

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

Case No. 2018-CP-40-05124

Appellate Case No. 2020-001065

RECEIVED

Sep 18 2020

SC Court of Appeals

Trisha Gibbons, Respondent,

v.

Aerotek, Inc., Appellant.

INITIAL BRIEF OF APPELLANT

Patrick D. Quinn
Nelson Mullins Riley & Scarborough LLP
1320 Main Street / 17th Floor
Columbia, SC 29201
(803) 255-9513

Bryson M. Geer
Nelson Mullins Riley & Scarborough LLP
151 Meeting Street / 6th Floor
Charleston, SC 29401
(843) 853-5200

William E. Corum (*pro hac vice*)
Megan A. Scheiderer (*pro hac vice*)
Husch Blackwell LLP
4801 Main Street, Suite 1000
Kansas City, MO 64112
(816) 983-8139

Attorneys for Appellant Aerotek, Inc.

TABLE OF CONTENTS

	<u>Page(s)</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE	1
STANDARD OF REVIEW	4
ARGUMENTS	4
I. The trial court erred both in holding Aerotek had an obligation to plead its entitlement to attorney’s fees, and in finding that Aerotek did not do so sufficiently to pursue recovery of its attorney’s fees in the present action	4
II. The trial court abused its discretion in calling into question the authenticity of Gibbons’s employment agreement	9
A. Aerotek met its burden (if any) to authenticate Gibbons’s employment agreement	9
B. Gibbons did not dispute the authenticity of her employment agreement	11
C. The trial court did not give Aerotek an opportunity to address the authentication issue it raised <i>sua sponte</i>	13
CONCLUSION	14

TABLE OF AUTHORITIES

Cases:	<u>Page(s)</u>
<i>Baird Pac. West v. Blue Water Sunset Park, Inc.</i> , No. 2004-UP-011, 2004 WL 6248287 (Ct. App. 2004)	7
<i>Calland v. Carr</i> , No. 14-0420, 2015 WL 4394977 (D.S.C. July 16, 2015)	6–7
<i>Dawkins v. Union Hosp. Dist.</i> , 408 S.C. 171, 758 S.E.2d 501(2014)	4
<i>Deep Keel, LLC v. Atl. Private Equity Grp., LLC</i> , 413 S.C. 58, 773 S.E.2d 607 (Ct. App. 2015)	10
<i>Fesmire v. Digh</i> , 385 S.C. 296, 683 S.E.2d 803 (2009)	4
<i>M/V Am. Queen v. San Diego Marine Constr. Corp.</i> , 709 F.2d 1483 (9th Cir. 1983)	4
<i>NGM Ins. Co. v. Carolina’s Power Wash & Painting, LLC</i> , No. 08-3378, 2010 WL 3258134 (D.S.C. July 6, 2010)	7
<i>Pee Dee Prod. Credit Ass’n v. Joye</i> , 284 S.C. 371, 326 S.E.2d 650 (1984)	12
<i>S.C. Elec. & Gas Co. v. Hartough</i> , 375 S.C. 541, 654 S.E.2d 87 (Ct. App. 2007)	5–6
<i>State v. Crawley</i> , 217 N.C.App. 509, 719 S.E.2d 632 (2011)	4
<i>State v. Green</i> , 427 S.C. 223, 830 S.E.2d 711 (Ct. App. 2019)	4
<i>Utilities Const. Co., Inc. v. Wilson</i> , 321 S.C. 244, 468 S.E.2d 1 (Ct. App. 1996)	6–7
 Other Authorities:	 <u>Page(s)</u>
Rule 8(a), SCRCP	5
Rule 13(a), SCRCP	7–8
Rule 13(b), SCRCP	7–8
Rule 901(a), SCRE	10
Rule 901(b)(1), SCRE	10

STATEMENT OF ISSUES ON APPEAL

- I. Whether a prevailing party defendant can seek contractual attorney's fees in the action in which the fees are incurred, without having pled a counterclaim for such fees, if the plaintiff brought a claim for breach of the same contract under which the defendant seeks its fees, and where the defendant did request an award of attorney's fees in its Answer, or whether such a defendant must file a separate lawsuit asserting an original claim for its attorney's fees.
- II. Whether Aerotek had an obligation to authenticate the contract under which it seeks contractual, prevailing party attorney's fees and, if so, whether it did so sufficiently.

STATEMENT OF THE CASE

On October 1, 2018, Plaintiff/Respondent Trisha Gibbons ("Gibbons") initiated the present action in the Court of Common Pleas for Richland County, South Carolina. (Summons and Complaint p. 1). Gibbons brought the action against: (1) Defendant Schneider Electric USA, Inc. ("Schneider Electric"); and (2) Defendant-Appellant Aerotek, Inc. ("Aerotek"). (Summons and Complaint p. 2). Gibbons alleged Defendants: (1) violated S.C. Code Ann. § 41-1-70 by terminating her employment because she complied with a trial subpoena; and (2) breached a written employment agreement by not increasing Gibbons's rate of pay after she had worked at Schneider Electric for ninety days. (Summons and Complaint pp. 4–5). Aerotek filed its Answer to the Complaint on November 21, 2018. (Answer p. 1).

On September 11, 2019, Aerotek filed a Motion for Summary Judgment with respect to both claims Gibbons asserted against it. (Motion for Summary Judgment p. 1; MSJ Memo p. 1). With respect to Count I of the Complaint (*i.e.*, the claim Defendants violated § 41-1-70), Aerotek—a staffing company—argued that it played no role in the decision of its client, Schneider Electric,

to terminate Gibbons's temporary assignment at Schneider Electric. (MSJ Memo pp. 8–12). With respect to Count II of the Complaint (*i.e.*, the claim Defendants breached Gibbons's written employment agreement), Aerotek argued that Gibbons's written employment agreement did not call for a pay increase after ninety days on the job. (MSJ Memo pp. 13–15).

On September 18, 2019, following a mediation held on September 13, 2019, at which Gibbons and Schneider Electric reached a settlement, the parties stipulated to the dismissal of the claims Gibbons asserted against Schneider Electric. (Stipulation of Dismissal p. 1; Order dated 06/18/20 p. 1). On October 28, 2019, Gibbons filed a Memorandum in Opposition to the portion of Aerotek's Motion for Summary Judgment directed to Count I of the Complaint (*i.e.*, the claim Defendants violated § 41-1-70). (Pl.'s MSJ Opp'n Memo p. 1). On October 29, 2019, the only remaining parties (Gibbons and Aerotek) stipulated to the dismissal of Count II of the Complaint (*i.e.*, the claim Defendants breached Gibbons's written employment agreement). (Partial Stipulation of Dismissal p. 1).

On January 3, 2020, the Honorable Courtney Clyburn-Pope denied Aerotek's Motion for Summary Judgment with respect to Count I of the Complaint. (01/03/20 Form 4 p. 1). The case then proceeded to a jury trial, which was held on January 29–30, 2020, before the Honorable Perry H. Gravely. (02/02/20 Form 4 pp. 2–3). At the close of the evidence, Aerotek made a Motion for Directed Verdict on the basis that Gibbons failed to prove any elements supporting her § 41-1-70 claim. (02/02/20 Form 4 p. 2). Judge Gravely granted Aerotek's motion and dismissed the case, finding that Gibbons failed to provide the trial court with facts to support the § 41-1-70 claim. (02/02/20 Form 4 p. 2).

On February 13, 2020, Aerotek filed a Motion for Attorneys' Fees and Costs based on a provision of the written employment agreement under which Gibbons brought Count II of the

Complaint. (Motion for Attorneys' Fees and Costs p. 1; Memorandum in Support of Motion for Attorneys' Fees and Costs p. 1). On March 6, 2020, Gibbons filed a Memorandum in Opposition to Aerotek's motion and a supporting Affidavit (executed before Aerotek filed its motion), in which Gibbons stated she has no memory of receiving or reviewing the written employment agreement at issue. (Memorandum in Opposition to Motion for Attorneys' Fees and Costs p. 1; 02/10/20 Gibbons Affidavit p. 1).

On April 27, 2020, Judge Gravely held a telephonic hearing on the Motion for Attorneys' Fees and Costs.¹ (Order dated 06/18/20 p. 1). On June 17, 2020, Judge Gravely electronically signed an Order denying the motion. (Order dated 06/18/20 p. 4). Said Order was entered and electronically filed on June 18, 2020, when Aerotek first received written notice of entry of the order. (Order dated 06/18/20 p. 1).

In the Order, Judge Gravely provided two grounds for denying Aerotek's Motion for Attorneys' Fees and Costs. (Order dated 06/18/20 pp. 2–3). First, Judge Gravely held that Aerotek was required to plead its entitlement to contractual attorneys' fees and costs in its Answer and/or a Counterclaim, but that Aerotek did not do so adequately. (Order dated 06/18/20 pp. 2–3). Second, Judge Gravely held that Aerotek did not adequately authenticate the written employment agreement upon which its Motion for Attorneys' Fees and Costs is based. (Order dated 06/18/20 p. 3).

On July 20, 2020, Aerotek served Gibbons with a Notice of Appeal with respect to the Order denying the Motion for Attorneys' Fees and Costs. (Notice of Appeal pp. 1, 9). Aerotek filed the Notice of Appeal with the trial court on July 30, 2020. (Notice of Appeal p. 1). The

¹ As Aerotek's counsel informed the Clerk of the Court of Appeals in correspondence dated August 13, 2020, the telephonic hearing was held without a court reporter and, therefore, there is no transcript of the proceedings.

present appeal concerns only Aerotek's *entitlement* to attorneys' fees and costs under the parties' written employment agreement. The appeal does not concern the *amount* to which Aerotek is entitled or the *reasonableness* of the fees and costs Aerotek is seeking. Aerotek contends those issues should be decided by the trial court upon remand.

STANDARD OF REVIEW

"This Court reviews all questions of law *de novo*." *Fesmire v. Digh*, 385 S.C. 296, 302 (2009). Relevant to the first issue on appeal, when reviewing a trial court order assessing the sufficiency of the pleadings, "the appellate court applies the same standard of review as the trial court." *Dawkins v. Union Hosp. Dist.*, 408 S.C. 171, 176 (2014). In other words, the review is *de novo*. Relevant to the second issue on appeal, at least one South Carolina court has included an authenticity determination among the evidentiary rulings typically subject to an abuse of discretion standard. *State v. Green*, 427 S.C. 223, 229 (Ct. App. 2019); *but see M/V Am. Queen v. San Diego Marine Constr. Corp.*, 709 F.2d 1483, 1491 (9th Cir. 1983) ("Whether evidence is properly authenticated is a question of law subject to *de novo* review."); *State v. Crawley*, 217 N.C.App. 509, 515 (2011) ("A trial court's determination as to whether a document has been sufficiently authenticated is reviewed *de novo* on appeal as a question of law.").

ARGUMENTS

I. The trial court erred both in holding Aerotek had an obligation to plead its entitlement to attorney's fees, and in finding that Aerotek did not do so sufficiently to pursue recovery of its attorney's fees in the present action.

In Count II of her Complaint, Gibbons alleged that Defendants breached the written employment agreement she entered into with Aerotek. The written agreement upon which Gibbons relied in her Complaint includes the contractual attorney's fees provision upon which Aerotek based the Motion for Attorneys' Fees and Costs it filed after the trial court anointed it the prevailing party in this action. Further, in its Answer, Aerotek specifically requested an award of

attorney's fees. Contrary to the trial court's order denying its motion, Aerotek was not required to plead anything further.

Under Rule 8(a), “[a] pleading which sets forth a cause of action, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain . . . a short and plain statement of the facts showing that the pleader is entitled to relief.” Rule 8(a), SCRPC (emphasis added). The trial court correctly noted that “[t]he Answer did not contain a counterclaim against the Plaintiff seeking attorneys’ fees.” (Order dated 06/18/20 p. 2). However, the trial court essentially held that the Answer *needed* to include such a counterclaim in order for Aerotek to seek its attorney’s fees in the present action: “Since Aerotek is seeking a judgment against the Plaintiff for more than \$200,000, the Court finds that the pleadings must comply with Rule 8(a), SCRPC.” *Id.* The upshot of the trial court’s finding is that, because Aerotek did not assert a counterclaim, it must now file a separate lawsuit against Gibbons asserting an original claim for its attorney’s fees. That result is not supported by South Carolina law.

In *S.C. Elec. & Gas Co. v. Hartough*, 375 S.C. 541 (Ct. App. 2007), SCE & G brought a declaratory judgment action based on its option contract with Hartough. *Id.* at 544–46. A special referee determined the option was valid and enforceable, and then awarded SCE & G its attorney’s fees and costs under the contract’s prevailing party attorney’s fees provision. *Id.* at 546, 550. On appeal, Hartough argued “SCE & G is barred from recovering attorney’s fees because SCE & G did not specifically plead it was seeking attorney’s fees pursuant to the option contract but merely stated it sought attorney’s fees for bringing the action.” *Id.* at 550. In other words, “SCE & G did not specifically plead the contract between the parties as the basis for its [attorney’s fees] claim.” *Id.*

However, “even if SCE & G did not specifically plead attorney’s fees pursuant to the contract, [the Court of Appeals] [found] the special referee properly awarded attorney’s fees.” *Id.* at 551.

SCE & G commenced the action in order to determine the validity of the option pursuant to the contract. The contract permitted any prevailing party to seek attorney’s fees in an action to enforce any right under the contract. In addition, the pleadings requested attorney’s fees. Therefore, Hartough was apprised SCE & G would be seeking a recovery of fees if successful.

Id. Accordingly, the Court of Appeals affirmed the order of the special referee awarding attorney’s fees and costs. *Id.*

In *Utilities Const. Co., Inc. v. Wilson*, 321 S.C. 244 (Ct. App. 1996), the Court of Appeals arrived at a similar result in favor of a defendant. There, an electrical contractor brought a mechanics lien claim against a property owner for which the contractor had done work. *Id.* at 246. The trial court directed a verdict in favor of the owner because the contractor failed to timely serve notice of the mechanic’s lien. *Id.* The trial court then awarded the owner attorney’s fees under the mechanic’s lien statute, which provided that attorney’s fees incurred in enforcing or defending against a lien may be recovered by the prevailing party.” *Id.* at 246–47.

On appeal, the contractor argued “[the owner] did not request attorney fees in her answer and is therefore barred from recovering them.” *Id.* at 247. Even though the owner’s answer did not include any request for fees whatsoever (not even a general request for fees failing to mention the specific basis for fees), the Court of Appeals “[found] no prejudice to [the contractor] because it had notice of the potential for an award of attorney fees given the mandatory language of the mechanic’s lien statutes.” *Id.*

In *Calland v. Carr*, No. 14-0420, 2015 WL 4394977 (D.S.C. July 16, 2015), the federal district court relied upon *Wilson* in deciding a motion for attorney’s fees brought under South

Carolina’s Residential Property Condition Disclosure Act (“Disclosure Act”). *Id.* at *1–3. The district court also cited *NGM Ins. Co. v. Carolina’s Power Wash & Painting, LLC*, No. 08-3378, 2010 WL 3258134 (D.S.C. July 6, 2010), in which “the magistrate judge concluded [in a report and recommendation adopted by the district court] that **where the right to attorney’s fees could only be determined after judgment, i.e.,** where they ‘were not required to be proved at trial as an element of damages,’ **the right to attorney fees did not need to be pled in the answer.**” *Id.* at *2 (quoting *NGM*, 2010 WL 3258134 at *2) (emphasis added). “In light of *Wilson* and *NGM*, the [*Calland*] court [found] that the [defendants] did not need to specifically plead attorney’s fees in their answer.” *Id.* at *3. Based in part on that determination, the district court granted the defendants’ motion for attorney’s fees under the South Carolina Disclosure Act. *Id.* at *6.

Finally, in *Baird Pac. West v. Blue Water Sunset Park, Inc.*, No. 2004-UP-011, 2004 WL 6248287 (Ct. App. 2004), which Aerotek cited in support of its Motion for Attorneys’ Fees and Costs, the Court of Appeals found that, “although [defendant] Blue Water did not make its request for attorney fees in its pleadings, its claim is not barred under the circumstances of this case.” *Id.* at *4. In the order denying Aerotek’s Motion for Attorneys’ Fees and Costs, the trial court dismissed *Baird* as an “unpublished opinion . . . [with] no precedential value.” (Order dated 06/18/20 p. 2). The trial court also distinguished *Baird* on procedural grounds. *Id.* However, the fact remains that *Baird* lends support, albeit with persuasive and not precedential value, to the idea that attorney’s fees may be awarded even when the defendant did not request fees in its answer, much less assert a counterclaim with respect to its attorney’s fees.

Under the South Carolina Rules of Civil Procedure, depending on whether its potential counterclaim “arises out of the transaction or occurrence that is the subject matter of the [plaintiff’s] claim,” the defendant either *shall* or *may* “state as a counterclaim any claim which at

the time of serving the pleading the pleader has against any opposing party.” Rule 13(a), (b), SCRCF (emphasis added). Aerotek’s right to attorney’s fees as the prevailing party in this matter could only be determined after entry of a judgment establishing that it did, in fact, prevail. That occurred no earlier than February 2, 2020, when the trial court granted Aerotek’s Motion for Directed Verdict. (02/02/20 Form 4 p. 1). Therefore, Aerotek had no basis upon which to assert a counterclaim at the time it served its Answer to Gibbons’s Complaint, fourteen months earlier, on November 21, 2018. (Answer p. 1).

Moreover, under the above authorities, Aerotek had no obligation either to assert a counterclaim with respect to its attorney’s fees, or to identify the specific basis upon which it was requesting fees (*i.e.*, Gibbons’s written employment agreement). In her Complaint, Gibbons asserted a claim for breach of the very agreement upon which Aerotek later moved for its attorney’s fees. (Summons and Complaint p. 5). In its Answer, Aerotek explicitly requested that the trial court “award Aerotek its attorneys’ fees and costs expended.” (Answer p. 7). Given those two facts, Aerotek pled as much as the prevailing party in *Hartough*, and more than the prevailing parties in *Wilson*, *Calland*, and *Baird*.

Under the circumstances, Aerotek pled all that was necessary to later file its Motion for Attorneys’ Fees and Costs after the trial court’s order installing Aerotek in the position of prevailing party. Aerotek is not required, as implied in the order on appeal, to file a separate lawsuit against Gibbons asserting an original claim for the attorney’s fees it incurred in this action. Therefore, this Court should: (1) reverse the trial court’s order denying on procedural grounds Aerotek’s Motion for Attorneys’ Fees and Costs; and (2) remand the case to the trial court for a substantive ruling on whether and in what amount Aerotek is entitled to an award of attorney’s fees and costs.

II. The trial court abused its discretion in calling in to question the authenticity of Gibbons’s employment agreement.

Along with its Motion for Attorneys’ Fees and Costs, Aerotek provided the trial court with a copy of Gibbons’s electronically-signed employment agreement. Aerotek previously authenticated the document, at the summary judgment stage of the litigation, through both deposition and affidavit testimony. In opposition to Aerotek’s Motion for Attorneys’ fees and Costs, Gibbons submitted an affidavit, in which she stated she did not recall—but did not deny—electronically-signing the employment agreement. Due to a change of judges, the trial court may not have been aware that Aerotek authenticated the employment agreement at summary judgment. For whatever reason, the trial court misinterpreted Gibbons’s affidavit testimony as creating an authentication issue it did not realize Aerotek had already resolved. Because the trial court raised the issue *sua sponte*, and for the first time, in its order denying Aerotek’s Motion for Attorneys’ Fees and Costs, Aerotek did not have an opportunity to address any concern the trial court may have had about authentication. As demonstrated below, however, there was no failure to authenticate that would support the trial court’s denial of Aerotek’s Motion for Attorneys’ Fees and Costs.

A. Aerotek met its burden (if any) to authenticate Gibbons’s employment agreement.

In its order denying Aerotek’s Motion for Attorneys’ Fees and Costs, the trial court suggested that Aerotek had an obligation not only to provide the court with a signed copy of the written agreement upon which the motion was based (*i.e.*, Gibbons’s employment agreement), but also to authenticate that agreement. (Order dated 06/18/20 p. 3). The trial court did not cite any authority requiring such authentication. *Id.* Nor did the trial court claim that the obligation to authenticate—if it exists—must be fulfilled through the papers a party submits in support of its

motion for attorney's fees. On the contrary, the trial court suggested that the purported obligation to authenticate would have been fulfilled (before Aerotek ever filed its Motion for Attorneys' Fees and Costs) if Gibbons's employment agreement had been "introduced as evidence during the trial of the case." *Id.*

To the extent Aerotek had one, "the burden to authenticate is not high and requires only that the proponent offer a satisfactory foundation from which the [trier of fact] could reasonably find that the evidence is authentic." *es Keel, LLC v. Atl. Private Equity Grp., LLC*, 413 S.C. 58, 64 (Ct. App. 2015) (quotation marks and ellipses omitted). "The requirement of authentication . . . is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." S.C. R. Evid. 901(a). One way to do that is through "[t]estimony that a matter is what it is claimed to be." S.C. R. Evid. 901(b)(1).

Leaving aside the fact that Gibbons initiated this lawsuit by filing a Complaint alleging Defendants breached her written employment agreement, Aerotek properly authenticated Gibbons's employment agreement before filing its Motion for Attorneys' Fees and Costs, and even before trial. The trial court may not have been aware of the prior authentication, because while Judge Gravely handled both the trial and Aerotek's Motion for Attorneys' Fees and Costs, Judge Clyburn-Pope handled Aerotek's Motion for Summary Judgment. (01/03/20 Form 4 p. 1; 02/02/20 Form 4 p. 1; Order dated 06/18/20 p. 3).

In the Memorandum in Support of its Motion for Summary Judgment, Aerotek authenticated Gibbons's employment agreement by identifying the following evidence in the summary judgment record: (1) Gibbons's deposition testimony (from April 5, 2019) that she electronically-signed the employment agreement online sometime after her in-person interview at Aerotek (Pl.'s dep. 17:4–18:19); and (2) Jason Pritchard's affidavit testimony, as an Aerotek

Employee Relations Manager, that the copy of the employment agreement filed as an exhibit accompanying Aerotek's Motion for Summary Judgment, and electronically-signed by Gibbons on September 14, 2016, is a true and accurate copy of a record maintained by Aerotek in the normal course of its business (Pritchard aff. ¶ 5). (MSJ Memo p. 3). This testimonial evidence is more than sufficient to support a finding that Gibbons's employment agreement is what Aerotek claims it to be.

B. Gibbons did not dispute the authenticity of her employment agreement.

In her Memorandum in Opposition to Aerotek's Motion for Summary Judgment, Gibbons did not controvert the fact that she electronically-signed the employment agreement. (Pl.'s MSJ Opp'n Memo p. 1). To be fair, that fact pertained more to Aerotek's argument on Gibbons's breach of contract claim (Count II) than to Aerotek's argument on the § 41-1-70 wrongful termination claim (Count I). Rather than address Aerotek's argument on Count II, Gibbons offered to stipulate to the dismissal of Count II shortly before filing her Memorandum in Opposition. *Id.* p. 8. Nevertheless, on summary judgment, Gibbons provided no evidence whatsoever calling into question the authenticity of her employment agreement.

Perhaps unaware of what occurred at summary judgment, the trial court incorrectly stated in its order denying Aerotek's Motion for Attorneys' Fees and Costs that "[t]he Employment Agreement on which Aerotek bases its claim for attorneys' fees and costs was never introduced as evidence." (Order dated 06/18/20 p. 3). The trial court noted that "[i]n opposition to this Motion [for Attorneys' Fees and Costs], Gibbons filed her affidavit stating that **she did not recall** signing the Employment Agreement, thus putting the authenticity of the agreement at issue." *Id.* (emphasis added). However, the substance of Gibbons's affidavit testimony did not put the authenticity of the employment agreement "at issue."

Citing *Pee Dee Prod. Credit Ass'n v. Joye*, 284 S.C. 371 (1984), the trial court declared that Gibbons's affidavit testimony shifted to Aerotek "the burden of establishing the terms of the Employment Agreement and that it was signed, physically or electronically, by Plaintiff." (Order dated 06/18/20 p. 3). In *Joye*, the Supreme Court of South Carolina stated the general proposition that "once the authenticity of a signature is placed in issue, the burden of proof as to the genuineness of the signature is on the party claiming under the signature." *Joye*, 284 S.C. at 373. However, in that case, the "appellant **did deny the signature was genuine**, so there was a dispute as to the signature's authenticity." *Id.* (emphasis added). "Furthermore, evidence was presented that more than one person had been signing the appellant's name." *Id.*

Under *Joye*, to shift the burden of proof as to the genuineness of her employment agreement, Gibbons had to at least deny she signed it. However, Gibbons's affidavit testimony regarding her recollection as of February 10, 2020 (the date she signed the affidavit) fell far short of that threshold showing.² See *J.B. Colt Co. v. Robinson*, 137 S.C. 224, 224 (1926) (Defendant's testimony "that she did not remember signing [the note and contract] . . . cannot be taken or construed as a denial of the execution of the note and contract by her."); *Gadberry v. Rental Servs. Corp.*, No. 09-3327, 2011 WL 766991, *2 (D.S.C. Feb. 24, 2011) (Plaintiff's "affidavit testimony that he does not remember signing the contract, [or] having the contract explained to him, . . . merely draws [his] recollection and understanding of the agreement into question. It would not support a finding that he did not actually sign the relevant contract.").

² This is especially true given the deposition testimony Gibbons provided ten months earlier, on April 5, 2019, when her recollection was fresher, at which time she recalled electronically-signing the employment agreement online sometime after her in-person interview at Aerotek. (Pl.'s dep. 17:4–18:19).

For the above reasons, Aerotek never bore the burden of proof as to the genuineness of Gibbons's employment agreement. But even if it did, Aerotek fully met any such burden with the record evidence it provided on summary judgment. Therefore, the trial court erred in finding "Aerotek failed to meet its burden in proving the terms of the employment agreement or that it was signed by Plaintiff." (Order dated 06/18/20 p. 3). As a result, this Court should: (1) reverse the trial court's order denying Aerotek's Motion for Attorneys' Fees and Costs; and (2) remand the case to the trial court for a ruling on whether and in what amount Aerotek is entitled to an award of attorney's fees and costs.

C. The trial court did not give Aerotek an opportunity to address the authentication issue it raised *sua sponte*.

As just demonstrated, in the affidavit she submitted in opposition to Aerotek's Motion for Attorneys' Fees and Costs, Gibbons did not actually dispute the authenticity of her employment agreement. (Pl.'s aff. p. 1). Nor did her counsel do so in Gibbons's Memorandum in Opposition to Aerotek's Motion for Attorneys' Fees and Costs. (Pl.'s Fees Opp'n Memo p. 1). Therefore, Aerotek had no reason to believe it needed to address the issue of authentication in its reply brief. (Fees Reply p. 1). Yet the trial court raised the issue *sua sponte* (and for the first time) in its order denying Aerotek's Motion for Attorneys' Fees and Costs. As a result, Aerotek had no opportunity to address the authentication issue that apparently troubled the trial court.

If Aerotek had the opportunity, it would have directed the trial court to the deposition and affidavit testimony it cited in its summary judgment briefing. Further, it may have submitted one or more additional affidavits from Aerotek personnel involved in Aerotek's online onboarding system, which presents new Aerotek employees with required pre-employment paperwork, including the employment agreement Gibbons electronically-signed. Therefore, if this Court

determines that authentication is still an outstanding issue, it should remand the case to the trial court for further findings on the issue.

CONCLUSION

The trial court gave two reasons for denying Aerotek's Motion for Attorneys' Fees and Costs. First, it ruled that Aerotek was required to *plead* its request for contractual, prevailing party attorney's fees at the outset of the litigation, as if it were a counterclaim, but that Aerotek failed to do so in its Answer. As demonstrated above, South Carolina law does not require such pleading, particularly where (as here) the plaintiff has asserted a claim based on the same contract or statute under which the defendant's motion for attorney's fees is based, and where (as here) the defendant actually does request an award of attorney's fees in its Answer.

Next, the trial court ruled that Aerotek did not sufficiently authenticate the contract upon which it sought prevailing party attorney's fees (*i.e.*, Plaintiff's employment agreement). As demonstrated above, Aerotek properly authenticated Gibbons's employment agreement, though both deposition and affidavit testimony, at the summary judgment stage of the litigation. Further, contrary to the trial court's assertion, the affidavit testimony Gibbons submitted in opposition to Aerotek's Motion for Attorneys' Fees and Costs, which did not include a denial that Gibbons electronically-signed her employment agreement, did not raise an issue regarding authentication or otherwise controvert the evidence Aerotek previously provided to authenticate the document.

Neither of the trial court's two stated reasons for denying Aerotek's Motion for Attorneys' Fees and Costs actually supports the ruling. Therefore, this Court should: (1) reverse the trial court's order denying Aerotek's Motion for Attorneys' Fees and Costs; and (2) remand the case to the trial court for a ruling on whether and in what amount Aerotek is entitled to an award of attorney's fees and costs.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/ Patrick D. Quinn

Patrick D. Quinn
SC Bar No. 100215
Email: patrick.quinn@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 255-9513

Bryson M. Geer
Email: bryson.geer@nelsonmullins.com
151 Meeting Street / Sixth Floor
Post Office Box 1806 (29402-1806)
Charleston, SC 29401-2239
(843) 853-5200

and

HUSCH BLACKWELL LLP

William E. Corum (*admitted pro hac vice*)
Email: william.corum@huschblackwell.com
Megan A. Scheiderer (*admitted pro hac vice*)
Email: megan.scheiderer@huschblackwell.com
4801 Main Street, Suite 1000
Kansas City, MO 64112
(816) 983-8139

Attorneys for Appellant Aerotek, Inc.

Columbia, South Carolina

September 18, 2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

Civil Action No. 2018-CP-40-05124

Appellate Case No. 2020-001065

RECEIVED
Sep 18 2020
SC Court of Appeals

Trisha Gibbons,..... Respondent,

v.

Aerotek, Inc., Appellant.

PROOF OF SERVICE

I certify that I served the Initial Brief of Appellant and Designation of Matter to Be Included in the Record on Appeal on Respondent Trisha Gibbons by depositing a copy of it in the United States Mail, postage prepaid, on September 18, 2020, addressed to her counsel of record, J. Paul Porter, Post Office Box 11675, Columbia, South Carolina 29211 as well as via electronic mail at paul@cbphlaw.com.

[Signature on Following Page]

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/ Patrick D. Quinn

Patrick D. Quinn
SC Bar No. 100215
Email: patrick.quinn@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 255-9513

Bryson M. Geer
Email: bryson.geer@nelsonmullins.com
151 Meeting Street / Sixth Floor
Post Office Box 1806 (29402-1806)
Charleston, SC 29401-2239
(843) 853-5200

and

HUSCH BLACKWELL LLP

William E. Corum (*admitted pro hac vice*)
Email: william.corum@huschblackwell.com
Megan A. Scheiderer (*admitted pro hac vice*)
Email: megan.scheiderer@huschblackwell.com
4801 Main Street, Suite 1000
Kansas City, MO 64112
(816) 983-8139

Attorneys for Appellant Aerotek, Inc.

Columbia, South Carolina

September 18, 2020

Patrick D. Quinn
T: (803) 255-9513
patrick.quinn@nelsonmullins.com

1320 Main Street, 17th Floor
Columbia, SC 29201
T: 803.799.2000 F: 803.256.7500
nelsonmullins.com

September 18, 2020

VIA ONEDRIVE ELECTRONIC FILING

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RECEIVED
Sep 18 2020
SC Court of Appeals

RE: Trisha Gibbons, Respondent, v. Aerotek, Inc., Appellant
Appellate Case No. 2020-001065

Dear Ms. Kitchings:

Enclosed please find Appellant Aerotek, Inc.'s Initial Brief of Appellant in the above-referenced matter. By copy of this letter served via U.S. mail and Electronic Mail, we are notifying all counsel of record of this filing.

Very Truly Yours,



Patrick D. Quinn

Enclosures

cc: Paul Porter, Esq. (via Email and U.S. Mail)
Elizabeth Millender, Esq. (Email and U.S. Mail)