THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, Circuit Court Judge

Opinion No. 5527 (S.C. Ct. App. Filed Dec. 20, 2017)
S.C. Ct. App. Case No. 2016-000106

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

Respondents,

v.

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

Defendants,

Of whom,

Charles C. Byer, John T. Bakhaus, and Kenneth Smith are Petitioners.

RESPONDENTS' REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

Thomas J. Rode, SC Bar No. 77480
Michael A. Timbes, SC Bar No. 69730, both of
THURMOND KIRCHNER & TIMBES, P.A.
15 Middle Atlantic Wharf
Charleston, SC 29401
Phone: 843.937.8000
Email: thomas@tktlawyers.com
Email: michael@tktlawyers.com

– and –

Kevin N. Molony, SC Bar No. 80679, of
ANGELL MOLONY, LLC
212 Newberry St. NW
Aiken, SC 29801
Phone: 803.335.1449
kevin@AngellMolony.com
Counsel for Respondents

INDEX

QUESTION PRESENTED & INTRODUCTION

The single issue presented is whether the Court of Appeals erred in affirming the trial court's award of contractual attorney's fees incurred by Respondents in supplemental proceedings against Petitioners, and rejecting Petitioners' urging to change the law of this State through the adoption of a *per se* prohibition on contracting for post-judgment attorney's fees even where the parties manifested a clear intent to the contrary.

Petitioners' argument is neither consistent with the laws and policies of South Carolina, nor properly before this Court. Therefore, the instant Petition for Writ of Certiorari should be denied.

STATEMENT OF THE CASE

It is undisputed that the parties executed a valid and enforceable promissory note wherein Petitioners were indebted to Respondents for $250,000.00 plus interest. [ROA, 33][1]. It is undisputed that Petitioners defaulted on this note. In April 2009, Respondents commenced an action in the Aiken County Court of Common Pleas to collect the amounts due (the "Underlying Action"). [ROA 7]. Petitioners failed to answer and in August 2009, the trial court entered Default Judgment (the "Judgement") against Petitioners in the amount of $250,000.00 plus interest, as well as attorney's fees and costs incurred in the Underlying Action. [ROA 1].

After failed attempts to collect on the Judgment, Respondents initiated supplemental proceedings in various counties throughout South Carolina and sought domestication of the Judgement in foreign jurisdictions. [ROA 19-23]. Having incurred costs and attorney's fees for their collection efforts in the supplemental proceedings, Respondents filed a motion in the Aiken

[1] Petitioners failed to include the Record on Appeal within the Appendix as required by Rule 242(b), SCACR. Respondents therefore make citation to the Record on Appeal rather than the Appendix where applicable.

County Court of Common Pleas on October 29, 2015, seeking recovery of these attorney's fees [ROA 18]. The terms of the promissory note provide:

> 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 [(Petitioners)] hereby agrees to pay **all costs of collection, including reasonable attorney's fees**. Charles C. Byers and John T. Bakhaus guarantee this obligation.

[ROA 13]; [Appx. 4] (emphasis added).

At a hearing on Respondents' motion, Petitioners argued that upon entry of the Judgment in the Underlying Action the terms of the promissory note "merged" with the Judgment thereby cancelling Respondents' contractual right to pursue attorney's fees incurred in their collection efforts. [Appx. 3][2]

The trial court found, as a matter of law, that the contract clearly and unambiguously provided for recovery of attorney's fees and additionally declined to adopt the variation of the merger doctrine advanced by Petitioners. [ROA 2-6]. Petitioners did not appeal the trial court's ruling that the plain language of the note showed an intent by the parties to recover attorney's fees under these facts. *See* [App. Br.] (not challenging this ruling).

On appeal to the Court of Appeals, as in the instant Petition, Petitioners argued that South Carolina should "follow the ruling of the Maryland Court [of Special Appeals] in *Monarc v. Aris*.[3]" [Pet. for Cert. pp. 3-4]. In affirming, the Court of Appeals, like the trial court, found the language of the parties' contract clearly and unambiguously provided for the subject attorney's fees and also rejected Petitioners' request to adopt a new rule. [Appx. 3-4]. On January 4, 2017, Petitioners filed a Petition for Rehearing alleging the Court of Appeals misapprehended the law by failing to

---

[2] Respondents do not concede this argument is preserved due to Petitioners' failure to include the Record on Appeal in the Appendix.

[3] *Monarc v. Aris*, 188 Md. App. 377, 981 A2d 822 (Md. App. 2009).

adopt its variation of the merger doctrine, citing only to *Moseley v. Mosier*[4]. [Appx. 9]. Importantly, Petitioner did not seek rehearing on the Court of Appeals' ruling that the plain language of the promissory note provided for collection of attorney's fees in this case. *See* [Appx. 9]. This unappealed ruling serves as an independent and dispositive basis supporting the decision and demonstrates that even if the instant Petition were granted the outcome of the Underlying Action, and the appeal therefrom, will remain unchanged.

ARGUMENT

A Petition for Writ of Certiorari should only be granted when the matter presents a novel issue of law; there was dissent by the Court of Appeals; the decision of the Court of Appeals conflicts with prior law; or where a substantial constitutional issue is directly involved. *See* Rule 242(b), SCACR. None of these factors exist in the present matter. The decision of the Court of Appeals is both consistent with and compelled by the common law of South Carolina.

The instant Petition should be denied because: (1) Petitioners' proposed application of the merger doctrine operates as a *per se* ban on contracting for post-judgment attorney's fees and is contrary to the long-standing laws and policies of South Carolina; and (2) Petitioners' failure to appeal the finding that the plain language of the contract provided for post-judgment attorney's fees is the law of the case and serves as an independent and dispositive sustaining ground, rendering any further appeal merely advisory.

1. South Carolina has rejected the application of the merger doctrine as proposed by Petitioners and the laws and policies of this State do not support the judicial re-writing of contracts or the imposition of a *per se* ban on contracting for attorney's fees.

Despite having the opportunity our Courts have consistently declined to adopt Petitioners' contention that the issuance of a judgment automatically extinguishes contract rights, including

[4] *Moseley v. Mosier*, 279 S. C. 348, 306 S.E.2d 624 (1983).

those to seek attorney's fees and interest. *See McDowell v. South Carolina Department of Social Services,* 304 S.C. 539, 405 S.E.2d 830 (1991) (finding that where a party was entitled to statutory attorney's fees in the underlying action, that party was likewise entitled to attorney's fees incurred in supplemental proceeding); *accord Renaissance Enters. v. Ocean Resorts*, 326 S.C. 460, 469, 483 S.E.2d 796, 801 (Ct. App. 1997) (confirming that supplemental proceedings to collect on the debt owed pursuant to the contract were "necessary" and therefore a contractual right to attorney's fees applied to the supplemental proceedings) (revs'd on other grounds by *Renaissance Enters., Inc. v. Ocean Resorts, Inc.*, 334 S.C. 324, 326 513 S.E.2d 617, 618-19 (1999) (confirming that a contractual rate of interest is properly applied post-judgment thereby recognizing that the terms of a contract will not "merge" with, or be superseded by, a judgment)).

The merger doctrine is not novel. It generally provides that the last agreement of the parties supersedes any previous agreements on the same subject, and is "founded upon the privilege, which **parties** always possess, of changing their contract obligations by further **agreements**[.]" *Shoney's, Inc. v. Cooke*, 291 S.C. 307, 310, 353 S.E.2d 300, 303 (Ct. App. 1987) *citing Charleston & Western Carolina Railway Co. v. Joyce*, 231 S.C. 493, 99 S.E. (2d) 187 (1957) (emphasis added). Thus, if merger is applied the terms of the prior agreement will be cancelled or superseded by the later agreement. However, it should not be overlooked that the Judgment is not a "further agreement" between the parties. This is reason enough not to apply the merger doctrine.

Here by suggesting the merger doctrine should dictate that the Judgment supersedes the clear terms of the contract, Petitioners ignore the elementary distinction that a judgment or court order is not an agreement. *See Shoney's,* at 310, 353 S.E.2d at 303 (stating that merger is "founded upon the privilege, which parties always possess, of changing their contract obligations by further **agreements**[.]") (emphasis added). Our Courts have time and again confirmed that contract rights

survive and remain enforceable post-judgment. *See e.g., Turner Coleman, Inc. v. Ohio Constr. & Eng. Co.*, 272 S.C. 289, 251 S.E.2d 738 (1979) (contractual interest rates survive judgment); *see also Renaissance*, at 469, 483 S.E.2d at 801 (Ct. App. 1997) (contractual attorney's fees survive judgment and applied to supplemental proceeding); *Renaissance*, at 326, 513 S.E.2d at 618-19 (contractual interest rates survive); *see also Charleston & Western*, at 493, 99 S.E.2d at 192 (acknowledging the contrary intent exception to merger).

Petitioners' use of the term "merger doctrine" is a misnomer. Merger is rooted in the principles of contract law to give effect to the parties' intent, not thwart it. *See Shoney's*, at 310, 353 S.E.2d at 303 (merger is derivative of the freedom of contract and the **parties'** rights to modify contracts by subsequent agreement) (emphasis added); *Epworth Children's Home v. Beasley*, 365 S.C. 157, 171, 616 S.E.2d 710, 718 (2005) (merger inapplicable where inconsistent with the parties intent). While **parties** are free to change their contracts, courts are not. *See e.g., Lewis v. Premium Inv. Corp.*, 351 S.C. 167, 171, 568 S.E.2d 361, 368 (2002) ("It is not the function of the court to rewrite contracts for parties."). Without doubt, the trial court—which issued the Judgment—is not a "party."

Although dubbing its proposed rule the "merger doctrine," in reality Petitioners advocate something else entirely— judicial rewriting of the clear terms of the contract which they now find unfavorable. However, "**courts do not sit for the purpose of relieving parties from unwise bargains.**" *Crawford v. Oman & Stewart Stone Co.*, 34 S.C. 90, 95, 12 S.E. 929, 931 (1819) (emphasis added). Petitioners' argument is a thinly disguised request for a wholesale abandonment of the principles of contract interpretation developed over the entirety of South Carolina's jurisprudence. This should not stand. *See Id.; see also Lewis,* at 171, 568 S.E.2d at 368 (*supra*); *Hardee v. Hardee*, 355 S.C. 382, 387, 585 S.E.2d 501, 503 (2003) ("The judicial function of a

court is to enforce a contract as made by the parties, and not rewrite or distort" the parties' intent).

It is settled that the merger doctrine "is not one to be applied rigidly[, and e]quity will not apply merger if . . . the intent of the parties would be frustrated," thereby making clear that the merger doctrine does not operate without regard for the parties' intent. *Epworth*, at 171, 616 S.E.2d at 718; *see Charleston & Western*, at 493, 99 S.E.2d at 192; *Hughes v. Greenville Country Club*, 283 S.C. 448, 450, 322 S.E.2d 827, 828 (Ct. App. 1984) (both recognizing that application of the merger doctrine requires analysis of the parties' intent and will not be applied in the face of a contrary intent). Simply put, the paramount inquiry to all contract questions—including whether merger applies—is to effectuate the parties' intent, and merger will not operate to defeat that intent.

Tellingly, the two (and only two) authorities Petitioners cite confirm that intent is the cornerstone to merger. The only South Carolina authority Petitioners site is *Moseley v. Mosier*, 279 S. C. 348, 306 S.E.2d 624 (1983), for the incorrect proposition that this Court has "wholeheartedly adopted the concept of merger" in the context of family court matters. [Pet. p. 3]. Petitioners miss the point of *Mosely*. The *Mosely* court merely held that "the terms [of a previously formed separation agreement] **will become part of the** [later] decree [of the court] and are binding on all parties." *Id.* at 353, 306 S.E.2d at 627 (emphasis added). This is the opposite of Petitioners' argument that the terms of the parties' contract are **extinguished** by a subsequent Court Order. In truth, *Moseley* offers no support to Petitioners, either directly or by analogy. Instead, the *Moseley* court reiterates that parties are free to contract upon terms that will survive a court order—in that case a decree of divorce. *Id.* (permitting contract terms to foreclose the family court's future jurisdiction even though such agreements must be approved and adopted by order of the court). The only "wholehearted" endorsement offered by *Moseley* is affirmation that when enforcing the terms of a contract, the lynchpin is—as it has always been—a determination of the parties' intent.

Petitioners' second authority; *Monarc v. Aris*, 188 Md. App. 377, 981 A2d 822 (Md. App. 2009), further confirms that even the mutated "merger doctrine" as advanced by Petitioners, cannot not operate to defeat the parties' intent. *Id.* at 398, 981 A2d at 834 (stating that analysis of the parties' intent was necessary to a determination of whether the judgment superseded the contract, but noting the failure to appeal the trial courts' ruling the intent of the parties prevented reversal). Thus, even if this Court were to adopt *Monarc*, it neither changes the law of this state nor the outcome of this case.

In sum, Petitioners' two cited authorities cut against their argument on all fronts by confirming that merger will not defeat the clear intent of the parties—a concept fully consistent with the well-settled laws of this State. This dovetails into demonstrating why Petitioners' failure to appeal the trial court and Court of Appeals ruling on the plain language and intent of the parties leaves their argument not properly before this Court. As in *Monarc,* where the appellant's failure to appeal the trial court's ruling regarding the intent of the parties prevented reversal, Petitioners' argument here fails for the same reason. By asking this Court to adopt *Monarc* Petitioners fall victim to a trap of their own making.

2. Issuance of a Writ of Cert would be merely advisory because Petitioners' argument is not properly before this Court.

An issue is not preserved for appellate review if not raised to the Court of Appeals. *See e.g.,* Rule 226, SCACR; *Anonymous v. State Bd. of Med. Examiners*, 329 S.C. 371, 496 S.E.2d 17 (1998). An appellant or petitioner has the burden to preserve all arguments and therefore appeal is not proper when there exists an unappealed basis to support the lower court's decision, which becomes the "law of the case." *See e.g., Charleston Lumber Co. v. Miller Hous. Corp.*, 338 S.C. 171, 525 S.E.2d 869 (2000). This concept, much like the "two-issue" rule, amalgamates various principles and axioms of appellate procedure by putting the appealing party's burden in context

with the Court's right to affirm for any reason appearing in the record. *See* Rule 220(c), SCACR (an appellate court may affirm for any reason appearing in the record). Inherent in the law of the case concept is the disfavor for advisory opinions, deference to judicial economy, and adherence to the timeworn practical advice that "whatever doesn't make any difference, doesn't matter." *See e.g., In re Chance,* 277 S.C. 161, 161, 284 S.E.2d 231, 231 (1981) (noting South Carolina appellate courts have consistently refrained from issuing purely advisory opinions); *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) (Sanders, J., coining the often-quoted phrase above).

Here, both the trial court and the Court of Appeals found the plain language of the agreement contemplates attorney's fees and Petitioners' have failed to appeal either of these rulings. This is now the law of the case and proves fatal to any further appeal since merger cannot defeat the parties' intent. *See generally, Charleston Lumber*, 338 S.C. 171, 525 S.E.2d 869. Ultimately, and regardless of Petitioner's argument, even if this Court were to "follow the ruling of the Maryland Court [of Special Appeals]" in *Monarc* (Pet. p. 2), Petitioners' failure to appeal the finding of the parties' intent would leave the result unchanged. *See Monarc,* at 398, 981, A2d at 834 (recognizing that failure to appeal the trial court's finding as to whether the parties manifested an intent contrary to merger prohibited reversal). Because the requested relief would have no effect on the outcome, this Petition exemplifies the notion that "whatever doesn't make any difference doesn't matter" and therefore this Petition should be denied. *McCall,* at 4, 362 S.E.2d at 28.

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari should be denied.

[signature block to follow]

Respectfully submitted,

THURMOND KIRCHNER & TIMBES, P.A.

Thomas J. Rode, SC Bar No. 77480
Michael A. Timbes, SC Bar No. 69730
15 Middle Atlantic Wharf
Charleston, SC 29401
Phone: 843.937.8000
Email: thomas@tktlawyers.com
Email: michael@tktlawyers.com

– and –

Kevin N. Molony, SC Bar No. 80679, of
ANGELL MOLONY, LLC
212 Newberry St. NW
Aiken, SC 29801
Phone: 803.335.1449
kevin@AngellMolony.com

Counsel for Respondents

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, Circuit Court Judge

Opinion No. 5527 (S.C. Ct. App. Filed Dec. 20, 2017)
S.C. Ct. App. Case No. 2016-000106

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

Respondents,

v.

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

Defendants,

Of whom,

Charles C. Byer, John T. Bakhaus, and Kenneth Smith are Petitioners.

AFFIDAVIT OF SERVICE

I, Moira K. McIntire, an employee of Thurmond Kirchner & Timbes, P.A., attorneys for the Respondents, do hereby certify that I have this date, mailed, postage prepaid, a true and correct copy of the Respondents' Reply to Petition for Writ of Certiorari to the following counsel of record:

FOR PETITIONERS:
Spencer A. Syrett, SC Bar No. 05459
Post Office Box 7403
Columbia, SC 29202
Phone: 803-765-2110
syrettlaw@sc.rr.com

Moira K. McIntire
Paralegal to Michael A. Timbes/Thomas J. Rode

May 18, 2018
Charleston, South Carolina