

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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JUL 14 2016

SC Court of Appeals

APPEAL FROM AIKEN COUNTY
IN THE COURT OF COMMON PLEAS
THE HONORABLE DOYET A. EARLY, III
CIRCUIT COURT JUDGE

CASE NO. 2016-000106

Harold Raynor a/k/a Harold Reynor and Michael
Caldwell,

Respondents,

v.

Charles C. Byers, John T. Bakhaus, Kurt Kasler and
Kenneth Smith,

Defendants,

of whom Charles C. Byers John T. Bakhaus and
Kenneth Smith are the Appellants,

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUE ON APPEAL

The Trial Court erred in awarding attorney fees for services performed after the judgment was issued.

STATEMENT OF THE CASE

On March 14, 2008, the Defendants, Charles C. Byers, John T. Bakhaus, Kurt Kasler, and Kenneth Smith, executed a Note in the amount of 250,000.00 to the Plaintiffs, Michael Caldwell and Harold Reynor. The note was due on March 1, 2009, without interest if paid on or before the due date. Rec. p. 13.

The Defendants failed to pay the note when due. On April 3, 2009, the Plaintiffs commenced an action with a verified Complaint against the Defendants seeking judgment for \$250,000.00, interest at the rate of eight (8.00%) per cent, the costs of the action, reasonable attorneys and other relief that the Court would deem proper. Rec. p. 7.

The Defendants were served and made no responsive pleadings.

On August 24, 2009, the Plaintiffs filed a Motion for Entry of Default and for Default Judgment. Rec. p. 14

On September 15, 2009, the Court signed an Order Entering Default Judgment in the amount of \$250,000.00, interest in the amount of \$9,535.20, costs of \$482.34, and attorney fees in the amount of \$960.00, for a total of \$260,977.54. Rec. p. 1.

The Plaintiffs sent an Execution to the Sheriff which was returned Nulla Bona. Plaintiffs then sought Supplementary Proceedings. Plaintiffs's attorneys claim to have conducted an extensive investigation into the Defendants' assets but it appears that most of the investigation was into the assets of Mr. Bakhaus and not of the other debtors.

Over time, the Defendants have paid the principal amount of the judgment and some interest.

On October 14, 2015, the Plaintiffs filed a motion in which they sought an award of post-judgment attorneys fees. This motion was supported by an affidavit setting forth their time and expenses. Rec. p. 18.

The Motion came to be heard before the Honorable Doyet A. Early, III on November 9, 2015.

On December 18, 2015, the Court issued its Order granting the Plaintiffs \$90,365.80

in fees, costs and expenses. Rec. p. 2.

Appellants, Charles C. Byers and John T. Bakhaus, served and filed their Notice of Appeal on January 20, 2016. Appellant Kenneth Smith served and filed his Notice of Appeal on January 20, 2016. The Appellants have elected to file a joint brief.

ARGUMENT

In appeals from the Circuit Court, this Court may correct errors of law. The Appellants assert that the award of post-judgment attorney fees for investigation and supplementary proceedings was an error of law.

The general rule is that attorney fees are not recoverable unless authorized by contract or statute. Baron Data Systems, Inc. v. Loter, 297 S.C. 382, 377 S.E.2d 296 (S.C., 1988)

The Restatement on Judgments §18 provides

When a valid and final personal judgment is rendered in favor of the Plaintiff

1. The Plaintiff cannot thereafter maintain an action on the original claim or any part thereof, except he may be able to maintain an action on the Judgment and
2. In an action upon the judgment, the Defendant cannot avail himself of defenses he might have interposed or did interpose in the first action.

After a money judgment is awarded and the execution to the Sheriff is returned unsatisfied, the creditor has the right to pursue an examination of the debtor before a circuit judge, special referee or Master in Equity. §15-39-310.

The judgment creditor has the right to subpoena witnesses and compel testimony §15-39-330.

The Court has the power to award witness fees, disbursements and \$30.00 in costs §15-38-480.

There is no provision for an award of attorney fees in the statutes providing for an examination of the debtor.

The judgment creditors have not argued that there is any statutory right to an award of attorneys fees.

If then, there is a right to attorney fees, it must arise from the provision of the contract. The Note states

In the event of default in the payment of this note, and if it is placed in the hands of an attorney for collection, the undersigned agree to pay all costs of collection, including a reasonable attorneys fee.

The Appellants admit that the note went into default and that it was placed in the hands of attorney for collection. That attorney obtained a judgment that included an award of attorney fees.

The Appellants assert that once the judgment was issued, the contractual provisions of the note merged into the judgment. Restatement of the Law of Judgments §18. Because the contractual provisions merged into the judgment and there is no statutory right to attorney fees for post-judgment collection activities, the award of fees was an error of law.

The award of a judgment is a significant event in the life of a debt. A judgment entitles the creditor to avoid further litigation on the validity of the debt. Res Judicata may be pleaded as an absolute bar to any further litigation of the merits of the claim.

A judgment creditor is entitled to the recognition and enforcement of the judgment in every other state of the United States under the full faith and credit clause of the U.S. Constitution. The Respondents have in fact sought to enforce the judgment against one of the Defendants in the Commonwealth of Kentucky. Their efforts there resulted in additional payment on the debt.

The judgment creditor has the right to pursue the assets of the debtor based on a amount which is now liquidated. The statutes provide for interest to be earned on the judgment even if the original debt was not entitled to interest because it was unliquidated or if the debt instrument did not provide for interest.

None of these rights accrue until the amount of the claim is reduced to judgment.

As a consequence of obtaining these rights, the judgment creditor waives further action on the original debt.

The issue of merger was addressed by the Maryland court in Monarc v. Aris 188 Md. App. 377, 981 A.2d 822 Md. App. 2009). In Monarc, the parties had resolved their disputes in a Settlement Agreement. Thereafter, Monarc sued on the Agreement and recovered a judgment in Virginia for damages and attorney fees based on the agreement.

It then sought to enforce the judgment in Maryland and to obtain an award of additional attorney fees. The Court refused to award additional fees. relying on the Restatement, it found that the attorney fees provision merged into the judgment and that there was no specific language in the Agreement which provided that the provision for fees survived the entry of judgment.

The South Carolina Court faced an analogous issue in Moseley v. Mosier, 279 S.C. 348, 306 S.E. 2d 624 (1983). In Moseley, the Court addressed the effect of issue of Family Court decrees on settlement agreement. The Court had previously used "words of art" to address the issues as whether or not an agreement was merged into a subsequent decree which incorporated but did not merge the agreement. At issue was whether the agreement could be enforced as a contract in Circuit Court or by the contempt power of the Family Court. The Court wholeheartedly adopted the concept of merger. It required the parties to unambiguously state that they were opting out of enforcement by contempt and must also unambiguously state if they were opting out of the ability of the Court to subsequently modify their agreement.

The only case cited in support of the Respondents position is Renaissance Enterprises v. Ocean Resorts 310 S.C. 395, 426 S.E. 821 (Ct. App. 1992), 326 S.C. 460, 483 S.E.2d 796 (Ct. App. 1997), 330 S.C. 13, 496 S.E.2d 858 (1998), 334 S.C. 324 513, S.E.2d 617 (1999).

Renaissance has a somewhat convoluted history which limits its persuasiveness.

In Renaissance I, the Court of Appeals upheld an arbitration award in the amount of \$69,566.73.

In Renaissance II, the Court of Appeals issued an Unpublished Opinion concerning issues not relevant to this appeal.

In Renaissance III, the Court dealt primarily with issues regarding the accrual of interest after a deposit of an amount into Court and addressed the issue of attorney fees in a cursory manner. The Court noted that the Appellant's "entire argument consists of four sentences asserting the award of any fee was erroneous because the Respondent failed to establish its entitlement to such fees incurred in a supplemental proceeding." The Court then cited the contract providing for attorney fees for collection and cited McDowell v.

SCDSS 304 S.C. 359, 405 S.E.2d 830 (1991).

It does not appear that the Appellants argued the issue of merger. McDowell is a case concerning attorney fees under a statute §15-77-310. This is not a case involving attorney fees under a statute and McDowell does not turn on the issue of merger. The holding in McDowell is irrelevant to the issue before the Court.


In Renaissance IV, the Supreme Court vacated an unpublished opinion of the Court of Appeals (96-UP-169 (Ct. App. 1996) which was Renaissance II. An Opinion which is vacated has no force or effect.

In Renaissance V, the Supreme Court reversed Renaissance III and found that a deposit into Court does not stop the accrual of interest under Rule 67, SCRPC. Rule 67 does not provide for the cessation of interest on the debt.

The order in Renaissance V preceded the decision in Futch v. McAlister Towing of Georgetown, 335 S.C. 598, 518 S.E. 2d 591 (1999). In Futch, the Court held that an Appellate Court need not address remaining issues when disposition of a prior issue is dispositive. The decision in Renaissance V can be seen as dispositive of the right to seek post-judgment attorney fees and need not have been ruled on by the Court.

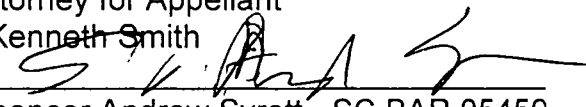
CONCLUSION

The Court should find that the note merged into the judgment and reverse the award of post-judgment attorney fees.


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The undersigned certifies that this Final Brief complies with the requirements of Rule 211(b).



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v.

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Kurt Kasler and Kenneth Smith,

Defendants.

of whom

Charles C. Byers, John T. Bakhaus, and Kenneth Smith are the Appellants,

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STATEMENT OF ISSUES ON APPEAL

The Trial Court properly interpreted the contract entered into by the parties and was correct in awarding post-judgment attorney's fees and costs in accordance with the prior decisions of this Court.

STATEMENT OF THE CASE

On March 14, 2008, the Defendants, Charles C. Byers, John T. Bakhaus, Kurt Kasler, and Kenneth Smith, executed a Note in the amount of \$250,000.00 to the Plaintiffs, Michael Caldwell and Harold Raynor. (R. p. 13) The note was due on March 1, 2009, without interest if paid on or before the due date. The Note also included an attorney's fees provision, which stated:

“In the event of default in the payment of this note, and if it is placed in the hands of an attorney for collection, the undersigned hereby agrees to pay all costs of collection, including a reasonable attorney's fee. Charles C. Byers and John T. Bakhaus guarantee this obligation”.

The Defendant's failed to pay the note when due. On April 3, 2009, the Plaintiffs commenced an action with a verified Complaint against the Defendants, seeking judgment for \$250,000.00, interest at the rate of eight (8.00%) percent, the costs of the action, reasonable attorney's fees, and other relief that the Court would deem proper. (R. p. 7)

The Defendants were served and made no responsive pleadings.

On August 24, 2009, the Plaintiffs filed a Motion for the Entry of Default Judgment in the amount of \$250,000.00, interest in the amount of \$9,535.20, costs of \$482.34, and attorney's fees in the amount of \$960.00, for a total of \$260,977.54. (R. p. 14)

The Plaintiffs sent an Execution to the Sheriff, which was returned Nulla Bona. Plaintiffs then sought Supplementary Proceedings. Plaintiffs' initial attorney, now The Honorable M. Anderson Griffith, filed the initial paperwork in Richland County and began the supplemental

proceeding process on behalf of the Plaintiffs. On October 7, 2014, Plaintiffs signed a contingency contract with Kevin N. Molony and Robert J. Harte to proceed with the collections process.

Plaintiffs then filed supplemental proceedings in York County, South Carolina and Beaufort County, South Carolina and continued the efforts to collect in Richland County, South Carolina. Hearings were conducted in York County against Defendant Kenneth Smith, in Beaufort County against Defendant Charles C. Byers, and in Richland County against Defendant John T. Bakhaus. Plaintiffs located real property owned by Defendant John T. Bakhaus in Lexington, Kentucky. Plaintiffs hired the Billings Law Firm out of Lexington, Kentucky after domesticating the judgment in Kentucky.

On October 29, 2015, the Plaintiffs filed a motion in which they sought an award of post-judgment attorney's fees. (R. p. 27) This motion was supported by an affidavit setting forth Plaintiffs' counsels time and expenses, as well as an affidavit submitted from Paul Simons, a local attorney, which stated the fees were reasonable in his opinion. (R. p. 39)

The Motion came to be heard before the Honorable Doyet A. Early, III on November 9, 2015.

On December 18, 2015, the Court issued its Order granting the Plaintiffs \$90,365.80 in fees, costs, and expenses. (R. p. 2)

From October 14, 2014 until the Order Awarding Plaintiffs Attorney's fees was filed on December 18, 2015, Plaintiffs' counsel initiated and conducted eight (8) separate hearings throughout the above-referenced counties in an attempt to satisfy the judgment, in addition to The Motion hearing on November 9, 2015. (R. p. 26)

Appellants, Charles C. Byers and John T. Bakhaus, served and filed their Notice of Appeal on January 20, 2016. Appellant Kenneth Smith served and filed his Notice of Appeal on January

20, 2016. The Appellants elected to file a joint brief.

ARGUMENT

Respondents assert that the Trial Court properly interpreted the contract between the parties and awarded reasonable post-judgment attorney's fees in accordance with prior opinions of this Court.

In Renaissance Enterprises v. Ocean Resorts, 326 S.C. 460, 483 S.E.2d 796 (S.C. App., 1997), the Court of Appeals was asked to determine whether the Master erred in granting attorney's fees for supplemental proceedings when the parties had contracted for the award of attorney's fees in their original contract. Id at 469. Subsequent to the Circuit Court approving an arbitration award in favor of Renaissance, Renaissance filed and conducted supplemental proceedings to collect on the outstanding debt owed by Ocean Resorts. Id at 462. The original contract between the parties provided, in part, "[i]f 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." Id. at 469.

Three years after the Circuit Court approved the arbitration award entered in favor of Renaissance, Renaissance filed the Motion for Attorney's fees. Id at 462. After reviewing the language of the contract between the parties, the Court ruled,

"[t]he 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" Id at 469.

In the footnotes of the opinion, The Court of Appeals clearly ruled a legal right exists in this State to collect contracted-for post-judgment attorney's fees. Id at 470. The footnote provided,

in part,

“[w]hile we recognize the decision of this court reverses some of the master’s rulings which were favorable to Renaissance, Ocean Resorts does not challenge the amount awarded or request redetermination of fees in light of the beneficial results obtained. Ocean Resorts only challenges Renaissance’s legal right to any such fees” (emphasis added) Id.

In the present case, a judgment was entered on August 4, 2009 in favor of Plaintiffs. Plaintiffs then initiated supplemental proceedings in an attempt to collect on the outstanding debt. The debt owed to Plaintiffs was not satisfied before the supplemental proceedings were initiated, and as in Renaissance, the parties’ contract clearly provided for the award of attorney’s fees during the collections process.

Under the common law of South Carolina, a prevailing party has no right to recover attorney’s fees. Duke Power Co. v. South Carolina Public Service Commission, 284 S.C. 81, 326 S.E.2d 395 (1985). In the absence of a common law right, the plaintiff must plead either a contract or a statute to receive enhanced damages or attorney’s fees. Hegler v. Gulf Insurance Co., 270 S.C. 548, 243 S.E.2d 443 (1978).

In the present case, the parties clearly entered into a valid contract. The clear language of the contract at issue provides, in part,

“[i]n the event of default in the payment of this note, and if it is placed in the hands of an attorney for collection, the undersigned hereby agrees to pay all costs of collection, including a reasonable attorney’s fee.” (R. p. 13)

The contract entered between the parties is clear and unambiguous. The parties contracted for an award of attorney’s fees in the event the Defendants default in the payment of the note. The contract clearly provides that the Defendants will pay all costs of collection, including a reasonable attorney’s fee, upon the default of the Defendants. Read as a whole, the contract in no way limits

the ability of the Plaintiffs to recover attorney's fees in supplemental proceedings.

Black's Law Dictionary defines the term, "all," as meaning, "each or every." <http://thelawdictionary.org/all>. Further, Black's Law Dictionary defines the term, "collection," as meaning, "a process for recovering delinquent amounts owed." <http://thelawdictionary.org/collection/>. Applying the clear meaning of the terms entered into by the parties, it is clear that attorney's fees were contracted for, and the obligation of the Defendants to pay such reasonable fees extended to each and every action the Plaintiffs were required to initiate to recover the delinquent amount owed, including supplemental proceedings.

Furthermore, the fees requested by Plaintiffs are reasonable. (R. p. 35, line 16) Plaintiffs filed their Affidavit of Attorney's fees and Costs on November 4, 2015, which outlined the services performed and costs incurred by counsel throughout the collection process. (R. p. 27) The Affidavit of Paul Simons, Jr., Esq. further illustrated the reasonableness of the attorney's fees awarded. (R. p. 39)

The Defendants suggested Moseley v. Mosier, 279 S.C. 348, 306 S.E. 2d 624 (1983) was analogous to the issues raised in their appeal. In Moseley, the Supreme Court adopted a rule in domestic matters, allowing parties to contract so that the court may never modify the terms of their separation agreement. The Moseley decision allowed the parties to contract out of the family court's continuing jurisdiction, should they decide to do so. In essence, the Supreme Court's decision in Moseley applied contract law to domestic matters, specifically separation agreements, and allowed parties to enter into binding contracts which remained in full effect after the Final Divorce Decree was entered.

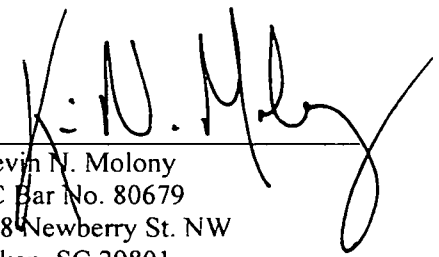
Domestic cases subsequent Moseley continued to illustrate the Supreme Court's willingness to allow parties to enter into contracts which are enforceable after the Final Divorce

Decree is entered. In Degenhart v. Burriss, 360 S.C. 497, 602 S.E.2d 96, 98 (Ct. App. 2004), the Supreme Court ruled, “[o]nce an alimony agreement that specifically disallows modification is approved by the court and merged into a judicial order, it is binding on the parties and the court and is not subject to modification.” Id at 500-01.

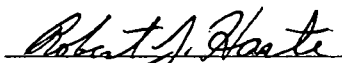
These cases illustrate the ability of parties to enter into binding contracts, which remain in full force and effect after a final order of the court is issued. In the present case, the parties contracted for the award of reasonable attorney’s fees for the collection of the judgment amount. The contract provision obligated the Defendants to pay a reasonable attorneys fee, and it survived the issuance of the Default Judgment. The requested for and awarded fees are reasonable based on the Affidavits filed by Plaintiffs. Finally, the decision in Renaissance, as it relates to the award of post-judgment attorney’s fees arising out of a contract, relates directly to the present case.

CONCLUSION

Based on the decision of this Court in Renaissance, the unambiguous language of the contract, and the reasonableness of the awarded fees and costs, the Court should affirm the Trial Court’s Order granting Plaintiffs Attorney’s fees and Costs.



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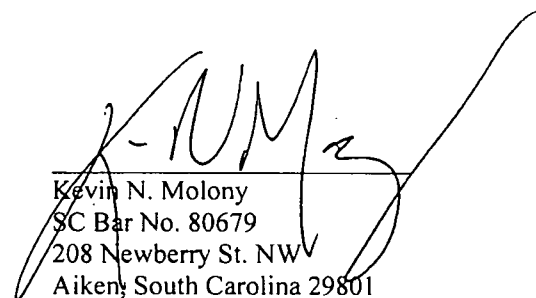
Appellants,

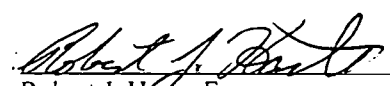
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Charles C. Byers, John T. Bakhaus, and Kenneth Smith are the Appellants,

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The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.


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CERTIFICATE OF SERVICE

I certify that on this date I served a copy of the **Final Brief of Respondents and Designation of Matter to be Included in the Record on Appeal** to the Appellants attorney by depositing in the U.S. Mail with sufficient postage affixed, addressed as follows:

Herb Hamilton, Esq.
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13 July, 2016
Date


Signature



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Rule 220(c), SCRAP	1

STATEMENT OF ISSUE ON APPEAL

The Trial Court erred in awarding attorney fees for services performed after the judgment was issued.

ARGUMENT

The Respondents have elected to rely on a legal dictionary definition and the opinion in Renaissance III. Renaissance Enterprises v. Ocean Resorts, 326 S.C. 460, 483 S.E.2d 796 (Ct. App. 1997).

As noted in Appellants' brief, the decision in Renaissance did not address the issue of merger and the Court went out of its way to comment on the cursory nature of the Appellants' argument. Given its later reversal, the decision in Renaissance is hardly persuasive.

More significant, however, is Respondents' failure to address the Appellants' argument on merger.

The Respondents could have presented an argument that the Court should not accept Section 18 of the Restatement of Judgments with regard to merger.

The Respondents could have conceded a general rule of merger but argued that the general rule should not apply to this case based on the facts of this case.

The Respondents could have stated an additional sustaining ground but did not do so..

Instead, the Respondents simply ignored this issue.

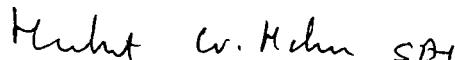
If an Appellant fails to file a Brief, the appeal will be dismissed Rule 208(a)(4), SCRAP.

If an Appellant fails to present an argument in its brief or presents only a cursory argument concerning an issue presented for consideration, the Appellant will be deemed to have abandoned that issue. First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994)

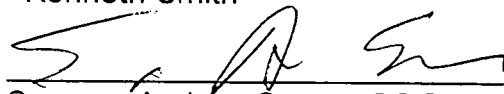
Although Rule 220(c) SCRAP, allows the Court to affirm on any ground in the record, there ought to be some consequence to the Respondent in the rare case when the Respondent utterly fails to respond to the Appellant's argument

CONCLUSION

The Court should find that the Respondents have waived argument on the issue of merger. The Court should also adopt the Restatement and find that the note merged into the judgment. The Court should then reverse the lower court and vacate the award of post-judgment attorney fees. To the extent that this Court has the power to do so, it should reverse or overrule its holding in Renaissance.



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July 14, 2016

The undersigned certifies that this Final Brief complies with the requirements of Rule 211(b).



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