THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Court of Appeals Opinion No. 5527
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 Petitioners,

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PETITION FOR WRIT OF CERTIORARI

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CERTIFICATION

The undersigned certifies that the Petition for Rehearing was made and finally ruled upon by the Court of Appeals on March 22, 2018.

QUESTIONS PRESENTED

1. Should the South Carolina Supreme Court adopt §18 of the Restatement of Judgments and find the terms of a note providing for costs of collection and attorney fees merge into a judgment on the debt?
2. Should the Court reverse the award of post-judgment attorney fees?

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.

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 fees and other relief that the Court would deem proper.

The Defendants were served and filed no responsive pleadings.

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

On September 15, 2009, the Court signed an Order Entering Default Judgment in the amount of $250,0000.00, 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.

The Plaintiffs sent an Execution to the Sheriff which was returned Nulla Bona. Plaintiffs then sought Supplementary Proceedings. Plaintiffs' 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 the other debtors.

Over time, the Defendants have paid the principal amount of the judgment and the interest. The only part of the judgment which remains unpaid is the award of attorney fees for post judgment collection activities.

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.

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.

Charles C. Byers, John T. Bakhaus and Kenneth Smith appealed the order to the Court of Appeals which affirmed the Order.

Due to health issues, Herbert W. Hamilton, attorney for Mr. Smith, withdrew from representation. Mr. Smith has now retained the undersigned as his new counsel.

ARGUMENT

1. Should the South Carolina Supreme Court adopt §18 of the Restatement of Judgments and find the terms of a note providing for costs of collection and attorney fees merge into a judgment on the debt?

The issue of whether the terms of a note merge into a judgment on the debt represented by the note has neither been presented to nor ruled upon by this Court. This is therefore a novel issue of law. Rule 242(b)(1), SCACR.

The Restatement on Judgments §18 provides

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

a. 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

b. In an action upon the judgment, the Defendant cannot avail himself of defenses he might have interposed or did interpose in the first action.

The Petitioners urged the Court of Appeals to follow the ruling of 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, the Maryland Court 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 Court of Appeals found that South Carolina had not adopted the merger doctrine from the Restatement. It decided the appeal on the language in the note which provided for attorney fees and costs of collection.

This Court has already adopted the doctrine of merger in Family Court.

In Moseley v. Mosier, 279 S.C. 348, 306 S.E. 2d 624 (1983), 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 also unambiguously state if they were opting out of the ability of the Court to subsequently modify their agreement.

2. Should the Court reverse the award of post-judgment attorney fees?

If the note merged into the judgment, then the award of attorney fees should be reversed.

CONCLUSION

The Court should grant the Writ and adopt the doctrine of merger as set forth in the Restatement of Judgments. The Court should rule that the terms of the note merged into the judgment. It should therefore reverse the award of post-judgment attorney fees.

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April 23, 2018

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PROOF OF SERVICE

APPENDIX 78

I certify that I have served the Petition for Writ of Certiorari on the Respondents, Harold Raynor a/k/a Harold Reynor and Michael Caldwell, by depositing a copy of it in the United States Mail, postage prepaid, on April 23, 2018, addressed to the attorneys of record:

Kevin N. Molony
212 Newberry St. NW
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Attorney for Respondents

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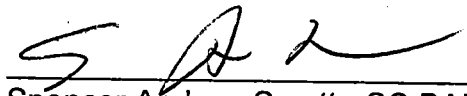

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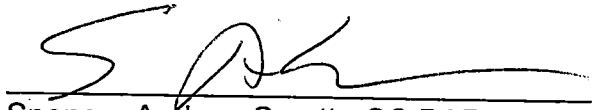

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