IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE BEAUFORT COUNTY
COURT OF COMMON PLEAS
HONORABLE MARVIN H. DUKES, III
BEAUFORT COUNTY MASTER-IN-EQUITY AND
SPECIAL CIRCUIT COURT JUDGE

CASE NO.: 2014-CP-07-0052
APPELLATE CASE NO.: 2018-001969

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

vs.

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 — Appellants/Respondents.

FINAL BRIEF OF APPELLANTS/RESPONDENTS REPLYING TO FINAL BRIEF OF RESPONDENTS/APPELLANTS

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STATEMENT OF THE CASE

A. PROCEDURAL BACKGROUND

This action arises out of the alleged breach of an Agreement to Buy and Sell Real Estate dated August 19, 2013 wherein Lady Beaufort, LLC ("Lady Beaufort") contracted to buy and Hird Island Investments, Inc. ("Hird Island") contracted to sell a 2.99 acre parcel of unimproved real property located in Beaufort County, South Carolina (the "Property"). ROA, pg. 76

This action was commenced by the filing of a Summons and Complaint in the Beaufort County Court of Common Pleas on January 7, 2014. .ROA, pg. 39. The Complaint was filed on behalf of Lady Beaufort and Tideland Realty, Inc. ("Tideland Realty") against Hird Island and Inverness, LLC ("Inverness"). The Complaint contains four (4) causes of action. The first cause of action is for breach of contract against Hird Island, in which Lady Beaufort seeks damages for the alleged breach of contract and Tideland Realty seeks the payment of a real estate commission on the aborted sale. The second cause of action is against Inverness only, alleging intentional interference with the contract between Lady Beaufort and Hird Island. The third cause of action seeks to set aside the deed between Hird Island and Inverness. The fourth cause of action seeks specific performance of the contract between Lady Beaufort and Hird Island.

On February 5, 2014 Hird Island and Inverness filed their Answers and Counterclaims. ROA, pp. 44 – 49. In these responsive pleadings both Lady Beaufort and Inverness denied the material allegations of the Complaint.

On May 29, 2014 Lady Beaufort filed an Amended Complaint. ROA, pg. 50. The Amended Complaint adds allegations of fraud as part of the cause of action to set aside the deed. On June 11, 2014 Hird Island filed its Answer and Counterclaim to the Amended Complaint, again denying the material allegations of the Complaint.

On November 24, 2014 Lady Beaufort Filed its Second Amended Complaint, in which Inverness was dropped as a defendant and Sherwood N. Fender ("Fender") was added as a new defendant. ROA, pg. 60.

In the Second Amended Complaint causes of action are alleged for breach of contract, breach of contract accompanied by a fraudulent act, fraudulent transfer and negligent misrepresentation. On November 13, 2014 Hird Island and Fender jointly filed their Answer to the Second Amended Complaint, denying the material allegations of the Second Amended Complaint, as well as a Counterclaim alleging that Lady Beaufort breached the contract. ROA, pg. 66.

In the Second Amended Complaint, the only specific allegation claiming attorney's fees or costs as damages is as follows:

> "As a result of Hird Island's breaches, Plaintiffs have been damaged in that it was required to obtain counsel and incur expense to acquire the property that Hird was legally obligated to sell to Lady Beaufort."

ROA, pg. 206, ¶14.

On November 25, 2014 this matter as referred to the Honorable Marvin H. Dukes, III, Master in Equity for Beaufort County, South Carolina, for final determination. ROA, pg. 33.

On March 1, 2014 this matter was tried non-jury before Judge Dukes and on May 11, 2017 Judge Dukes entered an Order granting Judgment against Hird Island and Sherwood Fender in favor of Lady Beaufort in the amount of $87,578.56 and entering judgment against Hird Island and Fender in favor of Tideland Realty in the amount of $17,500.17. ROA, pp. 18-32.

On May 19, 2017 Hird Island filed its Motion to Reconsider the Order dated May 11, 2017. Lady Beaufort did not move to reconsider this Order. ROA, pg. 70.

On February 14, 2018 Judge Dukes filed his Order Granting in Part and Denying in Part Hird Island's Motion to Reconsider. ROA, pg. 13. In accordance with this Order, another hearing was held before Judge Dukes on July 23, 2018, at which time testimony was taken regarding the attorney's fees claimed by Lady Beaufort. As a result of that hearing, on October 26, 2018 Judge Dukes filed his Order amending his previous judgment, in which he reduced the prior judgment against Hird Island and Sherwood Fender in favor of Lady Beaufort from $87,578.56 to $51,511.15. This reduction was the result of Judge Dukes amending his Judgment of May 11, 2017 by reducing Lady Beaufort's entitlement to recover attorney's fees as damages from $53,924.41 to $17,857.00. ROA, pg. 8.

On November 5, 2018 Hird Island and Fender filed their Notice of Appeal to the South Carolina Court of Appeals.[1] ROA, pg. 37. On November 17, 2018, Lady Beaufort filed their Notice of Appeal, which is the subject of the instant brief. ROA, pg. 35.

B. FACTUAL SUMMARY

Hird Island owned an unimproved 2.99 acre parcel of property in Beaufort County, South Carolina located at 9 Sams Point Road. Sherwood Fender, the President of Hird Island, needed to sell this property quickly because he was in dire financial straits or, as he put it, he had "gotten crosswise financially, personally." ROA, pg. 159. He was in arrears on a loan with Palmetto State Bank and feared foreclosure, plus he was in arrears with taxes owed to the Internal Revenue Service. *Id.*, pp. 160, 164 and 222. Fender approached Matt Trumps, a realtor with Tideland Realty, and asked Mr. Trumps to approach James Kerr about purchasing the parcel. Mr. Kerr was a real estate developer and the sole owner of Lady Beaufort, LLC. *Id.*, pp. 100 and 102. Mr. Kerr had previously created Lady Beaufort to acquire from Mr. Fender a .34 acre

[1] This appeal has been separately briefed by the parties, and one of the issues raised is Lady Beaufort's entitlement to any attorneys fees..

parcel of property that was adjacent to the subject property. Since Lady Beaufort already owned the adjacent property, Mr. Fender asked Mr. Trumps to approach Mr. Kerr to see if he was interested in purchasing the subject property. *Id.*, pp. 103-104.

Mr. Trumps subsequently approached Mr. Kerr and told him that Mr. Fender "needs to sell" the subject property. Mr. Kerr desired to purchase the property and, on August 19, 2013 he executed, on behalf of Lady Beaufort, an Agreement/Contract to Buy and Sell Real Estate which was presented to him by Mr. Trumps, which had been executed by Mr. Fender on behalf of Hird Island the day before, August 18, 2013. *Id.*, pp. 106 and pg. 269. This Contract has a purchase price of $260,000.00. It does not contain a financing contingency. *Id.*

The Contract defines its "Effective Date" as the final date upon which a party to the contract executes the contract. *Id.*, pg. 269, Section 1(D). As noted, Hird Island executed the contract on August 18 and Lady Beaufort executed the contract on August 19, 2013. The "Effective Date" for the contract was, accordingly, August 19, 2013. ROA, pg. 117.

The Contract further provides for a "Due Diligence Period", ending no later than 30 "Business Days" after the original "Effective Date" unless the parties agreed in writing to extend the Due Diligence Period. *Id.*, pg. 271, Section 12. The Contract defines "Business Day" as "a 24 hour period starting at 10 a.m. (M/Tu/W/Th/Fr) and counted from 10 a.m. of the first business day following the effective date. Business Days shall not be begin or end on a Saturday, Sunday or a Federal legal holiday." *Id.*, Section 1(E).

The parties stipulated that October 14, 2013 and September 2, 2013 were Federal holidays (Columbus Day and Labor Day, respectively). ROA, pg. 138.

Lady Beaufort took the position that the Due Diligence Period ended on October 1, 2013. ROA, pg. 141.

When first presented with the proposed Contract, Mr. Fender questioned the need for 30 days of due diligence, stating "The man who is buying it already owns the other half. He knows more about this property than I do.", but he agreed to this clause none the less. He stressed, however, that "time has got to be of the essence" because of his pressing financial needs. *Id.*, pg. 223.

With respect to the closing deadline, the parties deviated from the standard, pre-printed form of the contract, and instead inserted the following special clause:

> "Closing **shall** take place within seven (7) days of the end of the due diligence period."

ROA, pg. 275, Section 33 (emphasis added). In recognition of the fact that the above closing deadline references simply "days" (as opposed to "Business Days" utilized in calculating the Due Diligence Period) Lady Beaufort agreed that the last day to close under a "worse case" scenario was October 8, 2013. ROA, pg. 199. Accordingly, the closing of the transaction was scheduled for October 7, 2013. *Id.*, pg. 199 and 141.

With respect to the closing date, the contract provides for "an automatic extension of 5 business days for an unsatisfied contingency through no fault of either party." ROA, pg. 269, ¶4. The contract does not define what constitutes an "unsatisfied contingency."

Finally, the Contract contains the following provision which is emphasized and underlined, set forth in the first paragraph on the first page of the Contract:

> "Time is of the essence with respect to all provisions of this Contract stipulating time, deadline, or performance periods."

ROA, pg. 269, ¶1(G).

Lady Beaufort hired attorney Carl Rogers of Charleston to represent it in connection with the closing. ROA, pg. 168. Hird Island hired attorney Derek Gilbert of Beaufort to represent it.

Although the Contract contained no financing contingency clause, Lady Beaufort chose to obtain a loan to finance the transaction, dealing with Loan Officer Jan Malinowski of Palmetto State Bank. ROA, pg. 106.

On October 4th Mr. Fender, on behalf of Hird Island, signed all of the "closing documents" and delivered them to his attorney, Mr. Gilbert, in anticipation of closing on October 7th. These documents included the Deed to Lady Beaufort, the Seller's Affidavit, a 1099-S, a Corporate Resolution authorizing the sale, and a Power of Attorney authorizing Mr. Gilbert and his real estate paralegal to execute any documents on behalf of Hird Island necessary to close the transaction. *Id.,* pg. 261 to 262, and pg. 357. On that same date, these documents were forwarded by Mr. Gilbert's office to Carl Rogers email, with a short cover note stating:

> "Carl, in accordance with the contract, please find attached a signed deed and various affidavits. Our fee for the HUD Statement will be $350. Please forward a proposed HUD for our review **we are ready to exchange when you are**. Thanks, Christina Wilson, Real Estate Paralegal, Gilbert Law Firm, LLC."

ROA, pg. 358 (emphasis added).

Lady Beaufort, however, was not willing to close the transaction. In his Order of May 11, 2017 Judge Dukes recites three (3) reasons for Lady Beaufort's refusal to close, as follows:

First, Hird Island had been administratively dissolved in its state of incorporation, Georgia. ROA, pg. 18, Finding of Fact #8.

Second, a Certificate of Tax Compliance referenced in §12-54-124 of the South Carolina Code of Laws had not been obtained. *Id.,* Finding of Fact #11.

Third, the State of South Carolina had filed a tax lien on the property on September 27, 2013. *Id.*, Finding of Fact #12.

Judge Dukes concluded that the above three (3) facts constituted "unsatisfied contingencies" within the meaning of the Contract, thereby extending the deadline for closing by five (5) business days, from October 8 to October 15, 2013. ROA, pg. 21.

Sometime after the Contract was executed on August 19th, and before the scheduled closing date of October 7th, Mr. Fender was approached by Robert "Robbie" Sample of Inverness whom Mr. Fender had met once or twice before. ROA, pg. 161. Several months earlier Mr. Sample had shown an interest in purchasing this property and wanted to know if it was still available. Mr. Fender told Mr. Sample that he had "waited too late" and that it was under contract as he had already sold it to Lady Beaufort. As Mr. Fender explained:

> "He (Mr. Sample) said, man, I need that. I said, well, you waited too late. It's sold. He said, would you do me a favor? And I said what is that Robbie? He said, if it doesn't close, will you let me buy it? I said, sure. It's for sale. It always has been. And I said, but you got to be able to move in a hurry because I got financial issues I got to deal with. So you got to be ready. He said, okay. I will be ready."

ROA, pp. 162 and 227-228.

As the closing date approached, Mr. Fender began to have concerns about Lady Beaufort's willingness to close the transaction. He questioned why Lady Beaufort was making an issue of the administrative dissolution, the certificate of compliance, and the recently filed relatively small tax lien. He was confused when he heard about Lady Beaufort getting a loan from Palmetto State Bank, as the contract did not call for financing and he understood Lady Beaufort was paying cash. Finally, Lady Beaufort was insisting that he personally guarantee some things, which he had refused to do. All of this, as Mr. Fender put it, started to make him feel a little "paranoid" about the closing. ROA, pp. 225, 230, 232 and 242.

As Mr. Fender feared, the closing with Lady Beaufort never took place. Mr. Kerr of Lady of Beaufort explained why:

Q. Very good. And when was the closing between Hird Island and Lady Beaufort scheduled, do you recall?

A. October 7th of 2014.

Q. Okay.

A. 13. 13.

Q. That's correct. But the contract didn't close on that date, did it?

A. Did not.

Q. Okay. And why not?

A. Carl (Rogers) had indicated that he was not recommending that I close because there were some issues of title. And that he could not get title insurance based on some of the things that had surfaced during that period of time. He can explain all the details about that, but he did not advise me to close.

Id., pg. 108, line 19 to pg. 109, line 10. Mr. Rogers testified that by the scheduled closing date the issue regarding the administrative dissolution of Hird Island had been resolved, ROA, pp. 181 – 182, and the tax lien could have been paid and satisfied at closing, ROA, pp. 201-204, but he still had an issue with the lack of a certificate of compliance ROA, pp. 183-185.

Mr. Fender testified that he wanted the closing with Lady Beaufort to go through, and that he wished it would have closed. As he stated:

"I got no reason to not want to sell. . . . It served me no useful purpose to not close. As a matter of fact, I was very upset that it wouldn't."

Id., pg. 224, lines 16 – 22. When it still hadn't closed by October 8th Mr. Fender let Mr. Sample of Inverness know that the closing had fallen through. Inverness was still interested in buying the property, as well as an additional piece of property and indicated it could have the money in two (2) days. On October 10th the closing with Inverness occurred, with Inverness purchasing

the subject property for $245,000.00[2], as well as a second piece of property for $60,000.00 which was $40,000 to $50,000 under its market value. ROA, pp. 244, 251, 253, 254 and 259. None of the "unsatisfied contingencies" referenced by Judge Dukes in his Order were impediments to the Inverness closing. ROA, pg. 229. The tax lien was resolved by simply paying it out of the sales proceeds at closing. ROA, pg. 378, line 1303. The tax lien was for $480.01, plus $34.00 in court costs. ROA, pg. 202 and 339.

When Lady Beaufort learned of the sale to Inverness it promptly filed a lis pendens on the subject property and commenced this lawsuit against Hird Island and Inverness. Lady Beaufort subsequently settled its claim against Inverness by purchasing the subject property from Inverness for $285,000.00. ROA, pg., 197 to 198, and pg. 317. It then dismissed Inverness and added Fender as a defendant. Second Amended Complaint.

C. STANDARD OF REVIEW

"An action for breach of contract seeking money damages is an action at law." *R & G Construction, Inc. v. Lowcountry Regional Transportation Authority*, 343 S.C. 424, 430, 540 S.E.2d 113, 117 (Ct. App. 2000). "In an action at law, on appeal of a case tried without a jury, the findings of fact of the Judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the Judge's findings. . . . The Judge's findings are equivalent to a jury's findings in a law action." *Townes Associates v. City of Greenville*, 266 S.C. 81, 86, 221, S.E.2d 773, 775 (1976).

"An action to construe a contract is an action at law reviewable under an "any evidence" standard." *Pruitt v. South Carolina Medical Malpractice Liability Joint Underwriting Association*, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001). "In an action at law, tried without a

[2] The $245,000.00 sale to Inverness did not involve a real estate commission, while the $260,000.00 contract with Lady Beaufort would have involved a $13,000.00 real estate commission being paid to Tideland Realty.

jury, the Appellate Court's standard of review extends only to the correction of errors of law." *Sherlock Holmes Publishing, Inc. v. City of Columbia,* 389 S.C. 77, 81, 697 S.E.2d 619, 621 (Ct.App. 2010).

I. IT IS TOO LATE FOR LADY BEAUFORT, BY APPEALING THE OCTOBER 26, 2018 ORDER, TO CHALLENGE THE MASTER IN EQUITY'S RULING IN HIS MAY 11, 2017 ORDER, WHICH LADY BEUAFORT DID NOT CONTEST, MOVE TO RECONSIDER OR APPEAL.

During the trial, the evidence introduced by Respondent Lady Beaufort in support of its claim for attorney's fees and costs was very summary and conclusory.

The only testimony on this issue came from James Kerr, the owner of Lady Beaufort, and the entirety of his testimony on the subject was the following exchange:

Q. And can you tell me how much you have paid in attorney's fees?

A. Approximately $54,000. $53,924.21 in attorney's fees.

Q. Okay. And that is represented in Exhibit 2?

A. That's correct. With two affidavits.

ROA, pg. 115, line 21 to pg. 116, line 2.

The two affidavits referenced by Mr. Kerr, which were admitted into evidence without objection, are from Lady Beaufort's attorneys Carl Rogers and Michelle Endemann. Without itemization or elaboration, these affidavits recite that the total attorney's fees and costs charged by Mr. Rogers' firm is $7,857.00 and the total attorney's fees and costs charged by Ms. Endemann's firm is $46,067.41. The only explanation offered by either affidavit is that these attorney's fees and costs are "associated with the aforementioned legal representation." See ROA, pp. 279-280.

At the conclusion of the trial, after both sides had rested, the following discussion took place:

> Ms. Endemann: One housekeeping matter, Your Honor. He provided fee affidavits as Exhibit 2. I also have here in camera review all of our invoices. We held them as privileged just because some of the billings are rather detailed that I can provide to the Court.

Judge Dukes: I tell you what - -

Mr. Bowen: I don't need that, sir.

Judge Dukes: All right. Hang on to them then.

Mr. Bowen: Whatever the affidavit says, it says.

Ms. Endemann: Okay. All right.

Judge Dukes: It sounds like it's an all or nothing situation. All right. Well, if there is nothing else from counsel. That will conclude the matter.

ROA, pg. 264, line 20 to pg. 266, line 11.

In his Order of May 11, 2017 the only mention of, or reference to, attorney's fees and costs by Judge Dukes is the following:

> As a result of the Defendants' conduct, Lady Beaufort had to file suit in order to obtain the property that it was entitled to pursuant to its contract with Hird Island. Lady Beaufort filed suit against Hird Island and its principal Sherwood Fender as well as a third party that purchased the property from Hird Island, Inverness. Lady Beaufort was able to reach a settlement with Inverness. Pursuant to the settlement, Lady Beaufort paid Inverness $285,000.00 to obtain the property. This represents a $25,000.00 increase from Lady Beaufort's contract with Hird Island. (See Plaintiff's Exhibits 15 and 16). 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. (See Plaintiff's Exhibit 2). Attorney's fees are provided for in the contract. (See Plaintiff's Exhibit 1).
>
> I find Plaintiffs are entitled to prejudgment interest; however, Lady Beaufort is entitled to pre-judgment interest only as to the $25,000.00 increase in purchase price and not its attorneys' fees as the amount of attorneys' fee was not certain or capable of being reduced to certainty by conditions existing at the time the claim arose. . . .
>
> Accordingly, . . . I further award judgment against Hird Island and Sherwood Fender in the amount of $87,578.56, representing actual damages and prejudgment interest as described above in favor of Lady Beaufort.

ROA, pp. 25 and 26.

In *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 427 S.E.2d 659 (1993) the South Carolina Supreme Court held that there are six (6) factors to consider in determining an award of

attorney's fees: (1) Nature, extent, and difficulty of the legal services rendered; (2) Time and labor devoted to the case; (3) Professional standing of counsel; (4) Contingency of compensation; (5) Fee customarily charged in the locality or similar services; and (6) Beneficial results obtained. *Id.*, 310 S.C. at 494, 427 S.E.2d at 660. The Court further held that "when an award of attorney's fees is requested and authorized by contract or statute, the Court should make specific findings of fact on the record for each factor." *Id.*, 310 S.C. at 494, 427 S.E2d at 661.

Judge Dukes' Order failed to make specific findings of fact on each of the *Blumberg v. Nealco* factors. Accordingly, when the Appellants filed their Motion to Reconsider his May 11, 2017 Order they alleged, *inter alia*, the following:

> "In the event the Court does not alter or amend its findings of Defendants' liability, Defendants contest the finding of damages. (Order, pp. 8-9). Attorney's fees and costs should not be recoverable because the Court should not find in Lady Beaufort's favor. Alternatively, the amount is excessive the Court did not make any findings of fact as to the factors in determining an award of attorney's fees. See *Blumberg v. Nealco*, 310 S.C. 492, 494, 427 S.E.2d 659, 660.

ROA, pg. 74, ¶15. In other words, Appellants asserted that attorney's fees and costs: (1) Were not recoverable at all; (2) The amount awarded was excessive; and (3) The Court erred by not making any findings of fact as required by *Blumberg v. Nealco*.

In response to the Motion to Reconsider, Judge Dukes agreed that the foregoing ground "has merit with respect to the contention that the Court did not make any findings of fact as to the factors in determining an award of attorney's fees as required by *Blumberg v. Nealco.*" Order Granting in Part and Denying in Part Defendant's Motion to Reconsider dated February 14, 2018, ROA, pg. 15. Accordingly, Judge Dukes reconsidered and amended his May 17, 2017 Order to provide as follows:

> In addition to the foregoing, 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. (See Plaintiff's Exhibit 2). Attorney's fees are provided for in the contract. (See Plaintiff's Exhibit 1). In order to award attorney's fees and costs I must consider the six (6) factors enumerated in *Blumberg v. Nealco,* 310 S.C. 492, 494, 427 S.E.2d 659, 660 (1993). There is currently in an insufficient evidentiary basis upon which I can consider the *Blumberg v. Nealco*, factors. It is accordingly ordered that the record in this case should be reopened and the hearing reconvened, limited to the issue of that element of damages claimed by Plaintiff Lady Beaufort consisting of attorney's fees and costs in the amount of $53,924.41."

Id., pp. 15-16.

As a result of the reconvened hearing, Judge Dukes issued his Order Amending Judgment on October 28, 2018. In this Order, Judge Dukes concludes "that the attorney's fees and costs awarded to the Plaintiff Lady Beaufort, LLC in my order filed May 11, 2017 should be reduced from $53,924.41 to $17,857.00, and my judgment amended accordingly." ROA, pg. 2.

In arriving at the $17,857.00 figure, Judge Dukes noted that these attorney's fees and costs were divided between the Epting Law Firm and the Rogers Law Firm.

With respect to the attorney's fees and costs allocated to the Epting Law Firm, Judge Dukes stated the following:

> Lady Beaufort obtained the subject property from Inverness pursuant to a closing which took place on May 30, 2014. I find and conclude that the attorney's fees and costs charged by the Epting Firm to Lady Beaufort up through that point in time were reasonably necessary in order to obtain the property Lady Beaufort lost because of the Defendant's conduct. The attorney's fees total $15,560.00, while the costs totaled $1,065.00, resulting in total attorney's fees and costs of $16,625.00.

ROA, pg. 5, ¶13. Judge Dukes further noted, however, that the Epting Law Firm did not charge Lady Beaufort this sum. Instead, "Mr. Epting testified that Mr. Kerr (of Lady Beaufort) and his various business entities were good clients of his firm and he voluntarily reduced his firm's bill by $6,625.00, thereby charging Mr. Kerr only the balance of $10,000.00, which Mr. Kerr paid on

June 6, 2014. Accordingly, with respect to the Epting Law Firm, Lady Beaufort incurred $10,000.00 in attorney's fees and costs in order to obtain the property it lost because of the Defendant's conduct."

Id., pg. 6, ¶¶14 and 15 (paragraph numbers omitted).

With respect to the Rogers Law Firm, Judge Dukes found as follows:

> In addition to the Epting Firm, Lady Beaufort also incurred attorney's fees and costs with the Rogers Firm. No witness testified with respect to the Rogers Firm nor any of the firms billings placed into evidence. At the original hearing, however, an affidavit from D. Carlyle Rogers, Jr., Esquire the principal attorney of the firm, was introduced into evidence. From this affidavit it appears that Mr. Rogers represented Lady Beaufort in the attempted closing with Hird Island, was well as the successful closing of the transaction between Lady Beaufort and Inverness. He also assisted Lady Beaufort with the filing of a lis pendens on the property, as well as with putting the Defendant on notice of its default under its contract with Lady Beaufort. The total attorney's fees and costs associated with the aforementioned legal services was $7,857.00.

Id., pg. 6, ¶16. Judge Dukes noted that although there was no testimony that Lady Beaufort actually paid any part of the $7,857.00 in attorney's fees and costs claimed by the Rogers Law Firm, there was no reason to believe otherwise and gave Lady Beaufort the benefit of the doubt on this issue. *Id.*, pg. 7 – 8, ¶25.

Judge Dukes, accordingly, awarded Lady Beaufort the attorney's fees that it actually paid to the Epting Firm of $10,000.00 and the attorney's fees it presumably actually paid to the Rogers Firm of $7,857.00, arriving at the total award of $17,857.00.

With respect to the Rogers Law Firm, Judge Dukes awarded the total attorney's fees and costs charged by the Rogers Law Firm, without any cutoff date.

With respect to the Epting Law Firm, Judge Dukes awarded the actual attorney's fees and costs incurred that "were reasonably necessary in order to obtain the property Lady Beaufort lost because of the Defendant's conduct." *Id.*, pg. 5, Finding of Fact #13 and pg. 8, ¶a.

Lady Beaufort now complains that Judge Dukes erred in concluding that Lady Beaufort was only entitled to recover the attorney's fees and costs charged by the Epting Firm that were reasonably necessary in order to obtain the property Lady Beaufort lost because of the Defendant's conduct, i.e., those attorney's fees and costs incurred up through the time that the closing with Inverness occurred on May 30, 2014. Lady Beaufort's objection to this ruling, however, comes too late.

In his original Order of May 11, 2017 the only ruling made by Judge Dukes regarding Lady Beaufort's entitlement to attorney's fees and costs is the following:

> 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 Defendant's conduct**. (See Plaintiff's Exhibit 2). Attorney's fees are provided for in the contract. (See Plaintiff's Exhibit 1).

ROA, pg. 25 (emphasis added).

Judge Dukes, as set forth above, expressly limited the award of attorney's fees and costs incurred by Lady Beaufort "in order to obtain the property it lost because of the Defendants' conduct." Lady Beaufort did not appeal the aforesaid Order, nor did it move to have the aforesaid Order, or any of its findings, reconsidered, altered or amended. The first complaint by Lady Beaufort regarding Judge Dukes' decision to limit its recovery for attorney's fees and costs to those incurred in order to obtain the subject property from Inverness, comes in this counter-appeal to Judge Dukes' subsequent, October 26, 2018 Order amending judgment. It is too late for Lady Beaufort complain about this ruling at this late date.

"Closely related to the doctrines of claim and issue preclusion is the doctrine of law of the case, which holds that decision on an issue law made at one stage of the case becomes binding precedent to be followed in subsequent stages of the same litigation." *Flexon v. PHC-*

Jasper, Inc., 413 S.C. 561, 572, 776 S.E.2d 397, 403 (Ct. App. 2015), quoting *In Re Grossinger's Associates,* 184 B.R. 429, 434 (Bankr. S.D.N.Y. 1995).

"The policy behind the law of the case is to promote the finality and efficiency of the judicial process by protecting against the agitation of settled issues. The rule of the law of the case is a rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter. Law of the case rules have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit. These rules do not involve preclusion by final judgment; instead, they regulate judicial affairs before final judgment." *Id.*, 413 S.C. at 573, 776 S.E.2d at 404 (citations omitted).

"An unappealed ruling is the law of the case and requires affirmance." *Transportation Insurance Company v. S.C. Second Injury Fund*, 389 S.C. 422, 432, 699 S.E.2d 687, 691 (2010). "The doctrine of the law of the case applies to an order or ruling which finally determines a substantial right." *Shirley's Ironworks, Inc. v. City of Union,* 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013).

Judge Dukes' Order of May 11, 2017 was not an interlocutory order, but rather, a final judgment. His ruling as to the rights of Lady Beaufort to recovery attorney's fees was a final decision on a substantial right. Lady Beaufort failed to challenge, either by reconsideration or appeal, Judge Dukes' ruling on this issue. It is too late for Lady Beaufort to do so now.

II. THE MASTER IN EQUITY, AFTER GIVING DUE AND CAREFUL CONSIDERATION TO THE *BLUMBERG V. NEALCO* FACTORS, AWARDED A PROPER AND REASONABLE AMOUNT OF ATTORNEY'S FEES TO LADY BEAUFORT.

The Master in Equity expressly considered the following six (6) factors in determining whether, and how much, to award to Lady Beaufort in attorney's fees and costs: (1) Nature, extent and difficulty of the legal services rendered; (2) Time and labor devoted to the case; (3) Professional standing of counsel; (4) Contingency of compensation; (5) Fee customarily charged in the locality for similar services; and (6) Beneficial results obtained. ROA, pp. 6-7, Findings of Fact #17, #18, #19, #20, #21, #22, and #23. See *Blumberg v. Nealco*, 310 S.C. 492, 494, 427 S.E.2d 659, 660 (1993).

The award of attorney's fees includes every penny charged to Lady Beaufort by the Rogers Law Firm. ROA, pg. 7, Finding of Fact #25. ROA, pg. 278. This includes all of the attorney's fees and costs incurred by Lady Beaufort in preparing to close with Hird Island, and in actually closing with Inverness, and up through the filing of the lis pendens in this litigation. ROA, pg. 279

With respect to the Epting Law Firm, Judge Dukes awarded $10,000.00. ROA, pg. 7, Finding of Fact #24. Judge Dukes spends most of his Order Amending Judgment discussing the billing, charges, and fees actually paid by Lady Beaufort to the Epting Law Firm. ROA, pp. 4 - 7, Findings of Fact #11 - #24. The bottom line is that Judge Dukes concluded that $10,000.00 in attorney's fees is a fair and reasonable sum to charge in order to collect a claimed $25,000.00 in total damages.[3] From reviewing the billings, however, it appears that much of the work charged exclusively to Lady Beaufort was concurrently performed for Tideland Realty, such as, for

[3] The Epting Law Firm also represented Tideland Realty. What the Epting Law Firm charged Tideland Realty is unknown.

example, preparing for and taking the deposition of Sherwood Fender, for which the Epting Firm charged Lady Beaufort a total of $2,650.00. ROA, pg. 515.

It should be noted that Judge Dukes' decision to award Lady Beaufort $10,000.00 in attorney's fees, instead of the total amount requested, was undoubtedly influenced by the lack of credibility exhibited by Lady Beaufort on this issue. At the trial held on March 1, 2017 Mr. Kerr, the principal of Lady Beaufort, testified under oath that he had paid $53,924.21 (sic, $53,924.41) in attorney's fees and costs. ROA, pg. 115, line 21 to pg. 116, line 2. This was a lie. Of this total sum, he testified that the amount he had paid to the Epting Law Firm was $46,067.41, which he testified was represented in the affidavit contained within ROA, pg. 280. *Id.,*

At the reconvened hearing held on June 23, 2018 as a result of Hird Island and Fender's Motion to Reconsider the award of attorney's fees, the only witness to testify was Drew Epting, the Senior Attorney in the Epting Law Firm. Mr. Epting, to his credit, candidly refuted the testimony given by his client at the first hearing.[4] Mr. Epting testified, and his billings confirmed, that Lady Beaufort had, in truth and fact, paid only a total of $10,000.00 in attorney's fees and costs and that the Epting Firm had even voluntarily written off and reduced its initial billing by $6,625.00. ROA, pp. 435, 438-439 and 440-441 and pp. 509, 511 and 512.

In his Order amending judgment and reducing the amount of attorney's fees awarded to Lady Beaufort, Judge Dukes emphasized this fact. ROA, pg. 6, Finding of Fact #14. After such an outrageous lie, Lady Beaufort is fortunate Judge Dukes awarded it <u>any</u> attorney's fees.

[4] Mr. Epting was not involved in or present during the first trial, which was handled by another attorney.

III. THE MASTER IN EQUITY PROPERLY LIMITED LADY BEAUFORT'S CLAIM TO BE REIMBURSED FOR ATTORNEY'S FEES AND COSTS TO THOSE INCURRED IN ORDER TO OBTAIN THE PROPERTY BECAUSE THIS IS WHAT LADY BEAUFORT REQUESTED.

In his May 11, 2017 Order, the Master in Equity found that "Lady Beaufort has also expended $53,924.41 in attorneys fees and costs in order to obtain the property it lost because of the Defendants' conduct." ROA, pg. 25.

In his subsequent Order Amending Judgment issued on October 26, 2018, the Master in Equity reduced the amount of attorney's fees awarded to Lady Beaufort, replacing the above sentence with the finding that "Lady Beaufort has also expended or incurred $17,857.00 in attorney's fees and costs in order to obtain the property it lost because of the Defendant's conduct." ROA, pg. 8. Of this sum, $7,857.00 is attributed to the Rogers Law Firm, and it represents the entire Rogers Firm billing without any cut-off date. ROA, pp. 7-8, Finding of Fact #25. The remaining $10,000.00 balance is attributable to the Epting Law Firm, to wit:

> "I find and conclude that Lady Beaufort is entitled to recover from the Defendant the $10,000 in costs and attorneys fees which it paid to the Epting Firm in order to obtain the property which is the subject of this action."

ROA, pg. 7, Finding of Fact #24.

In short, the Master in Equity consistently, from start to finish, limited his award of attorney's fees to Lady Beaufort to those actually incurred "in order to obtain the property." The Master in Equity did not err in so doing, because this is exactly what Lady Beaufort requested.

In Lady Beaufort's Second Amended Complaint, the only specific reference to lost attorney's fees and costs as damages is the following allegation:

> As a result of Hird Island's breaches, Plaintiffs have been damaged in that it was required to retain counsel and incur expense to acquire the property that Hird was legally obligated to sell to Lady Beaufort.

ROA, pg. 67, ¶14 (emphasis added).

The Master in Equity, accordingly, awarded to Lady Beaufort the attorney's fees and expenses it incurred "to acquire the property," which is precisely the relief that Lady Beaufort sought in its Complaint.

IV. HIRD ISLAND AND FENDER DID NOT FAIL TO PRESEVE, NOR DID THEY WAIVE, THEIR RIGHT TO OBJECT TO THE AMOUNT OF ATTORNEY'S FEES AND COSTS AWARDED TO LADY BEAUFORT.

Lady Beaufort argues that Hird Island and Fender waived their right to object to the amount of attorney's fees and costs to be awarded by the Master in Equity. This is not correct. Hird Island and Fender simply did not object to the attorney fee affidavits being introduced into evidence, in lieu of requiring the affiants to testify. ROA, pg. 9, lines 8-22 and pg. 264, line 20 – pg. 265, line 11.

Lady Beaufort introduced two (2) attorney's fees affidavits, one from the Rogers Law Firm and one from the Epting Law Firm. These affidavits were admitted into evidence without objection. ROA, pg. 9, lines 8 – 22. Other than simply not objecting to their introduction into evidence, there were no stipulations regarding these affidavits. *Id.*

A failure to object to the introduction of testimony or an exhibit does not equate to a stipulation that the testimony or exhibit is either truthful or reasonable. A failure to object simply means either that there exists no legal ground for objection, or else a tactical decision was made that objecting would do more harm than good inasmuch as it would force the offering party to lay a proper foundation.

Lady Beaufort argues that, somehow, its offer to allow the Master in Equity to conduct an "in camera review" of "all of our invoices" somehow equates to a waiver of the right to object to the amount of attorney's fees ultimately awarded. This makes no sense, for several reasons.

First, this proffer was made after Lady Beaufort had rested its case-in-chief, ROA, pg. 218, lines 8 – 9, and Hird Island and Fender had likewise concluded their case. *Id.*, pg. 264, lines 15 – 17. *State v. Huckabee,* 388 S.C. 232, 242, 694 S.E.2d 781, 786 (Ct.App. 2010) ("Reply testimony should be limited to rebuttal of matters raised by the Defendants, rather than to

complete the Plaintiff's case-in-chief"); *State v. Prather*, 422 S.C. 96, 105, 810 S.E.2d 419, 423 (Ct. App. 2017) ("However, reply testimony should be limited to that which refutes or rebuts testimony presented by the Defendant.") Notably, Lady Beaufort did not make a motion to reopen its case-in-chief.

Second, the proffered invoices were not made part of the record. This Court is left to guess what these invoices would have shown[5]. *Cf., Jamison v. Ford Motor Company*, 373 S.C. 248, 260, 644 S.E.2d 755, 761 (Ct.App. 2007) ("The failure to make a proffer of excluded evidence will preclude review on appeal.").

Third, an "in camera review" of a document does not equate to introducing the document into evidence. By its very definition, an in camera review is not evidence inasmuch as it is not on the record.

The sum total of the discussion regarding these invoices consists of the following exchange:

> Ms. Endemann: One housekeeping matter, Your Honor. He provided fee affidavits as Exhibit 2. I also have here in camera review all of our invoices. We held them as privileged just because some of the billings are rather detailed that I can provide to the Court.
>
> Judge Dukes: I tell you what - -
>
> Mr. Bowen: I don't need that, sir.
>
> Judge Dukes: All right. Hang on to them then.
>
> Mr. Bowen: Whatever the affidavit says, it says.
>
> Ms. Endemann: Okay. All right.
>
> Judge Dukes: It sounds like it's an all or nothing situation. All right. Well, if there is nothing else from counsel. That will conclude the matter.

[5] There's no evidence that these invoices were the same as the invoices subsequently introduced into evidence at the July 21, 2018 hearing.

ROA, pg. 264, line 20 to pg. 265, line 11.

Lady Beaufort's counsel, accordingly, did not pursue, and apparently withdrew, her offer of an in camera review of the invoices. Lady Beaufort's counsel clearly never offered to introduce these invoices into evidence. Conversely, Hird Island and Fender's counsel simply made the rather obvious observation that "Whatever the affidavit says, it says." Significantly, he did not state that he agreed with what the affidavit stated, that its contents were truthful, or that the sums set forth were reasonable or recoverable.

Likewise, Judge Dukes' off-the-bench comment that "It sounds like it is an all or nothing situation," is not a ruling or binding Order. It is clear from the context that Judge Dukes was not making a decision or issuing a ruling, particularly since he begins with the qualifier "It **sounds** like . . ." . In any event, even if this were intended to be a ruling, Judge Dukes was free to change his mind, which he obviously did. See, *Bowman v. Richland Memorial Hospital,* 335 S.C. 88, 91, 515 S.E.2d 259, 260 (Ct. App. 1999) ("An Order is not final until it is written and entered by the Clerk of Court. Until an Order is written and entered by the Clerk of Court, the Judge retains discretion to change his mind and amend is ruling accordingly.").

CONCLUSION

Lady Beaufort has waited too late to challenge the Master in Equity's decision to award to it the attorney's fees and costs it spent in order to obtain the subject property. This decision was plainly and clearly set forth in the May 11, 2017 Order, which Lady Beaufort never challenged. In any event, the amount awarded, $17,857.00, was carefully arrived at by the Master in Equity after due consideration of the *Blumberg v. Nealco* factors. Under the totality of the circumstances considered by the Master, the sum is fair and reasonable, particularly considering Lady Beaufort's lack of creditability and initial attempt to deceive the Court as to the amount paid.

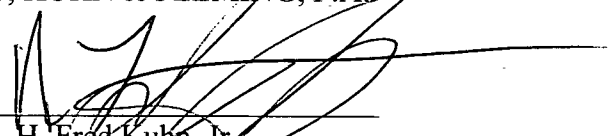
Likewise, the Master did not err in awarding to Lady Beaufort attorney's fees and costs incurred "to acquire the property", as this is exactly the relief for which Lady Beaufort prayed in its Second Amended Complaint.

Finally, Hird Island and Fender never, waived their right to contest the attorney fee award. They simply did not object to the attorney fee affidavits being admitted into evidence as exhibits.

It is accordingly respectfully requested that the Order of the Beaufort County Master in Equity be affirmed.[6]

[6] Subject, of course, to this Court's decision on the concurrent appeal of Hird Island and Fender, in which it is requested that the award of attorney's fees be reversed *in toto* as to both Hird Island and Fender, or alternatively, as to Fender only.

MOSS, KUHN & FLEMING, P.A.

By: 

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May 15, 2019