the employment agreement. That right has not disappeared; it is now embodied in the judgment entered based upon Lucas’s breach of the employment agreement. Similarly, the parties clearly intended that Lucas would be liable for any and all attorney’s fees and costs incurred in the enforcement of the right to recover damages in order to make Team IA whole. That right, too, did not disappear but is now embodied in the judgment. Indeed, only when Team IA recovers the judgment amount and its fees incurred post-judgment in the collection of the judgment will Team IA truly be made whole for the Respondent’s breach of contract.

Were the Court to find the contract ambiguous, the parties would be entitled to present parol evidence on the parties’ intent, and the Court would be required to engage in factual determinations about the parties’ intent. Having found as a matter of law that the contract is unambiguous, however, the Court need not address those issues of fact.

II. The Merger Doctrine

Respondent contends Team IA’s claim for post-judgment attorney’s fees is barred by the doctrine of merger. I disagree.

As noted above, a review of South Carolina jurisprudence reveals no controlling case law clearly discussing whether a party’s contractual right to recover attorney’s fees and costs extends

to supplemental proceedings. However, South Carolina jurisprudence contains a number of cases which indicate that right is not extinguished upon entry of judgment.

In *Renaissance Enterprises v. Ocean Resort*, a case subsequently reversed on other grounds, this precise issue was one of the many the Court of Appeals was asked to decide. *Renaissance Enters. v. Ocean Resorts*, 326 S.C. 460, 464, 483 S.E.2d 796, 798 (Ct. App. 1997), *rev'd on other grounds*, 334 S.C. 324, 513 S.E.2d 617 (1999).¹ While the case is not controlling, the Court of Appeals' analysis of the issue is illuminating. In that case, the contract between the parties included the following fee-shifting provision:

If arbitration and/or litigation shall become necessary, [Renaissance] shall be entitled to recover from [Ocean Resorts], reasonable attorney's fees . . . and all other costs of such arbitration and/or litigation.

326 S.C. at 469, 483 S.E.2d at 801. Ocean Resorts argued that Renaissance Enterprises failed to establish its entitlement to attorney's fees incurred in supplemental proceedings because the fee-shifting provision did not clearly allow for post-judgment fees. The Court rejected that argument, reasoning,

The contract between the parties clearly provided for the recovery of reasonable attorney's fees for necessary litigation. The supplemental proceeding was brought to collect on the debt owed pursuant to the contract. We find no reason that the agreement would not encompass fees incurred in this supplemental proceeding, brought in order to determine the amount due from the underlying proceeding. *See McDowell v. South Carolina Department of Social Services*, 304 S.C. 539, 405 S.E.2d 830 (1991) (wherein the Supreme Court found, where party was entitled to attorney's fees in underlying action pursuant to statute, that party was likewise entitled to attorney's fees for subsequent litigation over such fees incurred in supplemental proceeding). Accordingly, we find no error.

¹ The Supreme Court reviewed "the Court of Appeals' decision holding that the deposit of money into court as provided in Rule 67, SCRPC, stops the accrual of interest pursuant to the contract between the parties," and reversed that holding.

Id. In addition to *Renaissance Enterprises*, other reported cases from our appellate courts indicate the award of post-judgment attorney's fees is proper. *See, e.g., Linda Mc Co. v. Shore*, 390 S.C. 543, 550, 703 S.E.2d 499, 502 (2010) (noting special referee awarded attorney's fees pursuant to confession of judgment during supplemental proceedings); *Sears v. Fowler*, 293 S.C. 43, 45, 358 S.E.2d 574, 575 (1987) (holding contract provision setting higher rate of interest survives entry of judgment and applies to post-judgment interest as well; *Turner Coleman, Inc. v. Ohio Construction & Engineering, Inc.*, 272 S.C. 289, 251 S.E. (2d) 738 (1979) (same). *Accord, Muller v. Myrtle Beach Golf & Yacht Club*, 313 S.C. 412, 438 S.E.2d 248 (1993) (holding right to recover reasonable fees and costs under mechanic's lien statute extends to fees incurred on appeal after entry of judgment despite absence of language in statute specifically providing for post-judgment fees).

In this case, Respondent argues Team IA cannot recover post-judgment attorney's fees because that claim is based upon a contractual provision that merged into the judgment. *See Ryan v. Southern Mutual Building & Loan Association*, 50 S.C. 185, 27 S.E. 618, 619-620 (1897) (merger of the contract into the judgment precluded a post-judgment claim that the contract was usurious). It is rudimentary that once a party sues and obtains a judgment on a contract, he cannot file yet another suit upon the same contract. Principles like the doctrine of merger and the doctrine of bar are alive today in the doctrines of *res judicata* the doctrine of collateral estoppel. However, those doctrine have limitations. In essence, what the Respondents argue amounts to claim preclusion, *i.e.*, Team IA's claim for attorney's fees is precluded by the doctrine of merger. To accept that argument would result in the extinguishment of a claim that had not yet arisen and was not yet ripe for adjudication. Neither the doctrine of *res judicata* nor the doctrine of merger the Respondent cites can operate to bar a claim based on a judgment predating the claims existence.

As noted above, South Carolina courts have repeatedly enforced contract provisions after entry of judgment, contrary to Respondent's argument. Those courts have not limited their inquiry to the four corners of the order entering judgment. In *Sears* and *Turner Coleman*, the Supreme Court recognized that when parties negotiate for a higher rate of interest, that contract term is not extinguished upon entry of judgment. Instead, that provision survives. Interest accrues post-judgment at the higher, contractual rate. If Respondent's argument is correct, then *Sears* and *Turner Coleman* would have been decided differently. A party's claim for interest at a higher, contractual rate would be extinguished upon entry of judgment, and the party would be entitled only to recover interest on the judgment at the statutory rate.

In *Muller*, the Supreme Court specifically addressed whether a party's right to recover attorney's fees under the mechanic's lien statutes, S.C. Code Ann. §§ 29-5-10, et seq., extended to fees incurred post-judgment. Despite the absence of any specific language in the statute stating it applied both pre- and post-judgment, the Supreme Court held,

[T]he post-appellate fees incurred in the collection of trial and appellate fees may also be recoverable under § 29-5-10. See *Bowen & Smoot v. Plumlee*, S.C., 417 S.E.2d 855 (1992) (trial court had authority to determine award of attorney's fees as a result of case being remanded).

Accordingly, § 29-5-10 entitles Winters to all costs incurred in defending the mechanic's lien action up to the amount of the lien being foreclosed.

313 S.C. at 416, 438 S.E.2d at 250 (emphasis added).

In light of this precedent, I find the doctrine of merger does not bar Team IA's claim for post-judgment attorney's fees. The parties' contract clearly gives Team IA the right to recover "any and all reasonable attorney's fees, expenses, and court costs incurred in connection with the enforcement of Employer's rights hereunder." By law, the recovery of attorney's fees is separate and apart from actual damages Team IA sustained as a result of Lucas's breach of contract.

Attorney's fees are not determined by a jury but rather by a court. In its Order on Post-Trial Motions, the Circuit Court quoted the language above from the employment agreement. It then proceeded to hold, as a separate element of Team IA's claim, that in addition to actual damages in the amount of \$278,137.34, Team IA is entitled to recover its attorney's fees.

Today, the judgment having not been satisfied, Team IA's right to recover for its actual damages continues to exist. Similarly, as provided in the parties' contract, Team IA's right to recover additional attorney's fees and costs, incurred after the Order on Post-Trial Motions, continues to exist.

III. Vertical and Horizontal Fees

Team IA's question raises the issue of whether precedent allows for the recovery of both "horizontal" and "vertical" attorney's fees. Having examined applicable cases and the record in this case, I find it does.

In *Muller, supra*, Muller sued Winters for foreclosure of a mechanic's lien, among other claims. He prevailed and received a judgment that included attorney's fees. 313 S.C. at 414. On appeal, the Court of Appeals reversed. *Id.* On remand, Winters petitioned the Circuit Court for attorney's fees incurred during the trial phase and during the appeal (which was successful). *Id.* The Circuit Court denied Winters' petition on the grounds that it lacked jurisdiction.

In the second appeal, Winters argued he was entitled to recover fees incurred during trial, appellate, and postappellate stages of the case. *Id.* at 415. Notably, the statute on which Winters relied did not say "during trial, appellate, and postappellate." Instead, the mechanic's lien statute provides, "The 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." S.C. Code Ann. § 29-5-10. After resolving the jurisdictional issue, the Supreme Court agreed with Winters. The

Court interpreted the statute to allow Winters to recover “post-appellate fees incurred *in the collection* of trial and appellate fees.” 313 S.C. at 416, 438 S.E.2d at 250 (emphasis added).

Therefore, South Carolina courts have applied fee-shifting provisions to apply not only to “horizontal” fees but also to “vertical” fees.

IV. Practical Implications

The Court notes that a rule allowing the recovery for post-judgment fees and costs can, as any rule, be subject to abuse. However, there are safeguards in place.

First, any award of attorney’s fees must come from the court. *See Dilling, Baker & Co. v. Foster*, 21 S.C. 334, 335 (1884). Second, in the event a court finds a contractual or statutory provision authorizing attorney’s fees, the inquiry is not over. “When attorney’s fees are requested and authorized by contract or statute, the court should make specific findings of fact regarding certain factors including: (1) the nature, extent, and difficulty of the legal services rendered; (2) the time and labor devoted to the case; (3) the professional standing of counsel; (4) the contingency of compensation; (5) the fee customarily charged in the locality for similar services; and (6) the beneficial results obtained.” *Blumberg v. Ncalco, Inc.*, 310 S.C. 492, 494, 427 S.E.2d 659, 660-61 (1993); *see also Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997). This six-factor test ensures any fee award stays within the realm of reasonableness, a standard to which all fee awards in this State are subject.

Second, fees cannot be deemed due and owed by a party unless and until a court so orders. Accordingly, in the context of supplemental proceedings, a party entitled to recover post-judgment fees incurred in the collection of a judgment would be required to petition the court the same as any attorney prior to judgment. The amount owed by the judgment debtor would be the judgment amount, plus any prejudgment interest, plus any additional attorney’s fees and costs awarded post-

judgment. Because S.C. Code Ann. § 34-31-20(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. Rather, the award should be treated the same as it is at the trial stage. As demonstrated by this case, the Circuit Court determined the total amount Team IA was owed by adding actual damages and attorney's fees. In these supplemental proceedings, the amount required to satisfy Team IA's judgment will be the amount of the judgment, plus interest accrued thereon by law, plus any attorney's fees awarded. Indeed, this method would have been similar to that employed by the Circuit Court in *Muller* to determine the total amount owed once that case was remanded for a determination of fees.

CONCLUSION

Having found the Court's order issued December 15, 2016 and filed December 22, 2015 was controlled by an error of law, the Court finds it proper to grant Team IA's motion to reconsider.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Team IA's motion to reconsider is granted. Team IA shall be and hereby is entitled to recover its reasonable post-judgment attorney's fees and costs incurred in these supplemental proceedings. Petitioner or its counsel may submit a request at any time during these proceedings for attorney's fees and costs, together with supporting documents, for the Court to review.

AND IT IS SO ORDERED.

James O. Spence
Lexington County Master-in-Equity

June ____, 2017
Lexington, South Carolina

From: Mendoza, Rick <RMendoza@nexsenpruet.com>
Sent: Friday, May 26, 2017 4:34 PM
To: SPENCE, JAMES
Cc: Ben Bruner; Brannon, Kyle A.
Subject: Team IA, Inc. v. Cicero Lucas, Civil Action No. 2009-CP-32-1078 - Proposed Order on Motion for Reconsideration
Attachments: Order Denying Team IA_s Motion to Reconsider, Alter or Amend-c.DOCX

Dear Judge Spence,

Attached please find the proposed Order Denying Team IA, Inc.'s Motion to Reconsider, Alter or Amend, regarding your Order filed on December 22, 2016 denying Team IA, Inc.'s asserted right to post-judgment attorney's fees and expenses. I submit this proposed Order on behalf of Mr. Lucas. The proposed Order is in Word. By copy of this message, I am also providing the proposed Order to Ben Bruner.

Please let me know if you need anything further, or if there is something we can provide that would make your task easier.

I hope that you and Ben have an enjoyable Memorial Day weekend!

With best regards,
Rick

Julio E. Mendoza, Jr.
Member
Nexsen Pruet, LLC
1230 Main Street, Suite 700
Columbia, SC 29201
Post Office Box 2426 (29202)
T: 803.540.2026, F: 803.727.1478
RMendoza@nexsenpruet.com

www.nexsenpruet.com

NEXSEN PRUET

*** CONFIDENTIAL COMMUNICATION *** The information contained in this message may contain legally privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or duplication of this transmission is strictly prohibited. If you have received this communication in error, please notify us by telephone or email immediately and return the original message to us or destroy all printed and electronic copies. Nothing in this transmission is intended to be an electronic signature nor to constitute an agreement of any kind under applicable law unless otherwise expressly indicated. Intentional interception or dissemination of electronic mail not belonging to you may violate federal or state law.

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

Team IA, Inc.,

Petitioner,

vs.

Cicero Lucas,

Respondent.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2009–CP-32-1078

**ORDER DENYING TEAM IA, INC.’S
MOTION TO RECONSIDER, ALTER
OR AMEND**

INTRODUCTION AND PROCEDURAL POSTURE

Team IA, Inc. (“Plaintiff”) initiated Supplemental Proceedings in this matter to collect on its underlying judgment against Cicero Lucas (“Defendant”). Plaintiff argues that it is entitled to “any and all” attorney’s fees it incurs in this matter, including any fees and costs related to any trial, appeal, statutory Supplemental Proceedings, and bankruptcy proceedings. Defendant argues that Plaintiff is not entitled to post-judgment attorney’s fees or costs arising from this separate Supplemental Proceeding action. The parties previously requested that the Court issue a ruling on whether Plaintiff is entitled to add its post-judgment attorney’s fees to the underlying judgment. After hearing the parties’ arguments, the Court entered its Order on December 22, 2016 (the “Order”), wherein it held Plaintiff had no legal right to add any of its post-judgment attorney’s fees and expenses to the outstanding judgment amount.

Plaintiff filed and served its Motion to Reconsider, Alter or Amend the Order (the “Motion”) on January 13, 2017, and Defendant filed its Response in Opposition to Team IA, Inc. Motion to Reconsider, Alter or Amend (the “Response”) on March 6, 2017. The Court held a hearing on the Motion on March 29, 2017. Upon reviewing the record presented and considering the parties’ arguments, the Court denies Plaintiff’s Motion and finds no need to alter or amend its

Order filed on December 22, 2016.

STANDARD OF REVIEW

The purpose of Rule 59(e), SCRCP, whereby a party seeks to alter or amend a judgment, is for the trial judge to “reconsider matters properly encompassed in a decision on the merits.” *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992); *see also Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 23-24, 602 S.E.2d 772, 779-80 (2004). “A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.” *Elam*, 361 S.C. at 24, 602 S.E.2d at 780. A party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not. *See Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009); *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990).

ISSUES PRESENTED

1. Did the Court err in holding that the doctrine of merger precluded Plaintiff from relying on the attorney’s fees provision in the Employment Agreement as a basis to add its post-judgment attorney’s fees to the judgment?

2. Did the Court err in holding that the attorney’s fees provision in the Employment Agreement, which states that “. . . any and all reasonable attorney’s fees, expenses and court costs incurred in connection with the enforcement of Employer’s rights hereunder. . .”, is capable of at least two interpretations and is not sufficient to provide for Plaintiff to recover post-judgment attorney’s fees?

3. Did the Court err in finding that certain practical and public policy concerns support the Court's decision to deny Plaintiff's request for recovery of post-judgment attorney's fees?

ANALYSIS

1. The Doctrine of Merger

With respect to the first issue presented, Plaintiff argues that the Court erred in its Order by holding that the doctrine of merger provides that the specific terms of the Employment Agreement merged into the judgment and, therefore, precluded Plaintiff's post-judgment reliance upon Paragraph VII(G) of the Employment Agreement (the "Attorney's Fees Provision") to support its request for post-judgment attorney's fees. In support of this argument, Plaintiff first contends the merger doctrine stated in *Ryan v. S. Mut. Bldg. & Loan Ass'n*, 50 S.C. 185, 27 S.E. 618, 619-20 (1897), as cited in the Order, was actually an example of claim preclusion rather than an example of merging contract terms into a judgment. Accordingly, Plaintiff argues that the principles of claim preclusion would not prohibit the addition of post-judgment attorney's fees to the judgment in this case because that issue was not previously adjudicated by the Circuit Court. Plaintiff next argues that certain examples exist under South Carolina case law to support its argument that the doctrine of merger does not serve to merge all terms of the contract into the judgment, such as the contract interest rate being allowed for calculating post-judgment interest instead of the default statutory rate. See *Turner Coleman, Inc. v. Ohio Constr. & Eng'g, Inc.*, 272 S.C. 289, 292, 251 S.E.2d 738, 740 (1979).

Conversely, Defendant argues that the Court correctly held this doctrine precludes Plaintiff from adding its post-judgment attorneys' fees to the judgment because all terms of the Employment Agreement related to damages recoverable against Defendant merged into the judgment amount. In response to Plaintiff's arguments, Defendant disagrees that the doctrine of

merger stated in *Ryan* was merely a nineteenth century version of claim preclusion because claim preclusion principles were already established by 1897, and the *Ryan* court would have used those terms instead of the doctrine of merger if that is what they meant. *See, e.g. Hart v. Bates*, 17 S.C. 35, 40 (S.C. 1882) (“The doctrine of ‘*res judicata*’ is very far-reaching and effective. It is founded on principles of the wisest policy, because the peace and order of society require that a matter once litigated should not again be drawn in question between the same parties or those claiming through them.”); *Hyatt v. McBurney*, 15 S.C. 393, 402 (S.C. 1881) (“To that decision, however, the appellants were not parties, and the court, in pronouncing judgment, expressly declared that it would not bind the appellants. This decision, therefore, is not *res judicata* as to them, and it has no binding force here.”). Additionally, Defendant argues that the Court’s Order also relies on much more recent case law support for the doctrine of merger from the Fourth Circuit Court of Appeals in 2012, Maryland in 2009, Idaho 1992 and Washington in 1990, which are much more factually akin to the facts at bar.

With respect to Plaintiff’s second argument that the doctrine of merger is inapplicable, Defendant contends that Plaintiff’s reliance on *Turner Coleman* and its progeny, which relate to allowance of the contract rate of interest in post-judgment interest calculations, is clearly distinguishable from an analysis of post-judgment attorney’s fees because post-judgment interest, in general, is allowed by statute, where post-judgment attorney’s fees are not. S.C. Code Ann. § 34-31-20 shows the legislature’s clear intent to provide judgment creditors with post-judgment interest accrual and provides for a default statutory rate to be published by the Supreme Court each year.¹ Attorneys’ fees are the exact opposite. The assumption under the well-settled American Rule

¹ S.C. Code Ann. § 34-31-20(B) states, “A money decree or judgment of a court enrolled or entered *must* draw interest according to law.” The statutory rate under this statute is applicable only in the absence of a written agreement between the parties setting a different rate of interest. *Turner Coleman, Inc. v. Ohio Construction & Engineering, Inc.*, 272 S.C. at 289, 251 S.E.2d at 741.

is that each party must pay its own attorney's fees and costs unless fee-shifting is authorized by contract or statute. *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 759 (1997) (citing *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 427 S.E.2d 659 (1993)).

The Court does not find Plaintiff's arguments related to the doctrine of merger persuasive and, therefore, reiterates the conclusion stated in the Order that the doctrine of merger served to merge the terms of the Employment Agreement into the judgment, precluding Plaintiff from relying on the Attorney's Fees Provision.

2. The Language of the Attorney's Fees Provision in the Employment Agreement

A. The Attorney's Fees Provision is Ambiguous

The parties do not dispute that the language of the Attorney's Fees Provision does not use the express term "post-judgment attorney's fees"; however, Plaintiff argues that the Court erred in finding the language of the Attorney's Fees Provision is insufficient to except the fees in this case from the American Rule. Paragraph VII(G) of the Employment Agreement states as follows:

Fees, Costs and Expenses: In the event Employer must enforce any of the rights herein granted to it through an attorney, Employee shall be liable for any and all reasonable attorney's fees, expenses, and court costs incurred in connection with the enforcement of Employer's rights hereunder.

See the Order on Post Trial Motions filed by the Circuit Court on November 24, 2015 (the "Order on Post Trial Motions"), at page 29.

Plaintiff argues that "any and all" as used in the Attorney's Fees Provision means "everything" and should be interpreted as a completely unqualified right for Plaintiff's recovery of attorney's fees and expenses. Defendant contends that the attorney's fees recoverable by Plaintiff against Defendant through the Attorney's Fees Provision is limited, both in its wording (it references the Employment Agreement, and not a judgment) and by the doctrine of merger, and that the Attorney's Fees Provision should be interpreted to allow fees and expenses only if

“incurred in connection with the enforcement of Employer’s rights [under the Employment Agreement],” which right ended when the Employment Agreement merged into the judgment.

In the Order, the Court noted that the Attorney’s Fees Provision is capable of two interpretations: (1) a broad, universal interpretation posited by Plaintiff; or (2) a narrower interpretation posited by Defendant that would allow recovery of “any and all” fees for such pre-judgment actions taken to enforce the Employment Agreement such as (a) pre-litigation mediation or demand letters; (b) injunctive action; (c) arbitration; (d) mediation at the trial level to enforce the contract; or (e) trial for money damages. It is clear that the Circuit Court did not rule at the trial level on whether the Attorney’s Fees Provision applied to post-judgment attorney’s fees or on who drafted the Employment Agreement in its Order on Post Trial Motions, or in any other written ruling. In its Order on Post Trial Motions, the Circuit Court merely tracked the language of the Employment Agreement to find that Plaintiff was entitled to pre-judgment attorney’s fees and expenses. *See* Order on Post Trial Motions, page 28.

Plaintiff and Defendant presented no factual issues to the Court in regard to Plaintiff’s Motion; the only issues are legal issues, one of which is how to interpret the Employment Agreement. “It is a question of law for the court whether the language of a contract is ambiguous. . . . An ambiguous contract is one that can be understood in more ways than just one or is unclear because it expresses its purposes in an indefinite manner.” *Plantation A.D., LLC v. Gerald Builders of Conway, Inc.*, 386 S.C. 198, 205, 687 S.E.2d 714, 718 (Ct. App. 2009) (internal citations omitted).

Because it is without question that South Carolina follows the American Rule for attorney’s fees, the Court must decide whether the Attorney’s Fees Provision’s language is sufficiently clear and unambiguous to except Plaintiff’s request for post-judgment attorney’s fees from the

American Rule. The Court finds that it is not. As noted in the Order and above, the Attorney's Fees Provision can be read in a broad, universal manner or in a narrow manner. Therefore, the Attorney's Fees Provision "can be understood in more ways than just one" and it "is unclear because it expresses its purposes in an indefinite manner." *Id.* Put another way, reading the Attorney's Fees Provision in the practical and procedural context of how litigation takes place, Plaintiff asks the Court to interpret the Attorney's Fees Provision as providing Plaintiff with recovery of attorney's fees and expenses for any type of legal activity at any possible time, before litigation, during litigation, or years after litigation, while Defendant asks the Court to interpret the Attorney's Fees Provision to provide for recovery of attorney's fees and expenses until the Employment Agreement has been fully adjudicated, at which time a judgment is (was) entered for the amount determined due to Plaintiff. The Court finds Defendant's interpretation is correct.

B. "Horizontal" Application vs. "Vertical" Application of Provision

Although there are no disputed factual issues before the Court to allow for construction of the ambiguity in the Attorney's Fees Provision, the discrepancy between the parties' interpretations of the Attorney's Fees Provision can be viewed as whether the Attorney's Fees Provision applies only to "horizontal" procedural actions taken to enforce the Employment Agreement, as Defendant contends, or also to "vertical" procedural actions, as Plaintiff argues. The Court finds that the Attorney's Fees Provision applies only to "horizontal" actions taken by Plaintiff to enforce its rights under the Employment Agreement prior to entry of the judgment.

The parties agree that the Attorney's Fees Provision applies to "horizontal" actions that took place at the trial level before entry of the judgment. Examples of pre-judgment "horizontal" actions are where a defendant in a mortgage foreclosure action files a bankruptcy case, staying the state court action and sometimes requiring litigation in a bankruptcy forum before the matter is

returned to state court, or a party removing a state court action to federal court based on diversity or a federal question jurisdiction. In short, the Court views “horizontal” actions as pre-judgment actions while the case remains on the trial level. Conversely, “vertical” actions are those that typically involve appeals of final judgments, but also include supplemental proceedings on a judgment, as in the case at bar, which is an entirely separate, post-judgment statutory action that requires a new filing fee, a new order of reference, a new rule to show cause and potential for an entirely new set of written discovery and depositions. *See* S.C. Code Ann. §§ 15-39-310 *et seq.*

Plaintiff has not provided the Court with any legal authorities supporting its argument for allowing “vertical” attorney’s fees *based on a contract*. The cases cited by Plaintiff in its Motion and referenced below that do allow “vertical” attorney’s fees are where fees were allowed or mandated based on a statute. Plaintiff has cited no cases where “vertical” fees are allowed based on a contractual attorney’s fees provision, and the Court is not aware of any such authorities.

In *Muller v. Myrtle Beach Golf & Yacht Club*, the party who sought recovery of attorney’s fees for “vertical” actions on appeal relied on S.C. Code Ann. § 29-5-10, a section of the South Carolina mechanic’s lien statutory scheme that allows a party to recover reasonable attorney’s fees in enforcing or defending against the lien, up to the amount of the lien. *Muller v. Myrtle Beach Golf & Yacht Club*, 313 S.C. 412, 415, 438 S.E.2d 248, 250 (1993). In *Muller*, the moving party waived its right to recover appellate fees under Rule 222 of the South Carolina Appellate Court Rules, but the Court allowed recovery of appellate fees and costs under Section 29-5-10. *Id.* at 416, 438 S.E.2d at 250. In *McDowell v. S.C.D.S.S.*, the party who sought recovery of attorney’s fees for “vertical” actions on appeal relied on S.C. Code Ann. § 15-77-300, a section of the statutory scheme related to lawsuits involving the state, its agencies and officials and the United States. *McDowell v. S.C.D.S.S.*, 304 S.C. 539, 541-42, 405 S.E.2d 830, 832 (1991). This statute

allows a prevailing party to tax its reasonable attorney's fees against the appropriate agency if the court finds the state agency acted without substantial justification in pressing its claim and circumstances would not make recovery of such fees unjust. *Id.* In *McDowell*, the Court found that Supreme Court Rule 38 (the predecessor to SCACR 222) did not preempt an award of attorney's fees based upon this statute. *Id.* at 543, 405 S.E.2d at 833.

These cases are inapplicable to extend the ambiguous language of the Attorney's Fees Provision to Plaintiff's recovery of attorney's fees for "vertical" actions. A clear and unambiguous statute which specifically provides for the allowance of attorney's fees in certain situations is much different than the ambiguous "any and all" language at issue in this case. The specific wording of these fee-shifting statutes is presumed to be carefully tailored by the legislature with public policy of all litigants in mind, unlike the ambiguous language of the Attorney's Fees Provision between the parties in this case. *See Bass v. Isochem*, 365 S.C. 454, 470, 617 S.E.2d 369, 377 (Ct. App. 2005) ("Once the legislature has made a choice, there is no room for the courts to impose a different judgment based upon their own notions of public policy."). Moreover, unlike contract terms, statutory rights cannot merge into a judgment.

While Plaintiff argues it is not relevant that *Muller* and *McDowell* are based on statutes in an effort to have those cases support its position, Plaintiff argues the opposite approach in an effort to keep *Thornton v. Thornton* from weakening its position. In that case, the Supreme Court found that the family court erred in granting appellate attorney's fees to a wife under S.C. Code Ann. § 20-7-420(2). *Thornton v. Thornton*, 328 S.C. 96, 113, 492 S.E.2d 86, 95 (1997). In *Thornton*, the Court held that a wife was not entitled to recover attorney's fees incurred in the course of appellate representation from her husband based on the language of Rule 222, SCACR, despite the general allowance of recovery of fees and costs by the prevailing party under Section 20-7-420(2). *Id.* at

113-114, 492 S.E.2d at 95. Plaintiff argues that *Thornton* is inapplicable because the ruling is based on a fee-shifting statute instead of a contract; however, this argument is inconsistent with Plaintiff's arguments related to *Muller* and *McDowell* because those cases are based on fee-shifting statutes as well. For these reasons, Plaintiff's arguments for allowing "vertical" attorney's fees based on *Muller* and *McDowell* must fail.

C. The Attorney's Fees Provision Is Ambiguous and Horizontal in Effect

In summary, because the Attorney's Fees Provision is capable of multiple interpretations, such provision is ambiguous and the ambiguity contained therein does not extend Plaintiff's ability to recover attorney's fees to post-judgment, "vertical" actions that are incurred collecting the judgment amount and not "incurred in connection with the enforcement of [Plaintiff]'s rights hereunder."² The Attorney's Fees Provision does not apply to this Supplemental Proceedings case.

3. Practical and Public Policy Concerns

Due to the novel nature and potentially far-reaching implications of Plaintiff's request for post-judgment attorney's fees in this Supplemental Proceedings case, the Court views several practical and public policy reasons as additional bases for denying Plaintiff's Motion.

The Court's first concern relates to problems associated with adding post-judgment attorney's fees, on a potentially annual or semi-annual basis, to a judgment amount and compounding post-judgment interest related thereto. A judgment has active energy, generally, for ten years in South Carolina. *See* S.C. Code Ann. § 15-39-30 (1976, as amended). A diligent creditor may seek to initiate supplemental proceedings once a year during the ten-year life of the

² As stated in the Order, the Court notes that post-judgment attorney's fees have been allowed where the contract provision expressly provided for post-judgment attorney's fees and expenses, *e.g.*, *Arbor Lake, LLC v. Enterprise Bank & Trust*, 334 P.3d 344 (Kan. Ct. App. 2014), or where a statute specifically provides for post-judgment attorney's fees, *e.g.*, Cal Civ. Pro. Code § 685.040 and Idaho Code Ann. § 12-120(5). In this case, the Attorney's Fees Provision does not expressly provide for post-judgment attorney's fees and expenses. Moreover, in South Carolina, there is neither a statute nor a rule providing that judgment creditors are entitled to receive post-judgment attorney's fees and expenses incurred in pursuing collection of a judgment.

judgment, with new filing fees and attorney's fees for each time the judgment creditor initiates supplemental proceedings. Instead of a new judgment being entered each time post-judgment attorney's fees are added, which would necessarily require the Court to go through the six-factors in *Jackson v. Speed* each time, the Court believes the proper and only choice in that scenario would be for each round of post-judgment attorney's fees to be added into and relate back to the original judgment amount. The Court believes this would lead to myriad problems associated with recalculating the compounding post-judgment interest that would have already occurred under S.C. Code Ann. § 34-31-20.

Next, the Court believes the only court that would have jurisdiction to alter the judgment amount would be the court that originally granted the judgment. The Court is aware of no legal authority that allows a Master-in-Equity to alter a judgment entered by another tribunal. If a judgment creditor originally obtained judgment in the state of Indiana, domesticated that judgment under the Full Faith and Credit Clause to Lexington County, South Carolina, and obtained reference of the supplemental proceedings to the Master-in-Equity, this Court does not believe that the Master-in-Equity would have jurisdiction to alter that judgment amount. Supplemental proceedings are judgment collection proceedings, not judgment addition proceedings. *See* S.C. Code Ann. § 15-39-10 *et seq.*

Another concern related to the allowance of post-judgment attorney's fees is the potential for creating a feeling among judgment creditors that they have nothing to lose by frequently initiating rounds of supplemental proceedings. Many contracts and promissory notes that come before this Court include general language entitling a judgment creditor to reasonable attorney's fees in collecting amounts owed under the contract or enforcing the creditor's rights under the contract. These clauses are similar to the Attorney's Fees Provision in this case. If the Court were

to allow Plaintiff to recover post-judgment attorney's fees in this case based on the Attorney's Fees Provision, a flood of post-judgment attorney's fees requests may result, a situation the Court views as problematic and unwarranted as a practical matter.

Lastly, another practical concern is the judgment debtor's financial ability to retain counsel in each round of supplemental proceedings to contest a judgment creditor's motion for post-judgment attorney's fees, leading to the potential that these motions will be uncontested.

Examining Plaintiff's request in the context of these realities in the post-judgment litigation world further lends support to Defendant's position that the Attorney's Fees Provision in this case applies only to pre-judgment attorney's fees and costs.

CONCLUSION

For the reasons stated above, the Court denies Plaintiff's Motion and finds no need to alter or amend its Order filed on December 22, 2016. First, the doctrine of merger applies to this matter because the specific terms of the Attorney's Fees Provision merged into the judgment at the time of entry. Second, the "any and all" language of the Attorney's Fees Provision is ambiguous because it is capable of multiple interpretations in the context of litigation and no case law exists applying such contractual language to "vertical," post-judgment actions. Lastly, there are several practical and public policy concerns with allowing post-judgment attorney's fees based on ambiguous contractual language. Plaintiff's request for post-judgment attorney's fees, expenses and costs is denied.

AND IT IS SO ORDERED.

_____, 2017
Lexington, South Carolina

James O. Spence
Master-in-Equity for Lexington County

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

RECEIVED
NOV 14 2017
SC Court of Appeals

Team IA, Inc. Appellant,

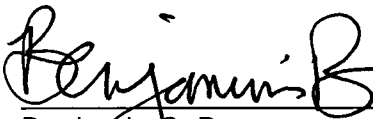
v.

Cicero Lucas. Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material
proposed to be included by either of the parties and not any other material.

November 14, 2017


Benjamin C. Bruner
BBruner@brunerpowell.com
Bruner, Powell, Wall & Mullins, LLC
P.O. Box 61110
Columbia, South Carolina 29260
803-252-7693
Attorney for Appellant