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

Trisha Gibbons,..... Respondent,

v.

Aerotek, Inc., ... Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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I. Aerotek sufficiently pleaded its request for attorneys' fees and costs in its Answer.

Gibbons concedes that "Aerotek plead[ed] that it should receive attorney's fees in its prayer for relief" in its Answer, *see* Resp. Br. 9 n.3, but Gibbons contends, as the trial court held, that this request in the prayer for relief was insufficient under the pleading standards under South Carolina law. *See id.* at 9. That is, Gibbons argues that the pleading standards under South Carolina law required Aerotek to meet a heightened burden: to "plead facts supporting its claim" for attorneys' fees and costs such that the pleading "put Plaintiff on proper notice" of her Employment Agreement that contained the contractual attorneys' fees and costs provision.[1] *Id.* (quoting Order dated 6/18/20, p.3). Indeed, Gibbons contends that Aerotek failed to meet this pleading standard by failing to mention the Employment Agreement containing the contractual attorneys' fees and cost provision either "in its pleadings" *or* "where appropriate in the course of the litigation." *Id.*

Put simply, the issue before this Court is twofold: (1) what, *if any*, pleading standard is required for requesting attorneys' fees and cost under a contractual fee provision and (2) depending on the standard, *if any*, did Aerotek's pleading in its Answer comply with that standard. *First*, there is no South Carolina authority, cited by the trial court, Gibbons, or otherwise, that supports the proposition that Aerotek must comply with Rule 8(a), SCRCP when requesting fees and costs pursuant to a contractual fee provision. As such, there is no South Carolina authority to support the proposition that Aerotek must assert a counterclaim, *or* must identify the specific basis upon

[1] Plaintiff makes multiple insinuations in her Respondent's Brief that Aerotek did not provide her notice (or even went as far as hiding), her Employment Agreement. *See* Resp. Br. 4 (stating that Aerotek "kept this agreement close-to-chest throughout."). Yet, she also either admits or does not contest that Aerotek presented this Agreement on *at least* three occasions in this very litigation: (1) Aerotek produced the three-page Employment Agreement in discovery, (2) presented the three-page Employment Agreement to her in a deposition (*see* Resp. Br. 5), and (3) appended the three-page Employment Agreement to its Motion for Summary Judgment (*see* Resp. Br. 12). As such, Plaintiff's admissions or failure to contest belie her argument.

which it was requesting fees (*i.e.*, Gibbons's Employment Agreement) in its Answer or otherwise, as the trial court and Gibbons suggested.[2] *Second*, Aerotek pleaded all that was necessary in its Answer to later file its Motion for Attorneys' Fees and Costs after the trial court's Order at direct verdict proclaimed Aerotek the prevailing party.

To begin, in support of her standard argument, Gibbons points to Rule 8(a), SCRCP and Rule 8(c), SCRCP of the South Carolina Rules of Civil Procedure for support. Rule 8(a), SCRCP requires that "*a cause of action*," including "an original claim, counterclaim, cross-claim, or third-party claim," contain "a short and plain statement of the facts showing that the pleader is entitled to relief." Additionally, Rule 8(c), SCRCP addresses the *defenses* that a party must "set forth affirmatively," including defenses such as "accord and satisfaction, arbitration and award, assumption of risk, condonation, contributory negligence, discharge in bankruptcy, duress, fraud, illegality, injury by fellow servant, laches, license, misrepresentation, mistake, payment, plene administravit or the administration of the estate is closed, recrimination, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense." But Plaintiff cites no authority to suggest that a request for attorneys' fees and costs pursuant to a contractual fees provision must be pleaded as a cause of action (i.e. a counterclaim) subject to Rule 8(a), SCRCP *or* an affirmative defense subject to Rule 8(c), SCRCP.[3]

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[2] Gibbons *does not* address the finding in the trial court's Order that seems to imply Aerotek must seek its attorneys' fees and costs through a counterclaim against Plaintiff. (*See* Order, dated 06/18/20 p. 2 ("The Answer did not contain a counterclaim against the Plaintiff seeking attorneys' fees.")). Instead, Gibbons appears to merely argue in her Respondent's Brief that Aerotek was obligated to plead the existence of the Employment Agreement in conjunction with the request for fees and costs presumably in the prayer for relief.

[3] Gibbons did not so much as cite Rule 8(a) in her Opposition to the Motion for Attorneys' Fees and Costs, but the trial court nevertheless held a request for fees and costs pursuant to a contractual provision, like here, must so comply. (Order dated 6/18/20, p. 2). But

Indeed, notably absent from her Respondent's Brief is a *single case* that requires a request for attorneys' fees and costs pursuant to a contractual provision to comply with Rule 8(a) or Rule 8(c), SCRCP. Instead, Gibbons resorts to pointing to a recent South Carolina Court of Appeals case, *Garrison v. Target Corp.*, 429 S.C. 324, 838 S.E.2d 18 (Ct. App. 2020), that addressed whether the statutory limitations on punitive damages was an affirmative defense subject to waiver if not pleaded under Rule 8(c), SCRCP. *Garrison*, 429 S.C. at 358, 838 S.E.2d at 36. In that case, the Court held that the defendant was required to plead the statutory limitations on punitive damages under Rule 8(c), SCRCP. 429 S.C. at 373, 838 S.E.2d at 44. This was so because if pleaded, the plaintiffs would have had "prior notice of the additional evidence they needed to lift the punitive damages limit" at trial. *Id.* But the defendant failed to do so, and the Court found "fairness dictates that we deem the application of the statutory damages limit to this case waived." *Id.*

Garrison in no way supports that the request for attorneys' fees and costs pursuant to a contractual fee provision must comply with Rule 8(a) or Rule 8(c), SCRCP. To begin, common sense dictates that the request for attorneys' fees and cost, which is a request for a form of relief, is *not* an affirmative defense, like the punitive damage cap in *Garrison*. Aerotek is not aware of, nor has Gibbons cited authority, that construes a contractual provision for fees and costs as an affirmative defense that must comply with Rule 8(c), SCRCP. Additionally, attorneys' fees and

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more importantly, Gibbons raises the argument that Aerotek must comply with Rule 8(c), as opposed to merely Rule 8(a), SCRCP, when pleading its request for attorneys' fees and costs for the *first time* in her Respondent's Brief. Because she did not argue Aerotek failed to comply with Rule 8(c) below, and the trial court did not rule as much below, Gibbons has waived any such argument. *See S.C. Dept. of Transp. v. First Carolina Corp of S.C.*, 372 S.C. 295, 302, 641 S.E.2d 903, 907 (2007) ("Additionally, '[i]t is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.'" (quoting *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (S.C. 1998))).

costs could not have been proved or defended at trial, like the punitive damage cap in *Garrison*, because Aerotek was not entitled to attorneys' fees and costs until *after trial* when it became the prevailing party. And finally, here, fairness does not dictate that attorneys' fees and costs are waived because Aerotek explicitly pleaded its request in its Answer. Plaintiff had notice from the infancy of the litigation of Aerotek's intent to seek fees and costs.

In contrast to Gibbons, Aerotek has pointed to numerous South Carolina authorities suggesting that the mere mention of a request for attorneys' fees and costs in the Answer is more than sufficient to plead for that relief pursuant to a contractual fees provision.. Indeed, in *South Carolina Electricity & Gas Co. v. Hartough*, the South Carolina Court of Appeals found that the party requesting fees under a contractual fee provision in a contract sufficiently pleaded its request where "the pleadings requested attorney's fees" despite the prevailing party failing to "specifically plead attorney's fees pursuant to the contract." 375 S.C. 541, 551, 654 S.E.2d 87, 92 (Ct. App. 2007). Here too, Aerotek's Answer requested attorneys' fees even if it did not specifically request them pursuant to the Employment Agreement. (Answer p. 7).

Gibbons makes three distinctions of *Hartough* in her Brief, but those distinctions are matters of form rather than substance. *See* Resp. Br. 10. That is, first, the Court "noted" that the issue of whether a party must specifically plead the basis for a fees' request was not preserved, but it still reached the underlying issue. *See Hartough*, 375 S.C. at 551, 654 S.E.2d at 92. Second, the Court acknowledged that the option contract containing the contractual fee provision was the option contract underlying the declaratory judgment action, but that was not the basis for the Court's holding that a mere request for fees in a pleading is sufficient. *See id.* Instead, the Court utilized that acknowledgment to find that the party opposing the fees request had sufficient notice of the fees provision contained in the contract (and therefore, the basis for the fees request)—much

like here, where Gibbons had sufficient notice of the contractual fees provision in her Employment Agreement, which was produced to her in discovery, presented in her deposition, and appended to Aerotek's Motion for Summary Judgment.[4] (*See* Pl.'s dep 17:4-18:19; MSJ Memo p. 3, Exh. D). Third, and finally, it is of no consequence that the Court discussed the possibility of fees and costs for purposes of equity pursuant to the declaratory judgment action. *Hartough*, 375 S.C. at 550, 654 S.E.2d at 91. *Hartough*, which is a binding decision of this Court, is sufficient to support this Court finding that Aerotek sufficiently pleaded its request for fees and costs pursuant to the Employment Agreement.

Nevertheless, Aerotek has provided three other cases that further support the proposition that a mere request for fees without anything more in an Answer (or perhaps even no request at all) is sufficient under South Carolina law. *See, e.g.*, *Utilities Constr. Co. v. Wilson*, 321 S.C. 244, 247, 468 S.E.2d 1, 2 (Ct. App. 1996) (allowing for the award of attorneys' fees despite the alleged prevailing party not including the request in the answer); *Baird v. Pac. W. v. Blue Water Sunset Park, Inc.*, No. 2004-UP-011, 2004 WL 6248287 (Ct. App. 2004) (finding that the alleged

[4] Additionally, to be clear, Plaintiff's argument that the Employment Agreement containing the contractual fees provision was "not at issue in this case" is belied by the record. Resp. Br. 10. Although not clearly stated, the basis for this argument seems to be her hindsight contention that her breach of contract claim was not based on the Employment Agreement—rather, she alleges it was "based on a job posting by co-defendant Schneider hiring contractor and comments made by Schneider during onboarding." *Id.* at 8.

To begin, her pleading specifically refers to the written Employment Agreement as underlying the breach of contract claim. (Compl. ¶ 14) ("Plaintiff was employed pursuant to a *written agreement* received upon her hire." (emphasis added)). However, even accepting as true that she intended to refer to an agreement other than the Employment Agreement, the defense of the case was based on the Employment Agreement. Indeed, Aerotek argued at summary judgment that it did not breach its Employment Agreement, which contains the at-issue contractual fees provision, because its Employment Agreement did not contain a provision calling for a pay increase after ninety days on the job as she claimed. (MSJ Memo pp. 13–15). Thus, the Employment Agreement has always been at issue in this case.

prevailing party "did not make its request for attorney fees in its pleading," but nevertheless determining its claims was "not barred"); *Calland v. Carr*, No. 14-0420, 2015 WL 4394977, at *2 (D.S.C. July 16, 2015) (determining "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." (quoting *NGM Ins. Co. v. Carolina's Power Wash & Painting, LLC*, No. 08-3378, 2010 WL 3258134, at *1 (D.S.C. July 6, 2010))).

Aerotek pleaded all that was necessary to later file its Motion for Attorneys' Fees and Costs after it became the prevailing party. (*See* Answer p. 7). The above authorities make clear that Aerotek had no obligation either to assert a counterclaim with respect to its attorneys' fees, or to identify the specific basis upon which it was requesting the fees. The trial court abused its discretion in holding that Aerotek had any such obligation. As a result, the Court should: (1) reverse the trial court's Order denying Aerotek's Motion for 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 attorneys' fees and costs.

II. Aerotek met its burden, if any, to authenticate the Employment Agreement.

Gibbons contends that Aerotek "failed to authenticate" her Employment Agreement. Resp. Br. 12. Gibbons alleges that the trial court's Order correctly recognized this failure to authenticate both (1) at summary judgment (where she alleges the Employment Agreement was introduced during summary judgment "without an authenticating affidavit") and (2) at trial (where the Employment Agreement "was never introduced at evidence"). *See* Resp. Br. 12. As such, Gibbons contends Aerotek had the "burden to authenticate" the Employment Agreement once she "challenged the authenticity of the electronic agreement in her affidavit" at the Motion for Fees and Costs phase of the litigation. *Id.* These arguments fail for numerous reasons.

To begin, Gibbons is not correct that the trial court's Order acknowledged, much less ruled, that Aerotek appended the Employment Agreement to its Motion for Summary Judgment with an insufficient affidavit to properly authenticate. *See* Resp. Br. 12 ("The trial judge reasoned that . . . even though [the Employment Agreement] was attached to an earlier memorandum in support of summary judgment there was not an authenticating affidavit."). A review of the Order and procedural posture of the Order makes relatively clear that the trial court was not aware of Aerotek previously authenticating the Employment Agreement at summary judgment. That is, the Order does not mention the Employment Agreement's inclusion in summary judgment. (*See generally* Order dated 6/18/20, p. 3). This makes sense given that Judge Gravely, who entered the trial court's Order on the Motion for Attorneys' Fees and Costs, did not rule on summary judgment. (*See* Order on MSJ dated 1/2/2020, p. 3 (entered by Judge Clyburn Pope); Order dated 6/18/20, p.3 (entered by Judge Gravely)). As such, Gibbons is not correct that Judge Gravely considered the fact that Aerotek authenticated the Employment Agreement at summary judgment.

Next, Gibbons contends "affixing a document to a summary judgment motion, for a separate purpose than is raised here, does not amount to authentication." Resp. Br. 12. In particular, Gibbons seems to contend that authentication may only occur at trial, not summary judgment. That is, Gibbons suggests that because the Employment Agreement "was never introduced at trial," there was "no foundation" laid by Aerotek that Gibbons signed the Employment Agreement. *Id.* at 13. Gibbons does not cite authority for the proposition that the *only way* to authenticate a document is at trial before a jury. Because this argument is conclusory and made without citation to authority holding as much, the Court should deem it abandoned on appeal. *See Potter v. Spartanburg Sch. Dist. 7*, 395 S.C. 17, 24, 716 S.E.2d 123, 127 (Ct. App. 2011) ("An issue is deemed abandoned if the argument in the brief is not supported by authority

or is only conclusory."). But even so, the Employment Agreement could be authenticated at summary judgment because South Carolina courts have deemed the summary judgment proceedings as equivalent to trial. *Brandt v. Gooding*, 360 S.C. 618, 625, 630 S.E.2d 259, 262 (2006) (describing the summary judgment examination as "constitut[ing] a trial").

Here, Aerotek offered the authenticity of the Employment Agreement in the Memorandum in Support of its Motion for Summary Judgment through (1) Gibbons's deposition testimony (Pl.'s dep. 17:4–18: 19); and (2) Jason Pritchard's affidavit testimony (MSJ Memo p.3, Exh. D). Plaintiff did not contest that offering of authenticity at summary judgment. (Pl.'s MSJ Opp'n Memo p.1). As such, the testimonial evidence was sufficient to support a finding that the Employment Agreement was authenticated *at summary judgment*. Because summary judgment is deemed equivalent to trial, Aerotek did not need to offer the Employment Agreement at trial for it to be authenticated as Gibbons suggests.

Further, Gibbons next argues that the evidence offered (*i.e.* the deposition testimony and affidavit) at summary judgment was insufficient to authenticate the Employment Agreement. *See* Resp. Br. 13. First, she argues that Aerotek's contention that these pieces of evidence could authenticate the Employment Agreement is "a brand new argument" and "not preserved for appellate review." *Id.* However, as explained in the Appellant's Brief, the trial court raised the authentication issue *sua sponte* in its Order once briefing and argument below had been completed. *See id*. Indeed, notably absent from Gibbons's Opposition to the Motion for Fees and Costs is the word authenticity *at all*. Thus, the argument is not subject to waiver because the Court *sua sponte* raised the authenticity below in its Order (based on its construction of Plaintiff's arguments), and Aerotek is countering at the first opportunity on appeal. Second, Gibbons alleges that the deposition testimony does not address whether "the [Employment Agreement] bears Ms. Gibbons'

electronic signature." *Id.* However, review of the testimony makes clear that Gibbons does not contest having seen and signed the Employment Agreement. (*See* Pl.'s dep. 17:18–18:14 (reflecting that Gibbons does not correct Aerotek's counsel stating that on the last page of the Employment Agreement, "it has your electronic signature and it is dated September 14th, 2017.")). Third, Gibbons contends that Jason Pritchard's affidavit "does not establish" authenticity of the document. *See* Resp. Br. 13. However, Jason Pritchard's affidavit, which Plaintiff did not contradict at summary judgment, met the low bar for authenticity, assuming Aerotek had the burden of authentication. *See Deep Keel, LLC v. Atl. Private Equity Grp., LLC*, 413 S.C. 58, 65, 773 S.E.2d 607, 610 (Ct. App. 2015) ("'[T]he burden to authenticate ... is not high' and requires only that the proponent 'offer[ ] a satisfactory foundation from which the jury could reasonably find that the evidence is authentic.'").

Moreover, Gibbons argues that Aerotek "incorrectly challenges" the nature of her Affidavit submitted in Opposition to the Motion for Fees and Costs. Resp. Br. 14. In that Affidavit, Gibbons stated she had "no contemporaneous memory of receiving or reviewing" the Employment Agreement that she "allegedly signed . . . electronically." (Pl.'s Opp'n to Motion for Fees and Costs, Exh. 1¶ 5). Gibbons does not state in that Affidavit that the alleged electronic signature is not hers. (*See id.*). Aerotek provided both deposition testimony and an affidavit at summary judgment providing for the authenticity of the Employment Agreement. (Pl.'s dep. 17:4–18: 19; MSJ Memo p.3, Exh. D). As such, her Affidavit does not controvert this proffered evidence, and thus, does not put the authenticity of the Employment Agreement at issue no matter who bore the initial burden relating authentication. *See J.B. Colt Co. v. Robinson*, 137 S.C. 224, 224, 135 S.E. 312, 314 (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, at *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.").

Finally, Aerotek contends that the trial court *sua sponte* raised the authenticity issue in its Order, as opposed to Gibbons raising the authenticity issue during briefing, in her affidavit, or during the hearing on the Motion for Fees and Costs. *See* Aplt. Br. 13. Aerotek respectfully requests the opportunity to address the authentication issue that apparently troubled the trial court, if necessary. *See id.* But Gibbons argues that Aerotek is not entitled to another chance to establish authenticity because it waived the authenticity argument by not filing a Rule 59(e), SCRCP, motion with the trial court. *See* Resp. Br. 14.

Gibbons cites no authority for the proposition that the failure to file a Rule 59(e) motion waives this particular argument on appeal, other than *Anderson County v. Preston*, 427 S.C. 529, 541, 831 S.E.2d 911 (2019) and *Thornton v. Thornton*, 428 S.C. 460, 836 S.E.2d 351, 359 (Ct. App. 2019) . *See* Resp. Br. 15. Both are distinguishable. In *Preston*, the County filed a Rule 59(e) motion addressing a defense that did not exist until after final judgment, so the Court determined that the argument addressing the defense was properly raised to and ruled upon by the circuit court through a Rule 59(e) motion and thus, preserved for appeal. *Preston*, 427 S.C. at 541, 836 S.E.2d at 359. This is not so here. Additionally, in *Thornton*, the wife in a divorce proceeding filed a Rule 59(e) motion, but failed to include two remaining arguments in that motion. *Thornton v. Thornton*, 428 S.C. at 476 n.4, 836 S.E. 2d at 359. The trial court determined these two arguments were not preserved for appeal because they had never been ruled on. *See id.* Again, this is not so here. Here, the trial court improperly construed Gibbons's arguments in her Opposition to the Motion for Fees

and Costs as questioning authenticity of the Employment Agreement, and it ruled accordingly. As such, a Rule 59(e) motion was not necessary to preserve the argument for appeal.

As a result, the Court should: (1) reverse the trial court's Order denying Aerotek's Motion for 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 attorneys' fees and costs.

III. The Court need not reach the additional grounds Gibbons suggests for affirmance.

Gibbons raises five additional grounds for affirming the ruling below. *See* Resp. Br. 15–22. Gibbons concedes that the additional grounds raised in her Respondent's Brief were not ruled on by the trial court. *See* Resp. Br. 15. But Gibbons alleges that pursuant to Rule 220(c), SCACR, the Court may affirm the trial court's Order on these alternative grounds. *See id.* But all five of these grounds fail for either being not preserved below *or* without merit, so the Court need not reach them.

A. Gibbons had actual notice of the Employment Agreement, and therefore, she assented to the Employment Agreement and its terms.

First, Gibbons argues that she did not assent to (*i.e.* have "actual notice" of) the Employment Agreement containing the contractual fee provision. Resp. Br. 17. In support, she points to the self-serving affidavit submitted with her Opposition to the Motion for Attorneys' Fees and Costs. (Pl.'s Opp'n to Motion for Fees and Costs, Exh. 1¶ 5). Specifically, she points to her statement that she does not have "contemporaneous memory of receiving or reviewing" the Employment Agreement in support. (*Id.*).

This argument is not supported by South Carolina law. The Employment Agreement is "valid and enforceable," if Gibbons and Aerotek had "a meeting of the minds as to all essential and material terms of the agreement." *Mathis v. Brown & Brown of S.C., Inc.*, 365 S.C. 629, 634, 698 S.E.2d 773, 778 (2010) (quoting *Davis v. Greenwood Sch. Dist. 50*, 365 S.C. 629, 634, 620

S.E.2d 65, 67 (2005)). The "meeting of the minds" required to create a valid and enforceable contract is "not based on secret purpose or intention on the part of one of the parties, stored away in his mind and not brought to the attention of the other party, but must be based on purpose and intention which has been made known or which, from all the circumstances, should be known." *Clardy v. Bodolosky*, 383 S.C. 418, 425, 679 S.E.2d 527, 530 (Ct. App. 2009) (quoting *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 894 (1989)).[5]

Indeed, there is no evidence that the Employment Agreement, including the contractual fee provision, was secret. To the contrary, Gibbons admits that the Agreement contains the contractual fee provision at issue. (*See* Pl.'s Opp'n to Motion for Fees and Costs, p. 3, Exh. 1 ¶¶ 4, 6–7). Gibbons further admits that the Employment Agreement "was presented to [sic] Ms. Gibbons as 'onboarding paperwork.'" Resp. Br. 3. So, there is no dispute that Aerotek gave her a copy of the Employment Agreement that contained the contractual fee provision. Gibbons does not deny that she electronically signed the Agreement, only that she does not have contemporaneous memory of electronically signing the Agreement. (*See, e.g., id.* at ¶ 10). As such, to the extent she did not have actual notice of the provision, it is just because she chose not to read it. These facts evidence that there was a "meeting of the minds" between Gibbons and Aerotek on the written terms in the Agreement, including the contractual fees provision.

[5] The cases Gibbons cites in support of the failure to assent are inapposite. Resp. Br. 16. That is, Gibbons cites case law addressing the actual notice requirement for assent to modifications of terms in subsequent employee handbooks. *See Fleming v. Borden, Inc.*, 316 S.C. 452, 450 S.E.2d 589, 595–96 (1994) (holding that to modify an implied employment contract with a subsequent handbook, the employer must give the employee actual notice of the modification); *Shelton v. Oscar Mayer Foods Corp.*, 319 S.C. 81, 459 S.E.2d 851, 856–57 (Ct. App. 1995) (discussing holding in *Fleming*); *Reese v. Comm. Credit Corp.*, 955 F. Supp. 567, 570 (D.S.C. 1997) (discussing holding in *Fleming*). There is no issue of the modification of the terms in an employee handbook at issue here. Rather, the contractual fee provision existed in the Agreement when she initially signed it and throughout her employment.

B. The Employment Agreement is not unconscionable.

Second, Gibbons asserts that the contractual fees provision in the Employment Agreement is unconscionable because it is part of a contract of adhesion and she was not advised it was included in the contract. *See* Resp. Br. 17–19. An adhesion contract "is a standard[-]form contract offered on a take-it or leave-it basis with terms that are not negotiable." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001). However, an adhesion contract is not per se unconscionable; instead, finding an adhesion contract is just the beginning of the analysis. *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 25, 644 S.E.2d 663, 669 (2007). Further, to be unconscionable, a party must demonstrate "the absence of meaningful choice on the part of one party due to one- sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them*." Carolina Care Plan, Inc. v. United Healthcare Servs., Inc.*, 361 S.C. 544, 555, 606 S.E.2d 752, 757 (2004). A lack of meaningful choice for a finding of unconscionability depends on "the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause." *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669.

Gibbons asserts in one sentence in her Respondent Brief, with no citation to evidence, that the Employment Agreement is clearly a contract of adhesion. *See* Resp. Br. 17. This assertion does nothing to show how the Employment Agreement meets the definition of an adhesion contract. Such a threadbare argument, unsupported by evidence, amounts to a waiver. *See Potter*, 395 S.C. at 24, 716 S.E.2d at 127 ("An issue is deemed abandoned if the argument in the brief is not supported by authority or is only conclusory."). Nevertheless, even if Plaintiff had provided some evidence for her position, she fails to recognize the South Carolina courts' broad acceptance

of contracts of adhesion. In fact, South Carolina courts recognize that form contracts "serve a very useful purpose in commerce." *Lackey v. Green Tree Fin. Corp.*, 330 S.C. 388, 396, 498 S.E.2d 898, 902 (Ct. App. 1998) (recognizing that form contracts are "part of the fabric of our society" that "should neither be praised nor denounced" (quoting *Goodwin v. Ford Motor Credit Co.*, 970 F. Supp. 1007, 1015 (M.D. Ala. 1997))). As such, even if this Agreement were an adhesion contract, that conclusion in no way renders it unenforceable.

Further, even assuming the Employment Agreement is a contract of adhesion, Gibbons does not demonstrate she had no meaningful choice in entering into the Employment Agreement, and therefore, it is otherwise unconscionable. Initially, Gibbons argues the contractual fee provision is unconscionable because there is a disparity in bargaining power between her and Aerotek. *See* Resp. Br. 18. But that alone cannot suffice to make a provision unconscionable. Indeed, if unequal bargaining power were enough to create unconscionability, virtually all employment agreements would be unconscionable as employers generally have greater bargaining power than potential employees.

Further, Gibbons argues that contractual fee provision is unconscionable because "Gibbons (hired to work at $12.00 per hour) would never be able to pay off Aerotek's attorney fees."[6] *Id.* This argument is without weight because it fails to recognize that the contractual fees provision was mutual and applied in both directions. Gibbons could have, and presumably would have, enforced the provision if she prevailed. Indeed, the Employment Agreement's fee provision actually created a scenario through which Gibbons could have recovered fees (had she

[6]Admittedly, Gibbons's ability to pay may be tangentially relevant to the question of reasonability of fees and costs. However, that is not the question before this Court: the questions before the Court relate to Aerotek's entitlement to fees under the contractual fee provision, not the amount. Aerotek respectfully requests a remand to the trial court to determine a reasonable amount for fees.

prevailed)—a right beyond that provided to her under South Carolina law. Additionally, Gibbons argues that the contractual fees provision was hidden. *See id.* But this argument is contradicted by the Agreement. (*See* MSJ Memo p. 3, Exh. D). The contractual fees provision was conspicuous: that is, the contractual fees provision was part of only a three-page contract, with 21 total paragraphs, and in readable font in the same size as the other provisions.[7]

C. The Employment Agreement is supported by consideration.

Third, Gibbons argues that Aerotek did not provide consideration for the Employment Agreement. *See* Resp. Br. 19–20. That is, Gibbons asserts that the Agreement offered her "contingent" employment that was co-extensive with the "whims of a Schneider Electric, a third party." *Id.* at 19. South Carolina recognizes the doctrine of at-will employment. *Baril v. Aiken Reg'l Med. Ctr.*, 352 S.C. 271, 281, 573 S.E.2d 830, 836 (Ct. App. 2002). Under this doctrine, "a contract for permanent employment is terminable at the pleasure of either party when unsupported by any consideration other than the employer's duty to provide compensation in exchange for the employee's duty to perform a service or obligation." *Id.* That is, under South Carolina law, the employer's duty to pay in exchange for the employee's duty to provide services is sufficient consideration to create a contractual relationship. *See id.*

Even so, there is mutuality of promise in the contractual fee provision—Aerotek would have been on the hook to Gibbons if Gibbons prevailed and Gibbons is liable to Aerotek because Aerotek prevailed. If Gibbons prevailed, she would presumably argue for enforcement of the

[7] Gibbons also alleged that she had no meaningful choice because "she was instructed by [Aerotek] that her employment was contingent upon signing the alleged contract within forty-eight hours of receipt." Resp. Br. 18. However, she did not raise this in briefing below. (Pl.'s Opp'n to Motion for Fees and Costs, p. 10). As such, the argument is waived. *See S.C. Dept. of Transp.*, 372 S.C. at 302, 641 S.E.2d at 907 ("Additionally, '[i]t is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.'" (quoting *Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733)) .

Employment Agreement. It cannot be enforceable for one party and not the other. There is clearly consideration for the Employment Agreement, including the value to Gibbons of the contractual fee provision itself.

D. Aerotek did not waive the right to move for fees and costs.

Fourth, Gibbons argues that the equitable doctrines of laches and waiver should apply because Aerotek did not mention its entitlement to attorneys' fees and costs in its Answer and otherwise discuss it during the litigation. *See* Resp. Br. 20. As to Aerotek's answer, Gibbons does not dispute that Aerotek requested attorneys' fees and costs in its Answer. *See id.* at 9 n.3 ("Aerotek plead[ed] that it should receive attorney's fees in its prayer for relief, but never mentioned its contract."). Instead, Gibbons implicitly suggests that this request did not put her on sufficient notice of the possibility of liability for attorneys' fees and costs. However, the South Carolina courts find waiver of attorneys' fees and costs, at most, where the request is omitted from the answer entirely. *See, e.g.*, *Utilities Constr. Co.*, 321 S.C. at 247, 468 S.E2d at 2 (finding that despite the alleged prevailing party failing to "request attorney fees in her answer," the alleged prevailing party was not "barred from recovering them."). Here, Aerotek need not even rely on those cases—because Aerotek unquestionably requested fees and costs in the Answer. (Answer, p. 7). Moreover, Aerotek is not aware of, nor has Gibbons cited, authority for the proposition that a defendant must somehow discuss the potential of attorneys' fees and costs after filing its answer, but prior to filing a motion for attorneys' fees and costs, or risk waiver. *See* Resp. Br. 20 (arguing that "[t]his Court can and should infer from Aerotek's omission of any discussion about its purported fee-shifting agreement throughout the course of litigation."). As such, the request in Aerotek's Answer, even if generic, was more than sufficient to preserve the request

E. Aerotek's requested fees and costs are reasonable.

Fifth, and finally, Gibbons argues that the fees and costs associated with Aerotek defending itself all the way through trial were unreasonable. *See* Resp. Br. 21. Specifically, Gibbons contends that: (1) a portion of the fees and costs are associated with the stipulated dismissal of the breach of contract; (2) the fees and costs do not comport with the total liability; (3) the case was "simple"; and (4) the case did not take Gibbons's counsel as much time to prosecute as it took Aerotek's counsel to defend. *See id.* Although Aerotek agrees with these assertions, it does not agree that these assertions make the fees and costs requested unreasonable.[8]

First, Aerotek agrees that it and Gibbons stipulated to the dismissal of the breach of contract claim with each side to bear its own costs and fees. *See id.* at 21–22. The two claims were somewhat intertwined—indeed, Aerotek has reviewed its invoices and few, if any, fees can be associated solely with the breach of contract claim. Nonetheless, it would be proper for the trial court judge to determine what, if any, downward adjustment to the request should be made to exclude fees and costs associated solely with the breach-of-contract claim.

Second, Aerotek also agrees that Gibbons had limited possible recovery in this case. *See* Resp. Br. 22. Throughout the litigation, Aerotek sought to resolve the claims in order to spare the litigants' and the Court's resources for this relatively small case. Aerotek informed Gibbons's counsel of its straightforward and meritorious defense from the outset (*e.g.*, the motion-to-dismiss phase). Aerotek continued to try to efficiently resolve the claims: at deposition when Plaintiff gave fatal admissions, at the summary-judgment phase, and at mediation. When the Court denied summary judgment, Aerotek had incurred $90,784.00. But Gibbons persisted pushing forward her

[8] Aerotek responds to this argument for purposes of preserving it. However, the question of what fees are reasonable are proper for the trial court in the first instance. As such, Aerotek requests remand for purposes of determining the reasonability of fees and costs.

meritless and unsupportable claims, which left Aerotek no option but to go to trial where it was meritorious in its defense with a Directed Verdict in its favor. Following the denial of summary judgment, Aerotek incurred significant fees to prepare for and try the case.

Third, Aerotek agrees that this was a simple case. *See* Resp. Br. 22. However, what otherwise was a simple case—with simple claims, issues of fact and law, and defenses—was unnecessarily complicated by Gibbons's refusal to dismiss her meritless claims. That is, Aerotek's counsel rendered legal services beyond what would otherwise be necessary in similar cases in light of Gibbons pushing forward meritless claims for which Aerotek had to defend.

Fourth, Aerotek agrees that it spent a substantial amount of time more than Gibbons's counsel defending the case. *See* Resp. Br. 22. The actions of Gibbons and Gibbons's counsel pursuing 16 months of litigation, which ultimately culminated in a jury trial, required more than 600 hours of attorney and paralegal time. The hours expended to defend Aerotek and achieve a Directed Verdict and Judgment solely in its favor reasonably resulted in the amount of attorneys' fees requested.

None of the five additional grounds proposed by Gibbons have merit for the reasons set forth above. Therefore, the Court need not reach these issues. As a result, the Court should: (1) reverse the trial court's Order denying Aerotek's Motion for 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 attorneys' fees and costs.

CONCLUSION

The trial court gave two reasons for denying Aerotek's Motion for Attorneys' Fees and Costs. For the reasons provided above, the trial court erred in its reasoning on these two bases, and this warrants reversal of the trial court's Order denying Aerotek's Motion for Fees and Costs. Additionally, the five additional bases proposed by Plaintiff that were not reached by the court do

not support affirmance, and therefore, this Court should not reach them. Finally, upon reversal, the Court should remand the case to the trial court for a ruling on whether and in what amount Aerotek is entitled to an award of attorneys' fees and costs.

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October 19, 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

Trisha Gibbons,..... Respondent,

v.

Aerotek, Inc., ... Appellant.

PROOF OF SERVICE

I certify that I served the Initial Reply Brief of Appellant on Respondent Trisha Gibbons by depositing a copy of it in the United States Mail, postage prepaid, on October 19, 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]

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October 19, 2020

VIA ONEDRIVE ELECTRONIC FILING

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
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RE: Trisha Gibbons, Respondent, v. Aerotek, Inc., Appellant
Appellate Case No. 2020-001065

Dear Ms. Kitchings:

Enclosed please find Appellant Aerotek, Inc.'s Initial Reply Brief 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 Quinn

Patrick D. Quinn

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