THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Hon. James O. Spence, Master-in-Equity

Case No. 2009-CP-32-01078
Ct. App. No. 2017-001497

Team IA, Inc., ... Appellant,

v.

Cicero Lucas, ... Respondent.

FINAL BRIEF OF RESPONDENT

Julio E. Mendoza, Jr.
Nexsen Pruet, LLC
Post Office Drawer 2426
Columbia, SC 29202
(803) 540-2026

Attorneys for Respondent Cicero Lucas

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE CASE

Respondent Cicero Lucas ("Lucas") has reviewed and adopts by reference the Statement of the Case set forth in Appellant's Brief. (Appellant's Br. at 1-2.) However, Lucas disputes Appellant's statement therein that its attorney's fees and costs were "necessarily incurred in the collection of its judgment against Lucas."

STATEMENT OF FACTS

This appeal is focused on the Master-in-Equity's (the "Master") ruling that Appellant Team IA, Inc. ("Team IA") is not entitled to post-judgment attorney's fees and costs incurred collecting its judgment against Lucas based on the language of the attorney's fees provision in the parties' contract (the "Attorney's Fees Provision"). (R. pp. 18-27 (Order Denying Attorney's Fees filed Dec. 22, 2016 ("December 2016 Order")); R. pp. 3-15 (Order Denying Team IA, Inc.'s Motion to Reconsider, Alter or Amend filed May 31, 2017 ("May 2017 Order")).)

In 2009, Team IA filed suit against Lucas and others for breach of that certain Employment Agreement (the "Employment Agreement"). (R. p. 18 (December 2016 Order at 1).) On March 27, 2015, Team IA obtained a jury verdict in its favor against Lucas, after which the parties filed post-trial motions. (R. p. 18 (December 2016 Order at 1); R. p. 38 (Order on Post Trial Motions at 1).) On November 24, 2015, the Circuit Court filed its Order on Post Trial Motions wherein it entered judgment in favor of Team IA against Lucas in the amount of $278,137.34 for damages related to breach of the Employment Agreement and $526,334.52 in attorney's fees and costs incurred by Team IA.[1] (R. pp. 73-74 (Order on Post-Trial Motions at 36-37); R. p. 18 (December 2016 Order at 1).) Therefore, the Circuit Court awarded judgment to Team IA against Lucas in the total amount of $804,471.86. (R. p. 74 (Order on Post-Trial Motions at 37); R. p. 18 (December 2016 Order at 1).) On December 2, 2015, the Lexington County Clerk of Court enrolled

[1] The attorney's fees and costs awarded by the Circuit Court as part of the judgment amount are not disputed or otherwise at issue in this appeal.

the $804,471.86 judgment against Lucas (the "Judgment"). (R. pp. 36-37 (Form 4 Judgment in a Civil Case at 1).)

In its Order on Post Trial Motions, the Circuit Court made the following finding in support of awarding Team IA attorney's fees and costs:

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

(R. pp. 65-66 (Order on Post-Trial Motions at 28-29); R. pp. 18-19 (December 2016 Order at 1-2).)

Thereafter, Team IA initiated Supplemental Proceedings under S.C. Code Ann. § 15-39-310 *et seq.* (1976, as amended), and the Circuit Court filed that certain Rule to Show Cause and Order of Reference on August 9, 2016 (the "Rule to Show Cause"). (R. pp. 31-32 (Rule to Show Case at 1-2).) In addition to requiring Lucas' appearance at a hearing before the Master on November 3, 2016, the Rule to Show Cause also referred the Supplemental Proceedings to the Master and provided him

with authority to fully and finally adjudicate all matters therein. (*Id.*) At the November 3, 2016 hearing, the Master continued the hearing to allow the parties to engage in additional discovery after Team IA's counsel examined Lucas under oath for approximately 40 minutes. (R. p. 30 (Supplemental Proceeding Order dated Nov. 3, 2016 at 1).) The Master further stated that Team IA requested a phone status conference on or before November 10, 2016. (*Id.*)

After a phone conference held on November 9, 2016, the parties advised the Master that they wished for him to determine the narrow issue of whether Team IA was entitled to add post-judgment attorney's fees and costs to its judgment. (*See* R. p. 207 (Letter from Mr. Bruner to Judge Spence dated December 2, 2016).) The parties agreed to submit proposed Orders to the Master by December 2, 2016. (*See* R. pp. 207-219 (Letters from Mr. Bruner and Mr. Mendoza to Judge Spence, with enclosures, dated December 2, 2016).) After the parties submitted proposed Orders, the Master filed the December 2016 Order on December 22, 2016, wherein he denied Team IA's claim for attorney's fees and costs incurred post-judgment while seeking to collect the Judgment amount. (R. pp. 18, 26-27 (December 2016 Order at 1, 9-10).)

In the December 2016 Order, the Court denied Team IA's claim for post-judgment attorney's fees because: (1) the language of the Attorney's Fees Provision did not provide for recovery of post-judgment attorney's fees; (2) the law of the case doctrine did not support Team IA's claim because the Order on Post Trial Motions did not address post-judgment attorney's fees; (3) the doctrine of merger served to extinguish the Attorney's Fees Provision in the Employment Agreement because the

Employment Agreement merged into the Judgment; and (4) no separate statutory basis exists for recovery of post-judgment attorney's fees. (R. pp. 20-26 (December 2016 Order at 3-9).)

On January 13, 2017, Team IA filed its Motion to Reconsider, Alter or Amend the December 2016 Order. (R. pp. 201-206 (Motion to Reconsider).) After a hearing held on March 29, 2017, the Master entered his Order Denying Team IA, Inc.'s Motion to Reconsider, Alter or Amend on May 31, 2017. (R. pp. 3-15 (May 2017 Order).) In the May 2017 Order, the Master reiterated his holding that Team IA is not entitled to post-judgment attorney's fees because: (1) the doctrine of merger extinguished the Attorney's Fees Provision; (2) the Attorney's Fees Provision is not sufficiently clear and unambiguous to except Team IA's request for post-judgment attorney's fees from the American Rule (which provides that generally each party bears the responsibility for its own legal fees and costs); (3) the Attorney's Fees Provision is ambiguous and should be construed to apply only to pre-judgment, or "horizontal," actions; and (4) certain practical and public policy concerns inherent in Supplemental Proceedings further weigh in favor of denying Team IA's claim for post-judgment attorney's fees. (R. p. 15 (May 2017 Order at 13).) Thereafter, Team IA filed its Notice of Appeal on July 7, 2017.

SUMMARY OF ARGUMENT

The Master-in-Equity correctly denied Team IA's claim for post-judgment attorney's fees because: (1) the well-settled merger doctrine extinguished the Attorney's Fees Provision upon entry of the Judgment; (2) the language of the Attorney's Fees Provision does not allow for post-judgment attorney's fees; (3) the Attorney's Fees Provision is ambiguous and the parties' did not intend that such provision extend beyond Judgment; (4) the law of the case doctrine did not apply because the Circuit Court did not, and could not, rule on the prospective issue of post-judgment attorney's fees; and (5) multiple practical and public policy concerns exist if the Court granted Team IA's claim.

ARGUMENT

I. THE MASTER-IN-EQUITY CORRECTLY RULED THAT THE MERGER DOCTRINE EXTINGUISHED THE ATTORNEY'S FEES PROVISION IN THE EMPLOYMENT AGREEMENT WHEN THE EMPLOYMENT AGREEMENT MERGED INTO THE JUDGMENT, LEAVING THE JUDGMENT AS THE SOLE SOURCE OF TEAM IA'S POST-JUDGMENT RIGHTS AGAINST LUCAS.

A. Upon entry of the Judgment, the merger doctrine extinguished the terms of the Employment Agreement.

Lucas contends that the merger doctrine, standing alone, is a sufficient basis for the Court to affirm the Master's ruling on appeal. It is undisputed that Team IA relies solely on the Attorney's Fees Provision in support of its position that it may recover post-judgment attorney's fees from Lucas. (Appellant's Br. at 7.) The merger doctrine prohibits Team IA's claim.

The merger doctrine provides that upon entry of a judgment, the specific terms of the parties' underlying contract are extinguished by virtue of their merger into the judgment. *See Ryan v. S. Mut. Bldg. & Loan Assoc.*, 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); *see also Moore v. Holland*, 16 S.C. 15, 16 (S.C. 1881). This merger leaves the judgment as the lone source of the judgment creditor's rights, not the underlying contract that led to the judgment. This doctrine is further buttressed by the commonly used phrase that a contractual claim or debt has been "reduced to judgment." *See Brookline Sav. & Trust Co. v. Barnett*, 243 S.C. 481, 486, 134 S.E.2d 569, 571 (1964).

While there are no published South Carolina opinions that apply the merger doctrine to a judgment creditor's attempt to obtain post-judgment attorney's fees, recent opinions in other states have found that the merger doctrine precludes such a claim. In *Monarc Construction, Inc. v. Aris Corporation*, the Maryland Court of Special Appeals reviewed whether the following contract provision would extend to allow the judgment creditor to recover post-judgment attorney's fees incurred seeking to collect the judgment:

> In the event that any party is required to enforce the terms or conditions of this Agreement in court, the prevailing party shall recover all costs and expenses incurred in or arising from such action, including reasonable attorney's fees.

Monarc Constr., Inc. v. Aris Corp., 981 A.2d 822, 826 (Md. Ct. Spec. App. 2009). This fees provision is substantially similar to the Attorney's Fees Provision in the Employment Agreement.

In *Monarc Construction*, the court first acknowledged that, like South Carolina, Maryland generally follows the American Rule, but allows for exceptions where fees are authorized by statute or an agreed upon contract. *Id.* at 831. Next, the court noted that "the crucial issue, for purposes of the instant appeal, is the effect of the doctrine of merger." *Id.* Analyzing the merger doctrine in the specific context of the judgment creditor's reliance on the contract for post-judgment attorney's fees (also a matter of first impression at that time in Maryland), the court held that the judgment creditor was not entitled to post-judgment attorney's fees. *Id.* at 834-35. In so holding, the court followed the rulings in published opinions issued by the Wisconsin Court of Appeals and the Washington Court of Appeals,

where post-judgment attorney's fees were precluded because "the merger of a contract into a judgment on the merits of a breach of contract claim precludes any subsequent, post-merger attempt to collect attorney's fees that were awardable solely based upon provisions of the merged contract." *Id.* at 832. (citing Restatement (Second) of Judgments § 18 (1982); *Prod. Credit Assoc. of Madison v. Laufenberg*, 420 N.W.2d 778, 779 (Wis. Ct. App. 1988); *Caine & Weiner v. Barker*, 713 P.2d 1133, 1134-35 (Wash. Ct. App. 1986)).

The court was also persuaded by the following language in a published opinion issued by the New Jersey Superior Court:

> We are persuaded that there are sound policy reasons consistent with the philosophy of the American rule for not construing the typical attorney-fees provision as including post-judgment services. We think it plain that a contrary construction would have a substantial potential for abuse, for unduly burdening consumer and other commercial transactions, for indefinitely delaying finality, and for spawning a host of ancillary litigation. Consequently, unless the agreement is express as to the post-judgment obligation, we decline to construe it as imposing that obligation.

Id. at 833 (quoting *Hatch v. T & L Assocs.*, 726 A.2d 308, 310 (N.J. Super. Ct. App. Div. 1999)). In short, the Maryland Court of Special Appeals relied on these prior rulings to hold that because the attorney's fees provision did not expressly provide for recovery of post-judgment attorney's fees, the merger doctrine extinguished the contractual attorney's fees provision upon entry of the judgment. *Id.* at 833-34. The Attorney's Fees Provision in the Employment Agreement between Team IA and Lucas also does not expressly provide for recovery of post-judgment attorney's fees.

Monarc Construction and the cases cited therein are not the only cases to find the merger doctrine precludes post-judgment attorney's fees based on a

contractual provision. In *Youngman v. Fleet Bank, N.A. (In re A&P Diversified Techs. Realty, Inc.)*, the Third Circuit Court of Appeals held the merger doctrine precluded a secured creditor from recovering attorney's fees in the bankruptcy case because the attorneys' fees provision in the mortgage, along with the other terms of the mortgage, merged into the foreclosure judgment obtained by the creditor prior to the borrower's bankruptcy filing. *Youngman v. Fleet Bank, N.A. (In re A&P Diversified Techs. Realty, Inc.)*, 467 F.3d 337, 343 (3rd Cir. 2006). The Third Circuit Federal Court of Appeals went on to note there is an exception to the merger doctrine in this context, where the contract "clearly evidence[s] an intent to preserve the effectiveness of the attorney's fees and expenses provision following the entry of the foreclosure judgment," but found that no such exception was present in the attorney's fees provision before the court. *Id.*

The Supreme Court of Iowa has similarly held that the merger doctrine extinguished a contractual attorney's fees provision upon entry of the judgment on that contract, prohibiting its use as a basis for post-judgment attorney's fees. *Allison v. John M. Biggs, Inc.*, 826 P.2d 916, 917 (Iowa 1992) ("While [Iowa Code] § 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. After the judgment had been perfected in this case, Allison became a judgment creditor and no longer depended on the note as the basis of Biggs' obligation.") (citing *Woodcraft Constr., Inc. v. Hamilton*, 786 P.2d 307, 308 (Wash. Ct. App. 1990)).

While the merger doctrine has not been analyzed in South Carolina in the context of post-judgment attorney's fees, the doctrine is well-settled. *See Moore v. Holland*, 16 S.C. 15, 16 (S.C. 1881) ("The Note was merged into the judgment."); *see also Ryan v. S. Mut. Bldg. & Loan Ass'n*, 50 S.C. 185, 27 S.E. 618, 619 (1897) ("The contract now said to be usurious had become merged into the judgment. The original contract was extinguished. The judgment became a new debt . . . .").

Based on this combination of our Supreme Court's acknowledgment of this doctrine as it pertains to contracts merging into judgments, and the case law from our sister jurisdictions applying the doctrine to preclude post-judgment attorney's fees, the Master did not err in ruling that the merger doctrine precludes Team IA's assertion of the Attorney's Fees Provision to hold Lucas liable for post-judgment fees. (R. pp. 23-25 (December 2016 Order at 6-8); R. pp. 5-7 (May 2017 Order at 3-5).)

B. Case law allowing post-judgment interest at the contract rate is inapplicable because post-judgment interest is a statutory right, whereas post-judgment attorney's fees are not.

In an effort to lessen the impact of the merger doctrine, Team IA argues that the merger doctrine does not apply to prohibit post-judgment attorney's fees in this case because of South Carolina case law allowing post-judgment interest to accrue at the contract rate. (Appellant's Br. at 9, 19-20.) These cases are inapplicable because our legislature has provided a clear and unambiguous statutory right to recover post-judgment interest pursuant to S.C. Code Ann. § 34-31-20. No such right to post-judgment attorney's fees exists.

Lucas does not dispute that *Turner Coleman, Inc. v. Ohio Construction and Engineering, Inc.* and its progeny provide that a stated contract interest rate is the operative rate for post-judgment interest calculations. *Turner Coleman, Inc. v. Ohio Construction and Engineering, Inc.*, 272 S.C. 289, 292, 251 S.E.2d 738, 740 (1979) ("It is well-settled that the parties are at liberty to contract, within legal limits, relative to the interest to be paid on an obligation, including the rate of interest be charged after maturity. . . . Therefore, Section 34-31-20, fixing the interest rate on money judgments or decrees, applies only in the absence of a written agreement between the parties fixing a different rate of interest.").

However, *Turner Coleman* and its progeny do not serve as blanket precedent that all terms of a contract reduced to a judgment survive entry of that judgment. Instead, those cases stand for the sole proposition that a written contractual interest rate can be used to calculate post-judgment interest, a statutory right that exists regardless of whether the judgment is based on a contract or not. *See id.* As the Master noted in the May 2017 Order, this situation "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." (R. p. 6 (May 2017 Order at 4).) Indeed, the general presumption is the opposite as to attorney's fees under the American Rule. *See Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 759 (1997).

Therefore, these cases cited by Team IA holding that the contractual interest rate shall apply post-judgment do not extend to allowing a contractual attorney's fees provision for recovery of post-judgment attorney's fees. For each of these

reasons stated above, the Master correctly ruled that the merger doctrine extinguished the Attorney's Fees Provision, thereby prohibiting Team IA's claim for post-judgment attorney's fees.

II. THE MASTER-IN-EQUITY CORRECTLY RULED THAT THE LANGUAGE OF THE ATTORNEY'S FEES PROVISION CONTAINED IN THE EMPLOYMENT AGREEMENT DID NOT ENTITLE TEAM IA TO POST-JUDGMENT ATTORNEY'S FEES AND COSTS.

A. Team IA's argument that the language of the Attorney's Fees Provision clearly allows for post-judgment attorney's fees is without merit.

It is well-settled in South Carolina that the American Rule prohibits recovery of attorney's fees and costs from an opposing party unless such recovery is authorized by contract or statute. *Jackson v. Speed*, 326 S.C. 289, 307, 486 S.E.2d 750, 759 (1997) (citing *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 427 S.E.2d 659 (1993)). It is clear in this case that no applicable statute exists that would allow Team IA to recover post-judgment attorney's fees. Therefore, Team IA seeks to extend the language in Paragraph VII (G) of the Employment Agreement to allow for such recovery. Paragraph VI (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.

(the "Attorney's Fees Provision") (R. p. 66 (Order on Post Trial Motions at 29).)

First, it is undisputed that the Attorney's Fees Provision does not make any specific or express mention of post-judgment attorney's fees. (R. p. 25 (December 2016 Order at 8).) In an effort to get around this fact, Team IA argues that the "any

and all" language in the attorney's fees provision provides it with an unqualified right for recovery of attorney's fees and costs it incurs while enforcing its rights. (Appellant's Br. at 14.) Conversely, Lucas contends that the Attorney's Fees Provision should be interpreted to allow only those attorney's fees and costs "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. Team IA enforced its rights under the Employment Agreement and obtained the Judgment. Team IA now seeks to exercise rights as a judgment creditor.

The Attorney's Fees Provision only provides a right for Team IA to recover attorney's fees and costs incurred in connection with its rights under the Employment Agreement, not its rights from any other source. This prompted the Master to find that the Attorney's Fees Provision is capable of two interpretations:

> (1) a broad, universal interpretation posited by [Team IA]; or (2) a narrower interpretation posited by [Lucas] 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; (2) injunctive action; (c) arbitration; (d) mediation at the trial level to enforce the contract; or (e) trial for money damages.
>
> . . .
>
> Put another way, reading the Attorney's Fees Provision in the practical and procedural context of how litigation takes place, [Team IA] 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 [Lucas] 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 [Team IA]. The Court finds [Lucas'] interpretation correct.

(R. pp. 8-9 (May 2017 Order at 6, 7).)

Based on this thorough analysis of the Attorney's Fees Provision, the Court correctly ruled that the Attorney's Fees Provision does not provide for attorney's fees incurred by Team IA in efforts to collect the Judgment.

B. *Renaissance Enterprises* is not binding precedent, and the facts in *Renaissance Enterprises* are distinguishable from the facts of this case.

Next, Team IA argues that the Master erred based on the Court of Appeals' finding that post-judgment attorney's fees were appropriate in *Renaissance Enterprises, Inc. v. Ocean Resorts, Inc.*, 326 S.C. 460, 483 S.E.2d 796 (Ct. App. 1997) *rev'd on other grounds*, 334 S.C. 324 (1999).

First, as also noted by Team IA in its brief, the Supreme Court reversed *Renaissance Enterprises* on other grounds and, therefore, this opinion does not have precedential value. *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 1139 (4th Cir. 1995). Second, the attorney's fees provision in *Renaissance Enterprises* is much broader than the Attorney's Fees Provision in the Employment Agreement. The attorney's fees provision before the Court in *Renaissance Enterprises* was as follows:

> 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.

Renaissance Enters., 326 S.C. at 469, 483 S.E.2d at 801. The language of this provision stated that Renaissance was entitled to reasonable attorney's fees for *any necessary litigation* – a much broader basis than mere enforcement of Team IA's rights under the Employment Agreement. Accordingly, the contractual language

relied upon by the judgment creditor in *Renaissance Enterprises* to obtain post-judgment attorney's fees is clearly distinguishable from the facts in this case.

Two other points are notable from *Renaissance Enterprises*. First, in footnote 2, the Court stated, "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." *Id.* at 469 n.2, 483 S.E.2d at 801. This statement shows that the Court finds it important to keep a reasonable balance between the amount in controversy and the attorney's fees sought. In this case, the fees already awarded are far from negligible – they constitute over 65% of the Judgment amount. (R. pp. 73-74 (Order on Post Trial Motions at 36-37).) As noted by the Master, "in light of the size and scope of that award, the addition of post-judgment fees and expenses cannot be deemed negligible." (R. p. 22 (December 2016 Order at 5).)

Lastly, the Court does not discuss, or even mention, the merger doctrine in *Renaissance Enterprises*, creating the strong implication that neither party argued the merger doctrine. *See, e.g. Degenhart v. Knights of Columbus*, 309 S.C. 114, 118, 420 S.E.2d 495, 497 (1992) (noting that arguments not raised at trial or in post-trial motions are not properly before an appellate court). Without discussion of the merger doctrine, it cannot be assumed that the Court of Appeals rejected the merger doctrine in the context of reviewing whether post-judgment attorney's fees were proper. (R. p. 23 (December 2016 Order at 6).)

For each of these reasons, *Renaissance Enterprises* is inapplicable to this case

C. Cases cited by Team IA dealing with pre-judgment awards of attorney's fees and statutory rights to attorney's fees are inapplicable.

In support of the language in its Attorney's Fees Provision, Team IA also cites several cases that are inapplicable to this case because those cases are either in the context of (1) attorney's fees awarded pursuant to a contract as part of the original judgment or (2) attorney's fees awarded pursuant to a statute.

Team IA asserts *West v. Gladney* supports its proposition that its Attorney's Fees Provision allows for post-judgment attorney's fees. In *West v. Gladney*, the Court of Appeals found that the trial court's judgment should be modified to allow for pre-judgment attorney's fees in the amount of fifteen percent of the amount due based on the language in the contract. *West v. Gladney*, 341 S.C. 127, 135-36, 533 S.E.2d 334, 338 (Ct. App. 2000). With respect to attorney's fees, this opinion stands for the sole, uncontested point that, "When a note provides for attorneys' fees at a specific rate in the event collection becomes necessary, the amount of attorneys' fees is governed by the contract." *Id.* (citing *Dedes v. Strickland*, 307 S.C. 155, 414 S.E.2d 134 (1992); *NationsBank v. Scott Farm*, 320 S.C. 299, 305, 465 S.E.2d 98, 101 (Ct. App. 1995). Neither *West*, *Dedes*, nor *Scott Farm* address extending a contractual attorney's fees provision to those fees incurred post-judgment.

Team IA also looks to *Muller v. Myrtle Beach Golf & Yacht Club* and *McDowell v. South Carolina Department of Social Services* for support. In *Muller*, the Supreme Court found that appellate and post-appellate fees were recoverable by the prevailing party under the mechanic's lien statutory scheme. *Muller v. Myrtle Beach Golf & Yacht Club*, 313 S.C. 412, 416, 438 S.E.2d 248, 250 (1993) (citing S.C.

Code Ann. § 29-15-10 (1976, as amended)). Similarly, in *McDowell*, the Supreme Court held that the prevailing party in Department of Social Services litigation was entitled to attorney's fees incurred in the appellate process pursuant to S.C. Code Ann. § 15-77-300. *McDowell v. S.C. Dept. of Social Servs.*, 304 S.C. 539, 543-44, 405 S.E.2d 830, 833 (1991).

These cases apply only to attorney's fees allowed by statute that were incurred in the appellate process. Accordingly, neither of these cases provide applicable support for a party seeking to extend a contractual attorney's fees provision to fees incurred seeking to collect a judgment. In addition, attorney's fees incurred on appeal are distinguishable to post-judgment attorney's fees because the merger doctrine would not yet apply in an appeal, where the underlying judgment is not yet final. As noted by the Master, in the May 2017 Order:

> [Team IA] 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"[2] 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.
> ...
> These cases are inapplicable to extend the ambiguous language in 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

[2] The Master noted: "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,. . . 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. (R. p. 10 (May 2017 Order at 8).)

> 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.

(R. pp. 10, 11 (May 2017 Order at 8, 9 (emphasis in original)).)

Therefore, these cases cited by Team IA are inapplicable to the facts at hand. For the foregoing reasons stated above, the Master correctly ruled that the plain language of the Attorney's Fees Provision does not provide for post-judgment attorney's fees.

III. THE MASTER-IN-EQUITY CORRECTLY RULED THAT THE ATTORNEY'S FEES PROVISION IN THE EMPLOYMENT AGREEMENT IS AMBIGUOUS AND CORRECTLY HELD THAT THE PARTIES DID NOT INTEND FOR THE ATTORNEYS' FEES PROVISION TO SURVIVE ENTRY OF THE JUDGMENT.

A. The Attorney's Fees Provision is ambiguous.

As stated in the Master's May 2017 Order, the Attorney's Fees Provision is ambiguous. (R. pp. 5-8 (May 2017 Order at 3-6).) "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 that 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).

As noted in the above Argument, the Master held that the Attorney's Fees Provision is capable of a narrow interpretation, as argued by Lucas, or a broad interpretation, as argued by Team IA. (R. pp. 8, 9 (May 2017 Order at 6, 7).) The Attorney's Fees Provision could have been unambiguous if it had expressly provided

for recovery of post-judgment attorney's fees or attorney's fees incurred collecting a judgment; however, no such language is present. Conversely, merely stating that Lucas was liable for fees "incurred in connection with enforcement of Employer's rights hereunder" is far from clear under the facts of this case and the procedural realities of pre-judgment and post-judgment litigation.

Considering that Team IA "asks the Court to interpret the Attorney's Fees Provision as providing [Team IA] with recovery of attorney's fees and expenses for any legal activity at any possible time, before litigation, during litigation, or years after litigation," the language leaves much "indefiniteness of expression." (R. p. 9 (May 2017 Order at 7).) *Proffitt v. Sitton*, 244 S.C. 206, 210, 136 S.E.2d 257, 259 (1964) (citing *Bruce v. Blalock*, 241 S.C. 155, 160, 127 S.E.2d 439, 441 (1962)). While Team IA argues that the Attorney's Fees Provision "contains no indication that Lucas's obligation was to be limited to fees and costs incurred only up to entry of judgment," conversely, the Attorney's Fees Provision clearly does not provide that it shall apply to fees incurred collecting the judgment either. (Appellant's Br. at 14-15.)

Therefore, because the term "[fees] incurred in connection with the enforcement of Employer's rights [under the Employment Agreement]" is unclear and can be understood in more ways than one in the context of pre-judgment versus post-judgment litigation procedures, the Master correctly ruled that the Attorney's Fees Provision is ambiguous as it relates to post-judgment attorney's fees.

B. Team IA presented no extrinsic evidence as to who drafted the Employment Agreement or the intent of the parties when the Master gave it an opportunity do so.

At the hearing on March 29, 2017, the Master provided the parties an opportunity to introduce any evidence relevant to determining who drafted the Employment Agreement. (R. p. 146, line 7 – p. 147, line 25 (Mar. 29, 2017 Hr'g. Tr. 20:7-21:25).) Neither party believed any such evidence had been previously introduced at the trial before the Circuit Court or in the Supplemental Proceedings, and neither party provided any indication that such evidence existed. (*Id.*) Therefore, the parties had an opportunity to present extrinsic evidence to the Master regarding the parties intent surrounding the Attorney's Fees Provision.

Without the introduction of such evidence, the Master had no evidence to consider, and the Court of Appeals cannot determine whether Team IA suffered prejudice by failing to submit such extrinsic evidence. *Rental Uniform Serv. of Greenville, S.C., Inc. v. K & M Tool and Die, Inc.*, 292 S.C. 571, 573-74, 357 S.E.2d 722, 724 (Ct. App. 1987) (limiting the Court of Appeals' ability to determine whether a party suffered prejudice by an asserted lack of opportunity to present evidence when the record does not show that the appellant offered this evidence or what this evidence would have been).

Lastly, Team IA argues that the trial court is required to receive evidence to determine the parties' intent when a contract is ambiguous. (Appellant's Br. at 15.) However, our case law leaves this matter of evidence to the trial court's discretion: "Once the court decides the language is ambiguous, evidence may be admitted to

show the intent of the parties." *S.C. Dept. of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 303 (2001) (citing *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997)).

Accordingly, the Master correctly noted in the May 2017 Order that "there is no persuasive evidence to show (1) who drafted the contract nor (2) evidence of the parties intentions regarding the terms." (R. p. 7 (May 2017 Order at 5).) Based on this lack of evidence, the Master correctly ruled that the prudent approach was to follow the American Rule for attorney's fees. (R. p. 9 (May 2017 Order at 7).)

IV. THE MASTER-IN-EQUITY CORRECTLY RULED THAT TEAM IA'S CLAIM FOR POST-JUDGMENT ATTORNEY'S FEES AND EXPENSES IS NOT SUPPORTED BY THE LAW OF THE CASE.

In the December 2016 Order, the Master correctly noted that 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." (R. p. 20 (December 2016 Order at 3).) Team IA's argument to the contrary has no merit.

It is true that the Circuit Court concluded: "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." (R. p. 66 (Order on Post Trial Motions at 29).) However, this conclusion merely tracks the language of the Attorney's Fees Provision, the statement was in the context of determining the amount of the Judgment, and it was not in the context of Team IA's request for any attorney's fees incurred after entry of the Judgment. As the Master further noted, the Circuit Court also did not rule on the survivability of any of the Employment Agreement's

terms after entry of the Judgment. (R. p. 20 (December 2016 Order at 3).) Any construction of the Circuit Court's Order on Post Trial Motion to the contrary would necessarily require a finding that the Circuit Court was looking to hypothetical events that might happen in the future when it drafted this conclusion – a construction that has no merit.

Furthermore, "[u]nder the law of the case doctrine, 'a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court.'" *Sloan Constr. Co. v. Southco Grassing, Inc.*, 395 S.C. 164, 169, 717 S.E.2d 603, 606 (2011) (quoting *Judy v. Martin*, 381 S.C. 455, 458-59, 674 S.E.2d 151, 153 (2009)). Therefore, this doctrine does not apply because the appellate court never issued an opinion on the Circuit Court's Order on Post-Trial Motions. While cross-appeals of the Order on Post Trial Motions were filed, the parties agreed to dismiss the appeals before the Court of Appeals issued an opinion. (R. pp. 189-200 (Notices of Appeal and Consent Order to Dismiss Appeal); R. pp. 34-35 (Court's Order Dismissing Appeal).) Therefore, the law of the case doctrine does not apply to the procedural posture of this case.

Because the Circuit Court did not, and could not, rule on future events, such as whether Team IA was entitled to post-judgment attorney's fees, neither the law of the case doctrine, *res judicata*, nor collateral estoppel prohibited the Master from ruling that Team IA is not entitled to post-judgment attorney's fees.

V. AS AN ADDITIONAL SUSTAINING GROUND, THE MASTER-IN-EQUITY CORRECTLY RULED THAT PRACTICAL AND PUBLIC POLICY CONCERNS INHERENT IN SUPPLEMENTAL PROCEEDINGS LENDS FURTHER SUPPORT TO THE HOLDING THAT TEAM IA IS NOT ENTITLED TO POST-JUDGMENT ATTORNEY'S FEES BASED ON THE LANGUAGE OF THE ATTORNEY'S FEES PROVISION.

In his May 2017 Order, the Master noted several practical and public policy concerns present if he were to grant Team IA's request for post-judgment attorney's fees. Those concerns included: (1) problems associated with compounding post-judgment interest where post-judgment attorney's fees are added to the total judgment amount on an annual or semi-annual basis; (2) whether the judge presiding over supplemental proceedings has jurisdiction to alter the original judgment amount entered by another tribunal; (3) the potential for creating a belief among judgment creditors that they have nothing to lose by frequently initiating rounds of supplemental proceedings; and (4) a judgment debtor's financial ability to retain counsel in each round of supplemental proceedings, meaning many judgment creditor's attempts to recover post-judgment attorney's fees may be uncontested. (R. 13-14 (May 2017 Order at 11-12).)

Many of these same concerns were also raised by the Maryland Court of Appeals in *Monarc Construction*. *Monarc Constr., Inc. v. Aris Corp.*, 981 A.2d 822, 833 (Md. Ct. Spec. App. 2009) (quoting *Hatch v. T & L Assocs.*, 726 A.2d 308, 310 (N.J. Super. Ct. App. Div. 1999)). Lucas agrees that allowing post-judgment attorney's fees based on the ambiguous language of the Attorney's Fees Provision would create procedural and substantive issues. With respect to a master-in-equity's ability to add amounts to a judgment granted by a court in another county

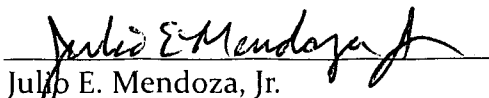
or state, it is generally believed that our supplemental proceedings statutes are intended to collect the judgment, not add to it. (R. p. 14 (May 2017 Order at 12).) S.C. Code Ann. § 15-39-10 *et seq.* (1976, as amended). Furthermore, it is questionable whether a master-in-equity has jurisdiction to alter the underlying judgment.

Courts are not required to enforce a contract that violates public policy. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 33, 644 S.E.2d 663, 674 (2007). Therefore, the practical and public policy concerns raised by the Master should serve as an additional ground to affirm the Master's ruling in this case.

CONCLUSION

For the foregoing reasons, the Master-in-Equity correctly concluded (1) the well-settled merger doctrine extinguished the Attorney's Fees Provision upon entry of the Judgment; (2) the language of the Attorney's Fees Provision does not allow for post-judgment attorney's fees; (3) the Attorney's Fees Provision is ambiguous and the parties' did not intend that such provision extend beyond Judgment; (4) the law of the case doctrine did not apply because the Circuit Court did not, and could not, rule on the prospective issue of post-judgment attorney's fees; and (5) multiple practical and public policy concerns exist if the Court granted Team IA's claim.

Wherefore, Lucas respectfully asks the Court to affirm the decision of the lower court.



Julio E. Mendoza, Jr.
Nexsen Pruet, LLC
Post Office Drawer 2426
Columbia, SC 29202
Phone: 803-540-2026
Facsimile: 803-727-1478
RMendoza@nexsenpruet.com

Attorneys for Respondent
Cicero Lucas

December 4, 2017
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
Hon. James O. Spence, Master-in-Equity

Case No. 2009-CP-32-01078
Ct. App. No. 2017-001497

Team IA, Inc., ... Appellant,

v.

Cicero Lucas, ... Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Respondent complies with Rule 211(b), SCAR.

Julio E. Mendoza, Jr.
Nexsen Pruet, LLC
Post Office Drawer 2426
Columbia, SC 29202
Phone: 803-540-2026
Facsimile: 803-727-1478
RMendoza@nexsenpruet.com

Attorneys for Respondent
Cicero Lucas

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Columbia, South Carolina