THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
The Honorable Marvin H. Dukes, III, Master in Equity

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SC Court of Appeals

Case No. 2014-CP-07-0052
Appellate Case No. 2018-001969

Lady Beaufort, LLC & Tideland Realty, Inc., *Respondents/Appellants*,

v.

Hird Island Investments, Inc., Sherwood N. Fender, Addison D. Fender, Martha B. Fender, William B. Bowen, Lady Kemmerlin, LLC, Brickyard Holdings, Inc., and A&K Holding Co., LLC, Defendants,

AND

William M. Bowen, Third-Party Plaintiff,

v.

James S. Kerr and Matt Trumps, Third-Party Defendants,

Of Which Hird Island Investments, Inc. and Sherwood N. Fender are the Appellants/Respondents.

FINAL REPLY BRIEF OF RESPONDENTS/APPELLANTS

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Respondents/Appellants Lady Beaufort, LLC and Tideland Realty, Inc. (hereafter, "Respondents") provide this brief in reply to Appellants/Respondents' (hereafter "Appellants") opposition brief dated January 2, 2019. Therein, Appellants argued that (i) Respondents' argument regarding attorneys' fees is not preserved, (ii) the Master's reduction of the awarded attorneys' fees was proper,[1] and (iii) Appellants did not waive or otherwise fail to preserve objections to the reasonableness of attorney's fees. Respondents address each in turn.

I. <u>There is No Issue Regarding Preservation of Respondents' Argument</u>

Appellants contend that six words on page eight of the Master's May 11, 2017 Order — "in order to obtain the property"[2] — strip Respondents of their entitlement to their full attorneys' fees under the contract between the Parties, and because Respondents did not previously appeal or seek reconsideration of the inclusion of those six words, Respondents' challenge to the reduction of attorneys' fees is not preserved. These arguments must fail.

1. Respondents Could Not Have Appealed or Moved for Reconsideration of the Original Order

Respondents were not an aggrieved party as to the original order and thus lacked standing to appeal from or move to reconsider the order. *See, e.g.*, *Cisson v. McWhorter*, 255 S.C. 174, 178 (1970) ("[O]ur court is concerned with correcting errors that have *practically* wronged the appealing party. It, therefore, follows that it is our duty to reject an appeal that is prosecuted by a

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[1] Appellants, in their separate appeal, contend that Respondents are not entitled to *any* attorneys' fees. This argument, though disputed, is addressed in the briefing for the separate appeal and is not responded to herein.

[2] "Lady Beaufort has also expended $53,924.41 in attorney's fees and costs *in order to obtain the property* it lost because of the Defendants' conduct." May 11, 2017 Order at 8 **(R. p 025)** (emphasis added). As discussed *infra*, the six italicized words are at odds with the rest of the Order, including the award.

party who is not aggrieved in a legal sense by the judgment of the trial court." (emphasis added)); *In re Estate of Timmerman*, 331 S.C. 455, 460, 502 S.E. 2d 920, 922 (Ct. App. 1998) ("When a party receives an order that grants certain relief not previously contemplated or presented to the trial court, *the aggrieved party* must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal." (emphasis added)). Respondents requested damages including attorneys' fees incurred as of the date of the request (the date of trial) and were awarded the same. There was nothing for Respondents to appeal or challenge on reconsideration.

2. The May 11 Order, Read as a Whole, Demonstrates the Intent of the Master to Award Respondents All of Their Attorneys' Fees

"[J]udgments are to be construed like other written instruments," and the "determinative factor is the intent of the court, as gathered, not from an isolated part thereof, but from all the parts of the judgment itself." *Weil v. Weil*, 299 S.C. 84, 90, 382 S.E.2d 471, 474 (Ct. App. 1989) (quoting 46 Am. Jur. 2d, *Judgments* § 73 (1969)). Applying this principle to the Judge Dukes' May 11, 2017 Order compels the conclusion that the Master intended to award attorneys' fees incurred after Lady Beaufort recovered the property from Inverness.

First, the Master *did* award attorneys' fees and costs past that time, awarding an amount that included fees incurred through the date of trial. Order (May 11, 2017) at 8 (**R. p 025**). Second, the Master's intent is evidenced by his awarding of prejudgment interest on the additional $25,000 that Lady Beaufort had to pay to Inverness over the original contract amount to acquire the property. This amount was, of course, ascertainable as of the date of the closing with Inverness. Judge Dukes declined, however, to award prejudgment interest on the claimed attorneys' fees, finding they were *not* ascertainable prior to the judgment in this case. *See Babb v. Rothrock*, 310 S.C. 350, 426 S.E.2d 789 (1993) (prejudgment interest is obtainable when payment is demandable of a certain or ascertainable sum). Had the Master's intent been to cut off Lady Beaufort's entitlement to attorneys' fees at the date of closing with Inverness, then Respondents' attorney's fees *would* have been ascertainable at that time because they could accrue no further, entitling Respondents to prejudgment interest on those fees as of that date.

3. As a Result of *Appellants'* Motion for Reconsideration, the Offending Language Was Removed from the Original Judgment

Judge Dukes' original Order stated, "Lady Beaufort has also expended $53,924.41 in attorney's fees and costs *in order to obtain the property* it lost because of the Defendants' conduct." Order (May 11, 2017) at 8 (**R. p. 025**) (emphasis added). However, Judge Dukes' February 14th Order (granting Defendants' Motion for Reconsideration in part) modified the original order, removing the language in question, changing it to: "Lady Beaufort also claims damages in the amount of $53,924.41 in attorney's fees and costs which it claims it expended *on account of Defendants' default*." Order (Feb. 14, 2018) at 3–4 (**R. p. 015-016**).

The "in order to obtain the property" language did not reappear until the October 26, 2018 Order Amending the Judgment, from which Respondents timely appealed. There is no issue regarding preservation of Respondents' argument.

II. The Master's Reduction of the Award of Attorneys' Fees Was in Error as a Matter of Law

1. The Contract Entitles Respondents to All of Their Attorneys' Fees

As set forth in Respondents' initial brief, the contract between the Parties provided that, "[i]f Seller defaults in the performance of any of the Seller's obligations, Buyer may . . . [r]ecover attorneys' fees and all other direct costs of litigation if Buyer prevails in any action against Seller." Contract at 6, § 27(A) (**R. p. 081**). Respondents brought and prevailed in an action arising out of Appellants' default, an action that continued past the date of the closing with Inverness and continues to this day. The contract does not limit the duration of time during which attorneys' fees accrue and are recoverable.

The closing with Inverness came about as part of the settlement of Respondents' claims against Inverness. Order (May 11, 2017) at 4, ¶ 25 (**R. p. 021**). The suit against Appellants (the Seller) continued thereafter and it is this latter suit that entitles Respondents to fees under the contract, not merely the claims against Inverness.

The Master therefore erred as a matter of law in establishing the date of closing with Inverness as a cutoff date for the accrual of attorneys' fees in the suit against Appellants and in reducing the award of those fees contrary the contract.

2. Paid vs. Incurred and Owing

Appellants seek to make much of a statement at trial by the principal of Lady Beaufort, Mr. Kerr, that $53,924.41 in attorneys' fees had been paid to date. Appellants' Brief (Jan. 2, 2019) at 19. Appellants go so far as to call this statement "a lie" and "an outrageous lie." *Id.* Respondents have conceded this was a misstatement by Mr. Kerr, a long-time client of the Epting firm, and that Mr. Kerr, under examination at trial, simply did not make a distinction between what he had paid and what he had incurred in attorneys' fees. Judge Dukes' order recognized that the distinction between amounts paid or incurred is of little moment. *See* Order (Oct. 26, 2018) at ¶ 26 (**R. p. 008**). ("I find and conclude that the Plaintiff has expended *or incurred* $17,857.00 in attorney's fees and costs in order to obtain the property it lost because of the Defendants' conduct, and the Order filed on May 11, 2017 should be amended accordingly.").

Nowhere in the contract between the Parties does it state that attorneys' fees must have been paid before they are recoverable. Courts have routinely held that attorneys' fees are recoverable to the extent they are incurred, regardless of whether payment has been made. *See, e.g.*, *Greenhill v. U.S.*, 96 Fed. Cl. 771, 776 (Fed. Cl. 2011) (noting that incurred attorneys' fees may be recoverable even where an attorney performs work *pro bono* with no expectation of payment by the client); *Farmers Ins. Exchange v. Law Offices of Conrado Joe Sayas, Jr.*, 250 F.3d 1234, 1238 (9th Cir. 2001) (noting courts' interpretations that fees were "incurred" "because the parties claiming fees had become liable to other parties for some amount of money as a result of the litigation"); *Phillips v. Gen. Servs. Admin.*, 924 F.2d 1577 (Fed. Cir. 1991) (holding a prevailing party entitled to attorney's fees incurred even though, pursuant to a fee arrangement, the party would never be responsible for paying those fees).

Appellants argue further that Judge Dukes' decision to reduce the award of fees "was undoubtedly influenced by the lack of credibility exhibited by Lady Beaufort on this issue." Appellants' Brief (Jan. 2, 2019) at 19. Judge Dukes' order, though, does not support this contention. By repeatedly stating that the attorneys' fees were awarded only to the extent incurred to obtain the property in question, the order makes plain that the Court's interpretation of the contractual entitlement to fees is the basis for the reduction. Specifically, the amended judgment refers to:

- "attorney's fees and costs spent by Lady Beaufort *to obtain the Property*" – ¶ 7
- "the attorney's fees and costs charged by the Epting Firm to Lady Beaufort up and through that point in time were reasonably necessary *in order to obtain the property* Lady Beaufort lost because of the Defendants' conduct" – ¶ 13
- "$10,000 in attorney's fees and costs *in order to obtain the Property* it lost because of Defendants' conduct" – ¶ 15
- "19.3 hours spent by Mr. Epting and the 27.5 spent by Ms. Endemann were reasonably necessary *in order to obtain the subject property*" – ¶ 19
- "The Plaintiff's attorneys have obtained a beneficial result for their client, having *obtained the Property* which is the subject of this action for their client." – ¶ 23

- "the $10,000 in costs and attorney's fees which it paid to the Epting Firm *in order to obtain the Property* which is the subject of this action" – ¶ 24
- "Plaintiff has expended *or incurred* $17,857.00 in attorney's fees and costs *in order to obtain the property* it lost because of the Defendants' conduct" – ¶ 26.

Order (Oct. 26, 2018) (**R. p. 001**). The contract, though, entitles Respondents to "[r]ecover attorneys' fees and all other direct costs of litigation if Buyer prevails in any action against Seller" with no such limitation as imposed by the trial court. The Master's reduction of Respondents' recovery of attorney's fees was, as a matter of law, contrary to the language of the contract and should be reversed.

III. Any Objection by Appellants to the Amount of Respondents' Fees Was Waived

An objection not raised at trial is waived. *See Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) ("An issue may not be raised for the first time in a motion to reconsider."). It is undisputed that Appellants did not dispute or object to the amount of Respondents' attorneys' fees at trial.[3] Appellants' objection to the amount of the award of attorneys' fees was therefore not preserved for reconsideration or for this appeal.

Additionally, Appellants mischaracterize the circumstances surrounding the entry of the Respondents' invoices at trial. As a housekeeping matter at the end of trial, counsel for Lady Beaufort sought to enter Plaintiffs' legal invoices into evidence to support fee affidavits already admitted. Trial Tr. 180:20–181:11 (**R. pp. 264–65**). A redacted version was handed to Defendants' counsel and an unredacted version was to be handed up to the Court, anticipating (i) that Defendants' counsel may challenge the redactions and the Court may need to conduct an *in*

[3] Nor did Appellant's January 2nd brief dispute that Respondents' fees were actually incurred and reasonable. *See* 5 Am. Jur. 22 *Appellate Review* § 512 (2016) (when a party "fails to respond to an issue in its brief, the court may treat the failure to respond as a confession that the [other party's] position is correct").

camera review at that time, and (ii) that the Master would need the invoices to make findings as to the reasonableness of the fees. *Id.* Counsel for Defendants stated, "I don't need that, sir," apparently indicating thereby that the affidavits were sufficient to establish the amount and reasonableness of the fees. *Id.* The Master seems to have understood counsel's statement in that way, stating "All right. Hang on to them," and "[i]t sounds like it's an all or nothing situation" regarding an award of attorneys' fees. *Id.*

In any event, Defense counsel did not object to the Court's statement or otherwise raise any contention that Respondents' attorneys' fees were too high or were to be cut off after a particular time. *See id.* The argument is not preserved.

IV. Conclusion

For the foregoing reasons, the trial court's October 26, 2018 order should be vacated and an order entered awarding Respondents all of their attorneys' fees, including post-judgment fees, incurred in this matter to date.

Respectfully submitted,

October 30, 2019

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CERTIFICATE OF COUNSEL PURSUANT TO RULE 211(B)

The undersigned certifies that the Final Brief of Respondents/Appellants, Final Reply Brief of Respondents/Appellants, and Final Brief of Respondents/Appellants as Respondents comply with Rule 211(b).

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