

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity

Case No. 2014-002661

John M. English,

Appellant,

v.

Ellen Sexton and John E.
White, Jr,

Respondents.

FINAL BRIEF
OF
RESPONDENT JOHN E. WHITE, JR.

John E. White, Jr.
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Respondent, Pro Se

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STATEMENT OF ISSUES ON APPEAL

Although the copy of Appellant's Initial Brief served on Respondent did not contain a statement of issues on appeal as required by Rule 208(b), SCACR, Respondent believes the issue Appellant intended to present to this Court in this appeal is ascertainable from Appellant's argument and is fairly stated as follows:

“Did the Master err in failing to vacate his prior order protecting Respondent's attorney's fees rather than deferring on this issue to the Fee Resolution Committee?”

Respondent hereinafter addresses the issue stated above as it appears to be the sole issue Appellant argues in his initial brief.

STATEMENT OF THE CASE

In his Motion to Alter or Amend Order Concerning Disbursement of Funds, hereinafter called “Respondent's motion”, Respondent petitioned the Lower Court for protection of his attorney's fees. As might be expected, much of the critical facts of this case are set forth in the unrebutted Affidavit of Co-Counsel in Support of Motion to Alter or Amend Order Concerning Disbursement of Funds (hereinafter referred to as “Affidavit of Co-Counsel”). It is respectfully submitted that since Appellant neither served nor filed an affidavit in rebuttal or an affidavit in support of his motion to reconsider, the affirmations in the Affidavit of Co-Counsel should be considered admitted facts for the purpose of this appeal. Nonetheless, it is necessary to set forth herein additional information so that this Court may properly assess the reasonableness of the contingency fee which Appellant agreed to pay his attorneys, the respondents John E. White, Jr. and

Karen M. DeJong.

The written fee agreement and the appealed orders involve attorney's fees on two cases which were consolidated for trial.

On September 3, 2010, Respondent, John E. White, Jr., on behalf of Appellant, John M. English, commenced an action in the Court of Common Pleas for the County of Charleston, alleging that Appellant was the equitable owner of the house and lot in which he and the defendant Ellen Sexton had previously resided together with defendant's minor daughter. Appellant alleged the defendant Sexton held legal title by virtue of a quit-claim deed from Appellant's brother, Clayton G. English, to Ellen Sexton recorded in the office of the Charleston County Registrar of Deeds on September 16, 2002 in Book O-418, page 276. Appellant alleged that Sexton held legal title only and that Appellant was the true equitable owner under a constructive trust. Appellant also alleged a cause of action for adverse possession and, in the alternative, an equitable lien. On September 9, 2010, Respondent filed an Amended Complaint adding causes of action for eviction and injunctive relief alleging that the Lower Court should evict defendant Sexton from the premises and should require her to transfer title of the Ford Explorer Appellant was driving to him. Sexton's answer and counterclaim set forth defenses of qualified general denial, statute of frauds, laches and estoppel. Sexton also counterclaimed for conversion of personal property. Appellant's reply included a supplemental complaint. The reply set forth defenses of failure to state a cause of action and lack of subject matter jurisdiction. The supplemental complaint alleged that Sexton violated an order of the Charleston County Family Court and in so doing was liable to Appellant for defamation and conversion (of the Explorer and its contents).

On September 9, 2010, Respondent, John E. White, Jr., on behalf of Appellant, John M. English, commenced a separate action in the Court of Common Pleas for the County of Colleton (known as Civil Action No.: 2010-CP-15-923) alleging Appellant to be the true owner of a tract of land consisting of approximately 13.5 acres located at 2093 Pierce Road, Cottageville, South Carolina 29435 (hereinafter called “the Cottageville property”) and praying for legal title thereto. (Affidavit of Co-Counsel p. 1; Original R. p. 13). The defendant Ellen Sexton held title of record by virtue of a quit-claim deed from Appellant to Ellen Sexton recorded in the office of the Colleton County Clerk of Court on September 24, 2004 and recorded in Deed Book 1077 at page 48. Appellant alleged that Sexton held legal title only and that Appellant was the true owner under a constructive trust. Sexton’s answer denied same and set forth as affirmative defenses unclean hands, statute of fraud, laches and estoppel.

On or about January 3, 2011, Appellant retained Karen DeJong of the DeJong Law Firm, LLC as additional counsel, whereupon Ms. DeJong, Respondent and Appellant entered into a written agreement regarding representation, attorney’s fees, etc. The terms of such representation were memorialized in writing by the document signed by Appellant and Respondents DeJong and White and attached to the Affidavit of Co-Counsel as Exhibit “A”. (Original R. pp. 22-24). The agreement evidences that Appellant agreed to pay his attorneys (Ms. DeJong and Respondent) a total contingent attorney fee of 40% of Appellant’s total recovery from the litigation in the two companion cases. It also specifies that each attorney shall be entitled to an attorney’s fee equal to 20% of Appellant’s total recovery from the subject litigation. (Since Respondent’s expertise was in real estate law and Karen DeJong was a trial attorney, the

understanding between Appellant and his attorneys was that Karen DeJong would generally handle court appearances such as the trial of the case and Respondent would handle legal research, drafting documents, briefs, etc.). (Affidavit of Co-Counsel, p. 2; Original R. p. 14)

The two civil actions were consolidated for trial and referred for binding arbitration to the Honorable Richard E. Fields as arbitrator by order filed April 26, 2011.

On June 23, 2011, the day of the merits hearing before the arbitrator, immediately prior to the hearing, the parties reached a settlement agreement wherein they agreed to completely settle the issues of ownership of the Cottageville property and the Furman Drive property. This agreement was adopted by the Arbitrator in his Arbitration Agreement and Award issued on August 3, 2011 and filed on August 4, 2011. Pertinent provisions of the agreement and award include:

- (a) Defendant would deed to Clayton G. English, as Appellant's nominee, an undivided 65% ownership interest in the Cottageville property; and,
- (b) Defendant would deed to Appellant's brother, Clayton G. English, as nominee for Appellant, an undivided 60% ownership interest in the Furman property; and
- (c) Both properties would be sold and the proceeds divided between Respondent Sexton and Appellant according to their respective ownership interests.

(Arbitration Agreement and Award, p. 2; Supplemental R. p. 6;
Affidavit of Co-Counsel p. 3; Original R. pp. 14-15).

Defendant Sexton executed and delivered to Respondent deeds to the subject

properties in compliance with the arbitrator's award. Respondent recorded such deeds and Appellant received recovery from both cases in this litigation. Appellant commenced marketing the subject real properties and quickly found purchasers (Timothy and Jewell Jurco, hereinafter called "the Jurco's") for the Cottageville property. On October 14, 2011, the Jurco's leased the Cottageville property and paid \$10,000.00 for the option to buy the property for \$ 135,000.00 within 24 months. (Affidavit of Co-Counsel, p. 3; Original R. p. 15).

By Consent Order of Reference dated and filed May 17, 2012, the arbitrator's award was confirmed and all remaining issues in the two cases were referred to the Honorable Mikell Scarborough, Master-in-Equity for Charleston County.

Attorney DeJong was relieved as counsel by consent order filed December 3, 2012. (Respondent White has not been relieved but has filed a motion to be relieved which motion has not been ruled upon).¹

When Ms. DeJong was relieved as counsel, Respondent White became, once again, Appellant's sole attorney in these cases. Respondent and Appellant agreed that Respondent would continue to represent Appellant for his fee of only 20% of Appellant's recovery. (Affidavit of Co-Counsel pp. 3-4; Original R. pp. 15-16).

Although Appellant had agreed to pay Respondent 20% of his gross proceeds from the sales (Exhibit "A" to Affidavit of Co-Counsel; Original R. pp. 22-24), Appellant closed the sales of the properties without advising either attorney working for the

¹ [Please note: Respondent White has been relieved since the initial brief].

closings and without paying either of them the amounts dues. At some point in time, Appellant paid Respondent \$ 5,000.00 while representing that he had not closed any sale. Ms. DeJong was not paid through or from the proceeds of the Cottageville closing and has not been paid any money for her services. Appellant has stated that he has no intention to pay her for her services. (Affidavit of Co-Counsel p. 4; Original R. pp. 16, 20).

The Jurco's retained James Daniel Lucero, Esquire to close the sale of the Cottageville property. Appellant refused to close with Mr. Lucero due to his title insurance company's refusal to insure over a judgment against Appellant without paying the judgment. (Affidavit of Co-Counsel p. 4; Original R. p. 16).

The Jurco's then retained the Weeks and Irvine Law Firm to close the sale, and the closing was assigned to Joseph Hand, Esquire in their Summerville office. Mr. Hand also required payment of the judgment if he were to close the transaction. (Affidavit of Co-Counsel p. 4; Original R. p. 16).

When Respondent was informed that Appellant advised someone at the Weeks and Irvine Law Firm that Appellant did not think Respondent was representing him, Respondent became suspicious of Appellant's motives for making such a statement. (Affidavit of Co-Counsel pp. 4-5; Original R. pp. 16-17)

Appellant advised the Jurco's and/or their loan officer that he would not close the sale of the Cottageville property with any attorney who would require him to pay the alleged lien of the problematic judgment and recommended that they should use another attorney to close the sale of the Cottageville property. (Affidavit of Co-Counsel, p. 5;

Original R. p. 17).

Apparently, Appellant decided to close the sales of the two properties and conceal the closings from Respondent. (Affidavit of Co-Counsel pp.4-8; Original R. pp. 16-20; Transcript p. 12, line 21-p. 15, line 8; Supplemental R., pp. 15-16).

R. David Chard, Esquire was next chosen (without advising Respondent) to close the sale of the Cottageville property and closed the transaction on March 29, 2013 (Affidavit of Co-Counsel, p. 3 HUD1 Exhibit "B" to Affidavit of Co-Counsel; Original R., p. 17, pp. 25-30) without the prior knowledge of Respondent. (Affidavit of Co-Counsel, p. 5; Original R., p. 17). The HUD-1 shows that the judgment against Appellant was not paid through the closing. Also, attorney Chard was not authorized by Appellant to tell Respondent if and/or when Appellant's proceeds of the Colleton sale were disbursed. (Transcript, p. 15, lines 3-5; Supplemental R, p. 16).

In fact, none of the attorneys for either party claimed to know whether those proceeds had been disbursed although counsel for Respondent Sexton said he believed they had been disbursed. (Transcript, p. 14, line 19- p. 15, line 8; Supplemental R, p. 16).

Neither White nor DeJong, Appellant's attorneys who had secured the recovery for Appellant, received payment of their attorney's fees from the proceeds of the Cottageville closing or from the proceeds of The Furman Drive closing. (Affidavit of Co-Counsel, pp. 5, 8; Original R. pp. 16, 20) although Respondent White was paid \$ 5,000.00 under the representation that Appellant had not closed upon a sale. (Transcript, p. 13, line 24- p.14, line 1; Supplemental R. p. 16).

The HUD-1 Settlement Statement executed at the closing of the Cottageville property evidences that it was signed by Appellant, as attorney-in-fact for his daughter, Meredith Fallin. The Addendum to the HUD-1 evidences that the check for the seller's proceeds was payable to "John English (Meredith Fallin)". The Addendum to the HUD-1 shows that, after all closing costs and Appellant's obligation to pay his portion of the mediator's fee had been deducted, Appellant received a check for \$ 71,633.51. In addition to this amount shown as payable to Appellant, the addendum shows payment of \$ 500.00 from Appellant's funds to the mediator in the subject litigation, a cost for which Appellant is separately responsible in addition to his attorney's fees. Therefore, Appellant's net recovery from the sale of the Cottageville property was \$ 72,133.51. Pursuant to the agreement between Respondent and Appellant, Respondent was entitled to 20% of Appellant's gross recovery from such sale. (Affidavit of Co-Counsel, pp. 5-6; Original R. pp. 17-18).

As to the Furman Drive property, Appellant had an attorney not involved in the subject litigation prepare and file a deed to the Furman Drive property transferring legal title from Clayton G. English, who held title as nominee for Appellant, to Appellant's daughter, Meredith Fallin, who thereby acquired the legal title only (as evidenced by the recorded order of the arbitrator, only legal title was owned by Clayton G. English, equitable title remaining in Appellant). That deed is dated February 10, 2012 and was filed of record on February 13, 2012 in Book 233, at page 309. (Affidavit of Co-Counsel p. 6; Original R., p. 18).

According to the deed of the Furman Drive property signed by Defendant Sexton

and by Appellant as attorney-in-fact for Meredith Fallin, dated May 9, 2013 and recorded on May 15, 2013 and according to the HUD-1 settlement statement (Exhibit "C" to Affidavit of Co-Counsel; Original R. pp. 31-35), the Furman property sold for \$ 510,000.00. Appellant did not disclose to Respondent the law firm chosen to close the sale or the fact that it had closed. At some point in time after the closing, Respondent found the deed indexed on the RMC's website. (Affidavit of Co-Counsel pp. 6-7; Original R. pp. 18-19).

A hearing was held on August 25, 2014, before the Honorable Mikell Scarborough, Master in Equity of Charleston County. By the time of the hearing, the real property had been sold, and David A. Collins, Esquire as counsel for Appellant was holding the sum of \$72,383.29 from the net proceeds of the sale of the Furman Drive property in escrow out of which Appellant is entitled to payment of 60% (Exhibit "C" to Affidavit of Co-Counsel; Original R. pp. 31-35; Transcript p. 14, lines 16-17). The principal issue remaining in this action at the hearing to authorize disbursement of the funds in Mr. Collins' trust account was the disposition of a Ford Explorer vehicle being driven by Appellant. The Master interpreted the language of the confirmed arbitrator's award to say that Appellant was required to reimburse Respondent in the sum of \$19,626.80, at which time Respondent was to sign over the title to Appellant.

Respondent filed and served Respondent's motion with supporting affidavit on September 4, 2014 because he believed that Appellant would not honor his obligation to pay Respondent the balance owed unless the Court protected Respondent's attorney's fees. Such belief was based on the facts stated in his supporting affidavit, including, inter

alia, upon:

- (a) Appellant's failure and refusal to advise Respondent of the attorneys who would be conducting closings of the sales of the subject properties;
- (b) Appellant's failure and refusal to advise Respondent of the dates of closings of the sales of the subject properties,
- (c) Appellant's failure and refusal to advise Respondent of the amounts Appellant received from the closings of the sales of the subject properties;
- (d) the anger and resentment Appellant showed during arguments about a confidential matter (which matter was known to the Master). This disagreement was identified by Appellant to Respondent as the reason Appellant decided to avoid using Appellant as his attorney subsequent to such arguments;
- (e) Respondent's discovery of Appellant's history of not paying people for their services as evidenced by the public records of Charleston County; by his failure to pay co-counsel; and by his apparent reluctance to pay any more of Respondent's fees after apparently concluding that Respondent's services were no longer required;
- (f) Appellant's statement that he could not afford to pay Respondent the attorney's fee he owes Respondent;
- (g) Appellant's alleged statement to Mr. Hand or his staff that he did not think Respondent represented Appellant which disavowal appeared to be an attempt to close the sale of the Cottageville property without payment to Respondent;

(h) Appellant's alleged statement to Mr. Chard that Respondent had agreed to a lesser fee than 20% of the proceeds;

(i) Appellant's change in behavior toward Respondent after the major issues of the litigation had been settled and Respondent had earned his fees;

(Affidavit of Co-Counsel pp. 7-8; Original R. pp. 19-20)

Based upon the un rebutted affidavit of Respondent White, the Master ordered that attorney Collins, as escrow agent, pay from the funds he holds to Respondent White the sum of \$18,112.69, pursuant to the written fee agreement signed by Appellant and Appellant's attorneys Respondents White and DeJong.

Appellant filed a motion for reconsideration with no mention of any petition to the Resolution of Fee Disputes Board. A hearing was held on November 10, 2014 and the motion was denied.

Appellant served the Notice of Appeal on December 12, 2014.

ARGUMENTS

I. APPELLANT'S ARGUMENT THAT THE MASTER ERRED IN FAILING TO DEFER TO THE FEE RESOLUTION COMMITTEE THE MATTER OF FEES POTENTIALLY OWED TO RESPONDENT HAS NO MERIT.

Respondent's Analysis of Appellant's argument:

In his initial brief, counsel for Appellant claims the Lower Court erred in granting Respondent's motion to protect his fees. However, at the time of granting Respondent's motion, Appellant had not informed the Lower Court of Appellant's petition to the Resolution of Fee Disputes Board. Appellant now claims that informing the Lower Court at the hearing upon Appellant's motion for reconsideration required the Lower Court to vacate its prior order as to Respondent's fees. Counsel for Appellant does not make clear whether he believes such error to be an error of law or an abuse of discretion. Moreover, Appellant's counsel cites no legal authority either in argument before the Lower Court or in his initial brief upon appeal for the assertion that the Lower Court erred in its ruling. He simply made a conclusory assertion. Appellant's entire argument as to this Respondent, with Respondent's comments inserted in italics as needed follows.

"B. The Master Erred in Failing to Defer to the Fee Resolution Committee the Matter of Fees Potentially Owed to Appellant's Former Attorney.

Appellant was not able to return to Charleston for the hearing before the Master in Equity. As Counsel for Appellant explained, Appellant is an employee of the federal government and, because of the timing of the hearing, was unable to return from the West Coast to participate. *[No further explanation was given at the hearing. The Lower Court did not accept the explanation as convincing. (Transcript p. 9 line 23-p. 10 line 12; Supplemental R. p. 15)].* Nevertheless, Counsel informed the Trial Court that Appellant had filed a fee dispute with the South Carolina Bar Association regarding the amount of the fees due to his former attorney, John White. *[The fee dispute, filed four days after Respondent's motion was served on Appellant, did not contest the unpaid balance, but merely related to the amount of \$ 5,000.00 which had previously been paid by Appellant and credited by Respondent White. (Transcript p. 13, lines 21-25; Supplemental R. p. 16). Counsel for Appellant claims that it was error for the Lower Court not to vacate its prior ruling and defer to the ruling of the Resolution of Fee Disputes Board on an issue which was not before the Board. To be clear, it should be noted that the Lower Court had not ruled upon Respondent's motion to be relieved as co-counsel for Appellant].* Despite the raising of this issue before the Master in Equity, the Master declined to delay any ruling on the amount of the fees he determined to be due to Mr. White. Appellant did not have an opportunity to present to any court or board his concerns regarding this figure, and this matter had, by the time of the hearing, already been presented to a forum specifically designed to resolve these matters. *[As earlier mentioned, Respondent served and filed his motion for protection of his fees on September 4, 2014. Appellant filed a*

petition to the Resolution of Fee Disputes Board four days later. This petition sought refund of the \$ 5,000.00 previously paid and did not mention the \$ 18,112.69 balance Appellant owed and did not concern the issue of the balance owed. (Transcript p. 13, line 13-p. 14 line 1).] Appellant believes that the matter of fees should have been dealt with by the Fee Dispute Committee of the South Carolina Bar Association.”

(Appellant’s Initial Brief, page 3, with Respondent’s comments in italics)

Prior to the hearing on Appellant’s motion for reconsideration, Appellant had not mentioned any alleged opportunity or requirement to submit the attorney’s fees issue to the Resolution of Fees Disputes Board in an affidavit or in any argument of counsel or in Appellant’s motion to reconsider. Also, if Appellant’s request had been granted, the issue before the Lower Court would not have been before the Resolution of Fee Disputes Board, and Respondent would have no means of collecting his fee. Respondent accepted a difficult and complex case on a contingency fee agreement, worked at least hundreds of hours upon it . (Affidavit of Co-Counsel p. 7; Original R. p. 19) and, with the assistance of Respondent DeJong, secured a favorable recovery in which Appellant received a net cash recovery of \$ 115,563.48. The balance of the fee was not before the Board and the Board had no power to order that balance paid and no enforcement power. In light of Appellant’s failure to pay either DeJong or White from the proceeds of the sales of the properties and Appellant’s concealment of the closing of the sales of the properties. (Affidavit of Co-Counsel pp. 6-7; Original R. pp. 18-19; Transcript, p. 12, line 17- p. 13,

line 2; Supplemental R. p. 16) the Lower Court, sitting as a court of equity, properly fashioned an equitable remedy to redress a wrong that had been committed by Appellant and to prevent the commission of another wrong by Appellant. As stated by the South Carolina Supreme Court, “Equity will not suffer a wrong without a remedy”. Lane v. New York Life Insurance Co., 147 S.C. 333, 369, 145 S.E. 216, 207 (1928).

Counsel for Appellant now claims that it was reversible error for the Lower Court not to vacate its prior ruling and defer to the ruling of the Resolution of Fee Disputes Board on the balance due Respondent, which balance was not before the Board.

It is well-settled that an argument in the form of a conclusory assertion, without citation of legal authority is deemed abandoned. In SunTrust Bank v. Bryant, 392 S.C. 264, 708 S.E.2d 821 (S.C. App. 2013), this Court declined to consider the Respondent Davis’ argument on an issue, citing prior authority as follows:

“...*See Bennett v. Investors Title Ins. Co.*, 370 S.C. 578, 599, 635 S.E.2d 649, 660 (Ct.App.2006) (holding that issues raised in a brief but not supported by authority are deemed abandoned and will not be considered on appeal).”

Appellant’s Initial Brief cited no authority at all regarding the issue of attorney’s fees due Respondent. Appellant did not cite any authority on this issue to the Lower Court either. It is respectfully submitted that this Court has no argument from Appellant on the issue of attorney’s fees to consider.

Respondent’s Argument that the Lower Court decided properly:

Assuming, arguendo, that Appellant’s failure to cite legal authority for his

argument is not fatal to the argument, Appellant has failed to give any sufficient rationale as to why the Lower Court should not have granted Respondent's motion to protect his fees. He did not deny Respondent's right to payment of attorney's fees. He simply asserted to the Lower Court and in his brief that there was an alternative to the Lower Court ruling upon the fee issue. Nonetheless, there are numerous reasons why it was proper and necessary for the Lower Court to rule upon Respondent's motion. These reasons include the following:

1. There were no facts or law in dispute and no issue which required further inquiry or testimony. The Respondent's motion to protect his fees and a detailed affidavit in support of such motion were served upon Appellant's counsel on September 4, 2014. Appellant did not file any rebuttal affidavit, either prior to the Court's Order protecting White's fees or in support of his motion for reconsideration. Appellant neither contested any facts of the Respondent's affidavit nor presented any facts whatsoever by affidavit, testimony or arguments of counsel other than the ambiguous statement of Appellant's counsel at the hearing of his motion to reconsider on November 10, 2014 that, "My client has told me that he has got problems with the amounts he is being charged by both of these attorneys".(Transcript p. 16, lines 19-21, Supplemental R. p. 16). Not wanting to pay is not a legal defense.
2. As previously discussed, the fees protected by the Lower Court in the appealed order were not even mentioned in the Appellant's petition to the Resolution of Fee Disputes Board. Appellant's petition dealt only with the \$ 5,000.00 Appellant had previously paid to Respondent months before and asked for that

money to be refunded. (Transcript p. 13, lines 21-25, Supplemental R. p. 16);

3. Respondent's motion to protect his fees was served prior to Appellant's petition to the Resolution of Fee Disputes Board. Effectively, Appellant argues that Appellant has a right to deprive the Court of jurisdiction over the issue after it had already acquired jurisdiction.
4. The Lower Court had dealt with this case and these parties since it was referred on May 17, 2012 and was familiar with the complexity of the litigation, with some of the difficulties of working with these particular clients, with the fact that various attorneys no longer were involved (Transcript p. 3, line 3-p. 4, line 8; Supplemental R. p. 13), and with the contributions of the attorneys toward Appellant's recovery. The Lower Court was in a better position to assess the justice of the motion to protect Respondent's fees than the Resolution of Fee Disputes Board would be. Not only did the Lower Court have prior experience and familiarity with the parties and the case, but the Lower Court received sworn testimony by way of affidavit of the Respondent White, to which Appellant chose not to respond by rebuttal affidavit or testimony. On the other hand, the investigator of the Fee Dispute Resolution Board does not require sworn testimony and had no familiarity with the case or the parties.
5. Appellant's motion to reconsider did not advise Respondent of the issues Appellant now claims as grounds for reversal. The hearing upon Appellant's motion to reconsider had begun before Appellant's counsel suggested that the Lower Court should vacate its prior order concerning Respondent's attorney's fees. The motion was also fatally defective in that it did not state its grounds as

required by Rule 7(b)(1), SCRCP which requires that the motion “shall state with particularity the grounds therefor...”.

The Appellant’s motion to reconsider says it is made “for good cause”, but does not identify the “good cause”. The failure to identify the grounds for the motion is compounded by the failure to support the motion with an affidavit to indicate what legal defense to payment, if any, might be argued by Appellant.

Respondent has no notice of any lawful defense which Appellant might claim.

6. Appellant has not indicated in any motion, affidavit or testimony that he has any meritorious defense to payment of Respondent’s fees. There was no genuine issue of fact or law presented to the Court to adjudicate despite Appellant’s numerous opportunities to present evidence and arguments by way of affidavit(s), testimony or brief(s). These opportunities include:

- (i) The opportunity to file an affidavit rebutting Respondent’s affidavit in support of Respondent’s motion to protect his fees;
- (ii) The opportunity to file an affidavit in support of Appellant’s motion to reconsider identifying Appellant’s objections to payment of Respondent’s fees;
- (iii) The opportunity and requirement to state in Appellant’s motion to reconsider with particularity the grounds for such motion, including why Respondent’s fees should not be protected by the Court;
- (iv) The opportunity to appear and testify at the hearing upon

the motion to reconsider.

7. Appellant's petition did not involve the balance Appellant owed Respondent White, which was the issue the Lower Court adjudicated in the appealed orders. Four days after being served with Respondent's motion for protection of his fees, Appellant filed a petition with the Resolution of Fee Disputes Board seeking return of the previously paid \$ 5,000.00. The petition did not mention the balance of \$ 18,112.69 Appellant owed. (Transcript p. 13, line 21-p. 14, line 1, Supplemental R. p. 16). If the Court had deferred to the Resolution of Fee Disputes Board, they would not have ruled upon the balance owed and Appellant would have absconded with his recovery from the Furman Drive closing without paying his attorneys. Appellant had closed the sale of the Cottageville property and paid neither of his attorneys their fees from that sale. Indeed, at the hearing upon Appellant's motion for reconsideration, no one present could account for the whereabouts of the money Appellant received from the Cottageville closing. (Transcript p. 14, line 14- p. 15, line 8; Supplemental R. p. 16). Fortunately, the sellers' proceeds from the Furman Drive closing were escrowed with Mr. Collins pending the determination concerning the Explorer.

As shown on the HUD-1 settlement statements, Appellant had received net proceeds of \$ 72,133.51 from the sale of the Cottageville property. Appellant's 60% share of the net proceeds from the sale of the Furman Drive property (\$ 43,429.97 being appellant's share) is being held in Mr. Collins' trust account (Transcript p. 14, lines 16-17; Supplemental R. p. 16). Respondent seeks the balance of his fees from Appellant's share of these proceeds.

Appellant's net recovery was \$ 115,563.48. Although the fee agreement entitled Respondent to a fee of 20% of Appellant's gross recovery, in order to avoid any argument on the calculation of his fee, Respondent calculated his fee on Appellant's net cash recovery. (Thereby giving Appellant a generous discount from the contractual amount. The 6% commission on \$ 510,000.00 on the sale of the Furman Drive property, of which Appellant paid 60%, was, by itself, a significant amount). At the hearing on Appellant's motion for reconsideration, Respondent advised the Court that he waived his right to calculate his fee on the gross recovery and asked only for his 20% of Appellant's net recovery from the two closings. (Transcript pp. 19-20, 25; Supplemental R. pp. 17,19).

Respondent's fee of 20% of the net recovery from the two sales is \$ 23,112.69.

Thus far, Respondent has been paid only \$ 5,000.00, leaving a balance of \$ 18,112.69, which is the amount the Lower Court ordered to be paid to Respondent.

The undersigned contends that Appellant raised and argued no issues contesting Respondent's right to his fees or contesting the amount of the fees. In fact, counsel represented only that his client "has problems with the amounts he is being charged by both of these attorneys" (Transcript p. 16, Supplemental R. p. 16) and was entitled to be heard (Transcript p. 8, lines 21-24; Supplemental R. p. 14). Appellant presented no affidavit or testimony and made no legal argument of counsel concerning the enforceability of the contract Appellant signed. Appellant's counsel even stated that he did not want to argue the issue and merely asked the trial judge to vacate his prior order

on this issue and requested that the Lower Court allow the Resolution of Fee Disputes Board to decide the issue (which was not before them since Appellant's petition did not even mention the balance due Respondent), or in the alternative, to reschedule the hearing. (Transcript p. 9, lines 17-22; Supplemental R. p.15).

Despite Respondent's argument at the hearing that Appellant has not claimed a defense to payment of Respondent's fees (Transcript p. 14, lines 8-12; Supplemental R. p. 16). At the hearing, Appellant did not claim any lawful defense to payment. It is axiomatic that an issue not raised before the Lower Court cannot be raised for the first time upon appeal. In In re Michael H., 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004), our Supreme Court stated, "An issue may not be raised for the first time on appeal. In order to preserve an issue for appeal, it must be raised to and ruled upon by the trial court." It is respectfully submitted that if there is no claim of lawful defense to payment, there can be no "good cause" for reconsideration.

Appellant claims that he was deprived of notice and opportunity to be heard on the issue of Respondents attorney's fees. Although this is *not* his ground for appeal, it should be noted that this claim is without merit. Respondent served and filed his motion for the Lower Court to protect his fees and simultaneously therewith, served and filed a supporting affidavit detailing his entitlement to such order. If Appellant had a defense, Appellant could have and should have filed a rebuttal affidavit to assert any defense to payment of Respondent's fees. Additionally, if he had a defense, he should have filed an affidavit supporting his motion for reconsideration and he should have appeared at the hearing. Even at the argument of Appellant's motion for reconsideration, counsel for Appellant merely requested that the Court not make a decision on the issue, but allow the

Resolution of Fee Disputes Board to decide the issue. Again, Appellant had the opportunity to raise an issue for adjudication, but did not. In the absence of any dispute, the Lower Court properly issued its order directing payment of Respondent's fees. Even in his initial brief, Appellant has failed to assert that he has a meritorious defense or any defense at all.

In summary, Appellant agreed to pay Respondent 20% of his total recovery from the subject litigation. According to the HUD-1 attached as Exhibit "B" to the Affidavit of Co-Counsel, Appellant recovered \$ 72,133.51 from the sale of the Cottageville property. The HUD-1 attached to the Affidavit of Co-Counsel as Exhibit "C", shows Appellant recovered an additional \$ 43,429.97 from the sale of the Furman Drive property. Appellant's net cash recovery for the two sales was \$ 115,563.48.

Respondent's fee based upon 20% of Appellant's net cash recovery totals \$ 23,112.69.

Respondent has been paid only \$ 5,000.00 toward this fee. Therefore, Appellant owes Respondent \$ 18,112.69. Appellant promised further payment on Respondent's fees, but instead of paying Respondent, Appellant concealed from Respondent the closings from which Respondent should have been paid. (Affidavit of Co-Counsel pp. 5-7; Original R. pp.17-19). Despite numerous opportunities to assert he had some defense to payment, Appellant has failed to allege any grounds for failing to pay the balance owed. Appellant now asks this Court to rule that the Master erred by not deferring to the Resolution of Fee Disputes Board on the issue of the unpaid balance of Respondent's fees, an issue not raised in Appellant's petition to the Board.

**II. AS ADDITIONAL SUSTAINING GROUNDS, APPELLANT'S
MOTION TO RECONSIDER WAS FATALLY FLAWED IN THAT
IT FAILED TO STATE THE GROUNDS FOR SUCH MOTION.**

It is respectfully submitted that Appellant's motion for reconsideration did not comply with Rule 7(b)(1), SCRCP, which requires that the motion "...shall state with particularity the grounds therefor..."

Rather than stating with particularity the grounds therefor, as required by Rule 7(b)(1), SCRCP, the Appellant's motion to reconsider says it is made "for good cause as provided for by the South Carolina rules (sic) of Civil Procedure, Rule 59(e)", but it did not identify the "good cause". Appellant should have identified his good cause for reconsideration and submitted an affidavit supporting same, and alleging he had a defense to payment if he believed he had a defense. Instead, Appellant failed to submit any affidavit and failed to appear at the hearing. Appellant's counsel did his best to excuse Appellant's failure to appear but the Lower Court was not persuaded by counsel's excuse for Appellant's failure to appear at the motion to reconsider (Transcript p. 9, lines 5-7; Transcript p. 9, line 23-p. 10, line 12; Supplemental R. p. 15).

Appellant's motion claimed that this Court should reconsider its order to pay the undersigned's attorney's fees "for good cause", but Appellant has not claimed at any time any alleged defense to payment. Appellant has had opportunities to do so. He did not serve an affidavit alleging any defenses to payment, did not appear to testify as to any potential good cause and did not submit any arguments to the Court at the hearing of the

motion to reconsider or at any other time that any good cause even exists.

Respondent respectfully submit that the motion was fatally flawed and any discretion of the Lower Court was properly exercised in the light of Rule 1, SCRCR which provides, in relevant part, "These Rules...shall be construed to secure the just, speedy and inexpensive determination of every action."

**III. AS FURTHER ADDITIONAL SUSTAINING GROUNDS,
APPELLANT HAS MADE NO ARGUMENT UPON THE ISSUE OF
RESPONDENT'S ATTORNEY'S FEES FOR THIS COURT TO
CONSIDER AS APPELLANT HAS CITED NO LEGAL
AUTHORITY FOR HIS CONTENTION THAT THE MASTER
ERRED IN AWARDING RESPONDENT HIS FEES.**

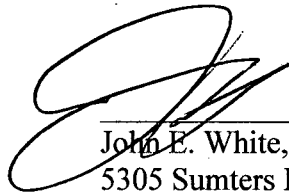
This Court has held that an argument which is conclusory in nature, reciting facts with no citation of legal authority is deemed abandoned. Bennett v. Investors Title Insurance Co., 370 S.C. 578, 599, 635 S.E.2d 649, 660 (Ct.App.2006) As Appellant has cited no legal authority for his position that the Master erred in awarding Respondent his fees, it is submitted that the argument on this issue has not been made.

CONCLUSION

For the reasons stated, this Court should affirm the judgment of the trial court as it relates to the judgment of the undersigned providing that his attorney's fees be paid.

Respectfully submitted,

September 2, 2016



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CERTIFICATE OF COUNSEL IN FINAL BRIEF

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

MIKELL R. SCARBOROUGH, MASTER-IN-EQUITY

Case No. 2014-002661

John M. English,

Appellant,

v.

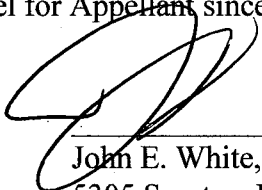
Ellen Sexton and
John E. White, Jr,

Respondents.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR as such requirements have been amended by the Order of this Court filed August 3, 2016 and noting by footnote only that this Respondent has been relieved as counsel for Appellant since the Initial Brief was served and filed.

September 8, 2016



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