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.

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This case was filed on October 10, 2018. Respondent Trisha Gibbons alleged a violation of S.C. Code Ann. § 41-1-70 which makes it unlawful for an employer to terminate an employee for complying with a subpoena or jury summons and a claim of breach of contract. (R. pp. 12-16).

Ms. Gibbons initially alleged these claims against Schneider Electric and Appellant Aerotek, Inc. (Id.). Schneider Electric was Ms. Gibbons' putative employer and Aerotek was the staffing agency who formally employed her but "leased" her to Schneider. (Id.).

Ms. Gibbons resolved this case with Schneider at mediation but was unable to settle with Aerotek. (R. pp. 157-158, n. 2). The breach of contract claim had more to do with Schneider Electric than Aerotek. After the mediation, Ms. Gibbons and Aerotek stipulated to the dismissal of the breach of contract claim. That stipulation was made "with each side to bear its own costs and fees." (R. p. 30).

Aerotek's Motion for Summary Judgment was denied on January 3, 2020. (R. pp. 5-7).

Trial began on January 29, 2018. Judge Perry H. Gravely presided. The Circuit Court denied Aerotek's mid-trial directed verdict but granted its post-trial directed verdict on January 30, 2018. (R. pp. 8-10). The directed verdict was based on a failure to prove that Aerotek, rather than Schneider Electric, was responsible for Ms. Gibbons' termination. (*See,* Id.).

Aerotek did not plead that it had a fee-shifting agreement or a contractual right to fees in its Answer or otherwise. (R. pp. 17-25). Nonetheless, Aerotek filed a motion on February 16, 2020 seeking $211,815.60 in costs and attorneys' fees from Ms. Gibbons based on a purported fee-shifting agreement. (R. pp. 98-152).

That fee-shifting agreement had not been the basis for Ms. Gibbons' breach of contract claim. Instead, the contract claim was based on job posting by a contractor of Schneider Electric and comments Schneider made during onboarding. (R. pp. 250-252), (R. p. 13, ¶ 14).[1]

A telephone hearing was held on April 27, 2020. Judge Gravely denied Aerotek's Motion for Attorneys' Fees and Costs on June 18, 2020. (R. pp. 1-4). The Court denied that motion because (1) Aerotek did not plead the facts surrounding its asserted fee-shifting agreement, and (2) Aerotek did not authenticate that agreement. Aerotek did not file a motion for reconsideration. (Id.). This appeal followed.

STATEMENT OF THE FACTS

Aerotek's fee-shifting agreement is an electronic adhesion contract that was presented to the Ms. Gibbons as "onboarding paperwork." (R. pp. 184-186), (R. pp. 176-177).

Ms. Gibbons was paid at a rate of $12.00 per hour. (R. p. 13, ¶ 14), (R. pp. 184-186), (R. pp. 250-252). S.C. Code Ann. § 41-1-70 limits an employee to receiving "fifty-two weeks of wages based on a forty-hour week." S.C. Code Ann. § 41-1-70. That amounted to $24,960.00 for Ms. Gibbons. Aerotek requests $211,815.60 pursuant to its electronic loser-pays fee-shifting agreement. (R. p. 99).

Ms. Gibbons has no "memory of receiving or reviewing [the loser pays contract] in any form or fashion." (R. p. 169, ¶ 5). Ms. Gibbons allegedly signed the agreement on September 14, 2017, but she did not start working for Aerotek until October 16, 2017. (R. p. 170, ¶ 10); (R. pp. 174-174).

Ms. Gibbons did receive an email on September 14, 2017 that described the purported contract as "online onboarding paperwork." (R. p. 170, ¶ 11); (R. pp. 176-177). That email did not mention: the loser pay's provision, other seriously restrictive terms in the agreement, that Ms. Gibbons

[1] These documents discussing a pay range of $12.00-$15.00 per hour were specifically referenced at the telephone hearing on this motion. That hearing occurred pursuant to early COVID-19 protocols without a court reporter. The documents are a later version of the job advertisement that Ms. Gibbons alleged read "$12.00-$16.00/hour" when she was hired.

could or should consult with a lawyer about the agreement, or that Ms. Gibbons had the right to opt out of the agreement. (Id.) Instead, the email read like the agreement was a standard form that had to be filled out before Plaintiff could officially start. (Id.). Indeed, the email opened:

> Congratulations and welcome to Aerotek! We are very excited to be working with you. Before you start your new position, please complete your online onboarding paperwork.

(Id.) The email then continued by stating "it takes approximately 60 minutes to complete [your onboarding paperwork]" and that "your paperwork must be completed within 48 hours of your receipt of this email." (Id.)

Aerotek never explained the significance of that paperwork to Ms. Gibbons, but it had the opportunity to do so. (R. p. 169, ¶ 6). The same day that Aerotek gave Ms. Gibbons 48 hours to electronically sign its loser pays agreement, it had her come to its office to fill out another agreement by hand. (R. p. 170, ¶ 12); (R. p. 188). That paper contract was dually signed by hand and said nothing about a separate "loser pays" agreement with Aerotek. (Id.). That paper contract indicates that Aerotek could have told Ms. Gibbons about its loser pays agreement before she signed it. (Id.); (R. pp. 170-171, ¶¶ 12-14).

Ms. Gibbons "had no clue the Attorneys' Fees" provision in the agreement even existed until after trial." (R. p. 171, ¶ 15).

Aerotek did not mention its "loser pays" agreement in its Answer or plead it as an affirmative defense. (R. pp. 17-25). Instead, in reference to attorney fees and costs, Aerotek's Answer merely made a generic request for attorney fees no different from the same request in almost every other Answer filed in every civil action. (Id.). Aerotek did not discuss its intent to seek fees from the Plaintiff during litigation—which would have conformed with custom had it intended to seek fees. Indeed, Aerotek kept this agreement close-to-chest throughout. Specifically, Aerotek did not mention its "loser pays" agreement in the only significant email chain between counsel about settling this case. (R. pp. 179-

182). Aerotek did ask Ms. Gibbons about the contract briefly during her deposition but did not mention the "loser pays" provision on its third page. (R. p. 169, ¶ 9).

The document Aerotek claims is a fee-shifting contract, first described as onboarding paperwork, opens on its face as a conditional offer of employment. (R. pp. 184-186). The first and second paragraphs of the purported contract indicate that the documents' underlying consideration is illusory; such that Plaintiff's conditional offer of employment is "at-will" and "co-extensive" with her assignment. (Id. at ¶¶ 1-2). Meaning that a third party (Schneider Electric,) who was not a party to the contract itself, could end Plaintiff's employment at-will. (Id. at ¶ 2).

The conditional offer next states that Ms. Gibbons would receive "$12.00 per hour." (Id. at ¶ 4). Then on page 2, it binds Ms. Gibbons to a 6 month non-compete agreement without geographical restrictions. (Id. at ¶ 7). Even though the contract said that Ms. Gibbons was an "at-will" employee subject to termination at any time by Aerotek or a third party, it required Ms. Gibbons to work a mandatory 10-day notice period. (Id. at ¶ 13).

Finally, after 18 preceding paragraphs on page 3, the purported contract has an inconspicuous "loser pays" agreement which reads:

> **19. <u>Attorney Fees</u>**—To the extent permitted by law, you agree that in the event of any dispute or claims: (a) arising out of or relating in any way to your employment relationship with Aerotek, Inc.; or (b) seeking to enforce the obligations contained in this agreement, the prevailing party shall be entitled to recover reasonable attorney's fees and all costs relating to the dispute or other claims and any process through which such a dispute or claims may be resolved.

(Id. at ¶ 19). The typeface on this provision matches the typeface in the remainder of the agreement. (Id.). The typeface does not employ an "all caps" function to even though that function is employed to highlight a third-party prospective release in the preceding paragraph. (Id. at ¶ 18). The bolding and underlining used on the header is the same bolding and underlining used at the beginning of each of the purported agreement's 21 enumerated paragraphs. (Id.)

The purported agreement claims to be electronically signed by Ms. Gibbons on September 14, 2017 (one month before she started working for the Aerotek) and electronically signed by Aerotek's receptionist on September 19, 2017. (Id. at p. 3).

Ms. Gibbons, at the $12.00 per hour she was paid, would have to work for Aerotek for 17,651.3 hours to pay it the $211,815.60 it now seeks which amounts to approximately 8.5 years of work against a 40-hour work week. (R. pp. 184-187); (R. pp. 98-100).

Aerotek, in its motion for fees and costs, made no distinction between the fees and costs expended in defense of the Plaintiff's breach of contract claim and her statutory claim and appears to seek fees for both. (R. pp. 98-100); (R. pp. 139-142); (R. pp. 144-149). Yet, Aerotek stipulated to the dismissal of that contract claim "with each side to bear its own costs and fees. (R. p. 30).

STANDARD OF REVIEW

"At common law, a judgment did not automatically carry with it an award of costs." *Black v. Roche Biomedical Labs., a Div. of Hoffman-LaRoche, Inc.*, 315 S.C. 223, 227, 433 S.E.2d 21, 24 (Ct. App. 1993). However, "[o]ver a hundred years ago, our Legislature adopted procedures to permit the prevailing party in a civil action to recover costs and disbursements from the losing party." *Id.* "Those procedures, now generally embraced in Rule 54(d) and S.C. Code Ann. §§ 15-37-10 to 220, to provide that a prevailing party shall ordinarily be entitled to recover certain costs and disbursements. Such costs and disbursements do not, however, include attorney fees." *Id.*

The question of whether or not to tax costs against a party is within the discretion of the Court. Rule 54(c), SCRCP ("[C]ost shall be allowed as of course to the prevailing party, unless the court otherwise directs[.]"); *Black*, 433 S.E.2d at 25, and 25 n. 5; ("We find no abuse of discretion."). ("Federal courts have held the allowance of costs to the prevailing party under Federal Rule 54(d) is discretionary unless the matter is controlled by a federal statute or rule.").

"The award of attorney's fees under a contract is [also] left to the discretion of the trial court and will not be disturbed unless the court abused that discretion." *JASDIP Properties SC, LLC v. Estate of Richardson*, 395 S.C. 633, 642, 720 S.E.2d 485, 489 (Ct. App. 2011); *Maybank v. BB&T Corp.*, 416 S.C. 541, 579-80, 787 S.E.2d 498, 518 (2016) ("The decision to award or deny attorneys' fees and costs will not be disturbed on appeal absent an abuse of discretion.").

"An abuse of discretion occurs when they conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions." *Layman v. State*, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008); *citing, Zabinksi v. Bright Acres Assocs.*, 346 S.C. 580, 601, 553 S.E.2d 110, 121 (2001). "Generally, attorneys' fees and costs are not recoverable unless authorized by contract or statute." *Maybank*, 416 S.C. 541, 580, 787 S.E.2d 498, 518 (2016). Here, Appellant claims it has contractual right to attorney fees. Thus, the enforceability of that contract is paramount.

ARGUMENT

The trial court did not abuse discretion in denying Aerotek's motion for costs and fees. Aerotek never plead that it had a fee-shifting contract. (R. p. 2) ("Since Aerotek is seeking a judgment against the Plaintiff for more than $200,000.00, the Court finds that pleadings must comply with Rule 8(a), SCRCP[.]"). Aerotek also never authenticated its fee-shifting contract at trial or otherwise. (R. p. 3) ("The Employment Agreement was . . . never introduced as evidence. Even though a copy of an employment agreement was attached to Aerotek's Memorandum in Support of its Motion, there was no affidavit from a representative to Aerotek as to authenticity of the agreement or that it had been [electronically] signed by the Plaintiff."). Aerotek's failure to plead and authenticate are fatal, and the trial court's order should be affirmed.

Additional sustaining ground also exist to affirm the lower court's rulings pursuant to Rule 220(c), SCACR. Those grounds are: (1) lack of actual notice; (2) unconscionability; (3) lack of

consideration; and (4) that Appellant's request for $211,815.60 in attorneys' fees and costs in a case where the maximum liability was $24,960.00 is unreasonable and unjust.

Ms. Gibbons, as set forth below, respectfully asks this Court to affirm the reasoned decision of the Circuit Court denying Appellants' request for over $200,000.00 in attorneys' fees and costs.

I. APPELLANT FAILED TO PLEAD EVEN BASE FACTUAL ALLEGATIONS ABOUT ITS FEE-SHIFTING AGREEMENT AND HAS WAIVED THE RIGHT TO SEEK ATTORNEY FEES AND COSTS FROM THE PLAINTIFF/RESPONDENT POST-TRIAL.

Aerotek opens its argument on this issue by claiming that Ms. Gibbons' breach of contract claim was based on its fee-shifting contract. (Appellant Brief p. 4). This is false.[2] Ms. Gibbons' contract claim was based on a job posting by co-defendant Schneider's hiring contractor and comments made by Schneider during onboarding. (R. pp. 250-252), (R. p. 13, ¶ 14). Indeed, the fee-shifting contract does not mention the 90-day wage increase at issue in the contract claim whatsoever. (R. pp. 184-187); (R. p. 39) ("The employment agreement provided for a regular rate of pay of $12.00/hour. It did not provide that Plaintiff's rate of pay would increase after any particular amount of time on this job."). After this matter was resolved with Schneider, Ms. Gibbons voluntarily stipulated to the dismissal of the contract claim against Aerotek. (R. pp. 30-32).

Turning to the law, the principal purpose of pleadings is to inform the pleader's adversary of legal and factual positions which he will be required to meet on trial. *Shirley's Iron Works, Inc. v. City of Union* 403 S.C. 560, 743 S.E.2d 778 (S.C. 2013); Rule 8(a), SCRCP requires pleadings to contain "a short and plain statement of the facts showing that the pleader is entitled to relief." Rule 8(c), SCRCP provides

> In pleading to a preceding pleading **a party shall set forth affirmatively the defenses**: accord and satisfaction, arbitration and

[2] Aerotek was corrected on this apparent misunderstanding, and now misstatement, at the telephone hearing on this matter, but persists in claiming the fee-shifting contract was the basis for Ms. Gibbons' breach of contract claim.

> 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 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.

(emphasis added). A party, in replying to a preceding pleading, shall affirmatively set forth his defense to the opposing party's complaint. *Madren v. Bradford*, 378 S.C. 187, 661 S.E.2d 390, 393 (Ct. Ap. 2008). "The note to Rule 8(c) states that its aim is to 'avoid the 'surprise' defenses permissible under the old general denial answer.'" *Garrison v. Target Corp.*, 429 S.C. 324, 359, 838 S.E.2d 18, 37 (Ct. App. 2020).

The Supreme Court in *Garrison* recently held that it was necessary for a defendant to plead a statutory limitation on punitive damages where questions of fact would affect the limitation on punitive damages. *Garrison v. Target Corp.*, 429 S.C. 324, 372, 838 S.E.2d 18, 43 (Ct. App. 2020), *reh'g denied* (Feb. 20, 2020). In this case, the trial court appropriately found that "Aerotek failed to sufficiently plead facts supporting its claim for [attorney's fees] and put Plaintiff on proper notice of the basis for the attorneys' fees and costs [sought]." Put simply, Aerotek waived any entitlement to contractual attorneys' fees by failing to mention it in its pleadings or where appropriate in the course of litigation.[3] Similar to the punitive damages limitation in *Garrison*, waiver is a fact issue and Aerotek's failure to plead its claim for contractual attorney's fees should be considered preclusive. *Provident Life and Accident Ins. Co. v. Driver*, 317 S.C. 471, 451 S.E.2d 924, 928 (Ct. App. 1994). ("Waiver is the voluntary and intentional relinquishment of a known right."); *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994). ("Waiver is a question of fact for the finder of fact.").

[3] Aerotek plead that it should receive attorney's fees in its prayer for relief, but never mentioned its contract. (R. p. 23). The trial court properly held that usage of "boilerplate" "is included in most pleadings filed with this Court" and that Aerotek's failure to reference the fee-shifting agreement in its Answer was preclusive. (R. p. 2).

Appellant now cites to *S.C. Elec. & Gas Co. v. Hartough*, a declaratory judgment action, to support its cause. *Hartough*, 375 S.C. 541, 654 S.E.2d 87 (Ct. App. 2007), (Appellant Brief p. 5). There are three obvious differences between *Hartough* and this case. In *Hartough*, the argument over whether SCE&G had to "specifically plead a contractual basis for the award of fees" was "not preserved for [] review." *Hartough*, 654 S.E.2d at 92. Second, the enforceability of the contract with the fee-shifting provision in *Hartough* was the basis for SCE&G's declaratory judgment action from the outset. *Id.* Last, on the issue of costs, the declaratory judgment act specifically provides for an award of costs where "equitable and just." S.C. Code Ann. § 15-53-100; *Hartough*, 654 S.E.2d at 91 (Further, a trial court may award costs in declaratory judgment actions as "may seem equitable and just."). *Hartough*, simply does not apply in this case where the problem of Aerotek's failure to plead is preserved, where the fee-shifting contract was not at issue in this case, and where there is no statutory entitlement to costs or fees by either party.

The next cases cited by Aerotek involved a statutory or quasi-statutory entitlement to attorney's fees and are even more obviously distinguishable. (Appellant Brief pp. 6-7); *citing, Utilities Const. Co., Inc. v. Wilson,* 321 S.C. 244, 468 S.E.2d 1 (Ct. App. 1996), *Calland v. Carr,* No. 14-0420, 2015 WL 4394977 (D.S.C. 2015), and *NGM Ins. Co. v. Carolina's Power Wash & Painting, LLC,* No. 08-3378, 2010 WL 3258134 (D.S.C. 2919). S.C. Code Ann. § 41-1-70 does not provide for the recovery of attorney's fees. The statutory mechanic's lien and property disclosure act cases do not apply because they involve a statutory entitlement to attorney's fees. *Wilson*, 321 S.C. 244 (mechanic's lien case); *Calland*, 2015 WL 4394977 (property disclosure act). The *NGM* case is similarly distinguishable where it involved the defense of a federal declaratory judgment act claim and the prevailing defense conclusively established a breach of the duty to indemnify. *Owners Ins. Co. v. Warren Mech., LLC*, 324 F. Supp. 3d 650, 654 (D.S.C. 2018), aff'd, 773 F. App'x 714 (4th Cir. 2019); (Explaining *NGM, Ins. Co.*) ("This court found that the defendants were entitled to recover attorney's fees because '[t]he

instant case is a declaratory judgment action, initiated by plaintiff in this court for the sole purpose of determining whether it was required to provide insurance coverage [ ] in the underlying action.'"); *citing, NGM Ins. Co.*, 2010 WL 3258134. These cases have no substantive application to this case where there is no attorney's fee statute in play and where Aerotek's victory at trial did not establish a breach of contract by the Plaintiff.[4]

Aerotek last cites to the unpublished decision of this Court in *Baird v. Pac West* which was already distinguished. *Baird v. Pac West,* 2004 WL 6248287 (Ct. App. 2004); (Brief of Appellant at p. 7).[5] The circuit court appropriately addressed and distinguished *Baird* on the basis that the "the Court of Appeals found that the wavier of attorneys' fees had not occurred because the claim had been asserted in a Motion filed months before the hearing on that issue and opposing counsel did not object to the request for attorneys' fees." (R. p. 2). Here, Aerotek did not raise its electronic fee-shifting contract until after the case was over. The trial court appropriately rejected this ambush for failure to plead, and this court should, too.

"The award of attorney's fees under a contract is left to the discretion of the trial court and will not be disturbed unless the court abused that discretion." *JASDIP Properties SC, LLC*, 720 S.E.2d at 489 (Ct. App. 2011). The trial judge did not abuse his discretion in rejecting Aerotek's request for $211,815.60 in fees and costs where Aerotek never plead the existence of the "contract" underlying its request.

II. AEROTEK'S FAILURE TO AUTHENTICATE ITS ASSERTED FEE-SHIFTING AGREEMENT IS PRECLUSIVE.

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[4] *Calland* and *NGM Ins. Co.* are unpublished decisions by the District Court that are not directly involved in this case thus they are not appropriately cited or relied upon in the first place. Rule 268, SCACR (d)(2).

[5] *Baird*, like *Calland and NGM*, is unpublished and has no precedential value. It's also not appropriately cited or relied upon in this case according to Rule 268, SCACR (d)(2).

The circuit court also rejected Aerotek's claim for attorney's fees and costs because Aerotek failed to authenticate its fee-shifting agreement. (R. p. 3). The trial judge reasoned that the contract was never introduced as evidence and even though it was attached to an earlier memorandum in support of summary judgment, there was not an authenticating affidavit. (*Id.*) The court concluded that Aerotek had the burden to authenticate its fee-shifting contract once Ms. Gibbons challenged the authenticity of the electronic agreement in her affidavit and that Aerotek failed to carry that burden. (*Id.*).

"South Carolina cases prior to the enactment of the Uniform Commercial Code and the Uniform Commercial Code as enacted in South Carolina clearly hold 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." *Pee Dee Prod. Credit Ass'n v. Joye*, 284 S.C. 371, 373, 326 S.E.2d 650, 652 (1984), *citing Citizens Bank of Darlington v. McDonald*, 202 S.C. 244, 24 S.E.2d 369 (1943).). Ms. Gibbons swore in her affidavit before the trial court that she had no memory of signing Aerotek's electronic fee-shifting agreement. (R. p. 169, ¶¶ 4-6, 8). Aerotek took no steps to establish the authenticity of its electronic fee-shifting agreement in response.

Aerotek claims that it "authenticated" its fee-shifting contract because it attached the document to its memorandum for summary judgment for a separate purpose. (R. p. 39).[6] Affixing a document to a summary judgment motion, for a separate purpose than is raised here, does not amount to authentication. *See, Deep Keel, LLC v. Atlantic Private Equity Group, LLC,* 413 S.C. 58, 64, 773 S.E.2d 607, 610 (Ct. App. 2015) citing *United States v. Hassan,* 742 F.3d 104, 133 (4th Cir. 2014)(""The burden to authenticate ... is not high' and requires only that the proponent 'offer [] a satisfactory foundation

[6] Ironically enough, Aerotek successfully sought to keep a critical contract out of evidence at trial that it also attached to its memorandum in support of summary judgment on authentication grounds. (*See*, R pp. 37-38).

from which the jury could reasonably find that the evidence is authentic."'); and *State v. Green,* 427 S.C. 223, 230, 830 S.E.2d 711, 714 (Ct. App. 2019) ("The trial judge acts as the gatekeeper, and a party may open the gate by laying a foundation from which **a reasonable juror** could find the evidence is what the party claims" and "Once the trial court determines the prima facie showing has been met, the evidence is admitted and **the jury decides whether to accept the evidence as genuine** and, if so, what weight it carries."). The fee-shifting agreement was never introduced at trial, and no foundation was otherwise laid that Ms. Gibbons electronically signed it.

Aerotek now makes a new argument that Ms. Gibbons testified that the agreement bore her signature (she did not) and that an unspecified affidavit of an HR Manager it proffered at the summary judgement stage authenticated the fee-shifting agreement (it does not). This is a brand-new argument on both fronts and is not preserved for appellate review. *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 372, 628 S.E.2d 902, 919 (Ct. App. 2006) ("In order for an issue to be properly preserved for appeal, it must have been both raised to and ruled upon by the trial court."). Nevertheless, Ms. Gibbons deposition testimony (not raised at the hearing below) simply does not say what Aerotek claims it says. On the two pages cited by Aerotek, Aerotek's lawyer claims in his questioning that the agreement bears Ms. Gibbons' electronic signature, but he never asks Ms. Gibbons if she remembers the document or electronically signing it. (R. pp. 61-62, 17:4-18:25). Next, the HR Manager's affidavit (not raised at the hearing below) does not establish that the affiant knows anything about the e-signature or is able to verify that it belongs to Ms. Gibbons.[7]

[7] Typically, this is done through electronic logs, IP addresses, or an IT or HR employee's affidavit based on knowledge of their companies' intranet and network mechanisms. *See, Gordon v. TBC Retail Grp., Inc.*, No. 2:14-CV-03365-DCN, 2016 WL 4247738, at *7 (D.S.C. Aug. 11, 2016) (Finding authentication was made where an HR employee swore an affidavit stating that an arbitration agreement was signed through an employee-only portal, using a specific employee number, with screenshots saved which detailed the process.). This unpublished district court case is used based on the lack of governing authority on point.

Aerotek next incorrectly challenges the nature of Ms. Gibbons' denial of the affidavit based on *J.B. Colt Co. v. Robinson,* 137 S.C. 224, 135 S.E. 312 (1926) and *Gadberry v. Rental Servs. Corp.,* No. 09-3327, 2011 WL 766991 (D.S.C. 2011). (Brief of Appellant p. 12). In those cases, in contradiction to a statement by the alleged signatory that they did not remember a contract, the party asserting the contract provided affirmative evidence satisfying the low burden of authenticity. *Id.* The affirmative evidence included expert testimony, admissions that the alleged signing party recognized her own handwriting on the document, and testimony from eyewitnesses to the signings. *Id.* This case is not comparable. No such evidence has been proffered by Aerotek nor was any such evidence provided to the trial court.[8]

Last, Aerotek claims that the trial court raised the issue of authentication *sua sponte* and that it is entitled to another chance to establish authentication as a result. Yet, Ms. Gibbons' affidavit denying the authenticity of the fee-shifting agreement was filed on March 6, 2020. (R. pp. 169-171). The hearing was not held until April 27, 2020. Indeed, Aerotek filed a 13-page reply memorandum on April 24, 2020 that acknowledged that Ms. Gibbons had denied recollection of the fee-shifting agreement but never attempted to authenticate the agreement in response. (R. pp. 237-238). Aerotek had a fair opportunity to attempt to authenticate its fee-shifting agreement before the trial court, but it failed to do so. It is not entitled to a second bite at the apple.

Aerotek's final argument is also unpreserved. *Greenwood Dev. Corp.*, 628 S.E.2d 902, 919 ("Error preservation principles are intended to enable the trial court to rule after it has considered all relevant facts, law, and arguments."). Assuming arguendo that Aerotek could not have raised this argument at or before the hearing, Aerotek filed no motion to reconsider. Rule 59, SCRCP. Aerotek could have and should have raised it in a motion to reconsider. *Anderson Cty. v. Preston,* 427 S.C. 529, 541, 831

[8] As with the arguments about Ms. Gibbons deposition testimony and the HR affidavit, this argument was not raised to the trial court and is not preserved.

S.E.2d 911, 917 (2019) ("Rule 59(e) motion was the proper means to raise an argument that was not raised earlier that first became relevant in response to the initial judgment on appeal); *Thornton v. Thornton*, 428 S.C. 460, 476, 836 S.E.2d 351, 359 (Ct. App. 2019) ("However, Wife neither raised these arguments to the family court at the hearing nor in her Rule 59(e), SCRCP, motion. Thus, we find these arguments are not preserved for this court's review.").

Aerotek did not authenticate its fee-shifting agreement and the trial judge properly determined that Aerotek's failure to authenticate was fatal. Aerotek's several new arguments to the contrary are neither preserved nor persuasive.

III. ADDITIONAL SUSTAINING GROUNDS EXIST FOR THE COURT TO AFFIRM THE LOWER COURT'S RULING.

Ms. Gibbons raises five additional sustaining grounds, raised below, upon which this Court can affirm the Lower Court's decision. Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision, or judgment upon any ground(s) appearing in the Record on Appeal.). Each of the following arguments were specifically made to the circuit court and were acknowledged by the circuit court in its Order. (R. pp. 153-167).

A. The fee-shifting agreement is not supported by actual notice.

"The necessary elements of a contract are an offer, acceptance, and valuable consideration. *S. Glass & Plastics Co. v. Kemper*, 399 S.C. 483, 491, 732 S.E.2d 205, 209 (Ct. App. 2012). A party cannot conceivably ascend to the terms of an adhesion contract they do not know about. Mutual assent is necessary to establish a valid offer and acceptance. ("Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.") *Electro-Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter*, 357 S.C. 363, 369, 593 S.E.2d 170, 173 (Ct. App. 2004); *qouting*, Restatement (Second) of Contracts § 50 (1981); *see also*, *W.E. Gilbert & Assocs. v. S.C. Nat. Bank*, 285 S.C. 421, 423, 330 S.E.2d 307, 309 (Ct. App. 1985) ("Mutual assent to all the essential terms of the agreement is necessary to the formation of a contract."); *Vessell v. DPS*

Associates of Charleston, Inc., 148 F.3d 407, 410 (4th Cir. 1998). (The formation of a binding contract requires "the parties [to] have a meeting of the minds with regard 'to all essential and material terms of the agreement.'").

In the at-will employment context, actual notice is required to alter the terms of an ordinary employment relationship. *See, Reese v. Commercial Credit Corp.*, 955 F. Supp. 567, 570 (D.S.C. 1997) ("It is not too much to ask an employer to provide actual notice to its employees before significantly restricting rights created by decades of state and federal legislation."). The law, to modify even a unilateral employment contract, imposes a "reasonable notice requirement for modification [that] requires actual notice to the employee." *Fleming v. Borden, Inc.*, 316 S.C. 452, 463, 450 S.E.2d 589, 596 (1994); *see also, Fleming*, 316 S.C. 452, 463, 450 S.E.2d at 596 ("Whether the employer has provided actual notice of a modification of the employment contract created by an employee handbook in most cases will be for the jury to determine.").

Actual notice can be express or implied. *Strother v. Lexington County Recreation Com'n*, 332 S.C. 54, 63, 504 S.E.2d 117, 122 (S.C. 1998). Express actual notice has been found in employment cases when plaintiffs have received, read, understood, and signed new agreements. *See, Shelton v. Oscar Mayer Foods Corp.*, 319 S.C. 81, 89-90, 459 S.E.2d 851, 856-57 (S.C. Ct. App. 1995). However, the South Carolina Supreme Court has declined to find actual notice where "there [wa]s no evidence that [the plaintiff] had read and understood" an updated handbook. *Id.* 319 S.C. at 90. Actual notice can also be implied through an act, such as attending a meeting, personally disseminating information to others, or filing a claim through mediation. *See, Hightower v. GMRI, Inc.*, 272 F.3d 239, 242 (4th Cir. 2001) (applying North Carolina law).

There is no evidence that Aerotek gave Ms. Gibbons actual notice of the fee-shifting contract that it disguised as "on boarding paperwork." In fact, the evidence shows the opposite. Ms. Gibbons has testified that she has "no contemporaneous memory of receiving or reviewing [the loser-pays

contract] in any form or fashion." (R. p. 169, ¶ 5). When Ms. Gibbons received an email from Aerotek with instructions to complete the purported contract, the email did not mention the loser-pays provision, other seriously restrictive contractual terms, that Respondent could or should consult with a lawyer about the agreement or that Respondent had the right to opt out of the agreement. (R. p. 170, ¶ 11); (R. pp. 176-177). Instead, the email referred to the fee-shifting agreement as "on-boarding paperwork." This hardly amounts to a sufficient level of actual notice to establish the base elements of an enforceable contract.

B. This adhesion agreement, wherein a multi-national staffing agency seeks attorney's fees and costs from a wageworker, is so one-sided and oppressive that it is unconscionable.

The fee-shifting contract asserted here is an adhesion contract. *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 26–27, 644 S.E.2d 663, 669 (2007) ("An adhesion contract is a standard form contract offered on a "take-it-or-leave-it" basis with terms that are not negotiable."). "Adhesion contracts [] are not per se unconscionable; [] finding an adhesion contract is merely the beginning point in the analysis." *Id.*

The next step in the analysis, after identifying an adhesion contract, is to determine whether this contract is so one-sided or oppressive as to be deemed procedurally or substantively unconscionable. *Id.* at 27, 644 S.E.2d at 670 ("Moreover, regardless of the general legal presumptions that a party to a contract has read and understood the contract's terms, we also find it necessary to consider the otherwise inconspicuous nature of the arbitration clause in light of its consequences.").

The court in *Herron v. Century BMW* laid down a variety of factors to be considered in an unconscionability analysis. *Herron v. Century BMW,* 137 S.C. 224, 693 S.E.2d 394 (S.C. 2010). The *Herron* Court stated:

> In determining whether there is an absence of a meaningful choice, as would support determination that contract is unconscionable, courts consider the relative disparity in the parties' bargaining power, the parties' relative sophistication, the nature of the injuries suffered by the

> plaintiff, whether the plaintiff is a substantial business concern, whether there is an element of surprise in the inclusion of the challenged clause, and the conspicuousness of the clause.

Id. The factors laid out in *Herron*, are present in this case. Respondent in this case had no meaningful choice, as she was instructed by Appellant that her employment was contingent upon signing the alleged contract within forty-eight hours of receipt. (R. p. 170, ¶ 11); (R. pp. 176-177). Furthermore, Ms. Gibbons, a $12.00 per hour worker, has a massive disadvantage in bargaining power in comparison to her corporate-entity employer. (R. pp. 184-186). The clause, buried in the middle of 21 enumerated paragraphs in uniform type face, is not conspicuous. (Id.). Perhaps most compelling, its obvious that Ms. Gibbons (hired to work at $12.00 per hour) would never be able to pay off Aerotek's attorney fees.

That inability to pay amounts can demonstrate unconscionability and is supported by similar decisions in other jurisdictions. The third circuit has implied that "loser pays" agreements in the employment context are outright unenforceable:

> Whether a loser pays provision is unconscionable turns on an individual assessment of ability to pay. *See Parilla v. LAP Worldwide Services, VI, Inc.,* 368 F.3d 269, 283-84 (3d Cir.2004). Although Hall has submitted evidence of the cost of arbitration, which Divi Casino has not disputed, she has not submitted evidence of what her expenses were at the time that she entered into the Hourly Employee Agreement. **Notwithstanding this paucity of evidence, the Court finds that the loser pays provision would deter Hall, with a pay rate of $8.00 per hour, from pursuing a meritorious claim for fear of being strapped with an unmanageable financial burden.** See *Alexander v. Anthony Intern., L.P.,* 341 F.3d 256, 269 (3d Cir.2003). 'Simply the prospect that the employee may have to pay the entire amount of the arbitrator's fees and expenses may serve to chill her willingness to bring a claim.' *Parilla,* 368 F.3d at 284. Therefore, the loser pays provision is also substantively unconscionable.

Hall v. Treasure Bay Virgin Corp., No. CIV. 2005/0170, 2009 WL 689626, at *1 (D.V.I. 2009), *aff'd sub nom. Hall v. Treasure Bay Virgin Islands Corp.*, 371 F. App'x 311 (3d Cir. 2010); *Parilla v. LAP Worldwide Servs., VI, Inc.,* 368 F.3d 269, 285 (3d Cir. 2004) ("We therefore conclude that, as long as Parilla carries

her burden to show an inability to pay the anticipated arbitral costs, the "loser pays" provision is just as unreasonably favorable to Appellants as would be a "fee splitting" provision.").

Ms. Gibbons, at $12.00 per hour, would have to work for Aerotek for 8.5 years (17,651.3 hours) to pay Aerotek the "reasonable" fees and costs they seek. (R. pp. 184-186). This agreement if enforced would clearly "deter [Gibbons and her peers], with a pay rate of [$12.00] per hour, from pursuing a meritorious claim for fear of being strapped with an unmanageable financial burden." *Hall,* at *3. Thus, even if a contract was formed, Aerotek's asserted contract must be deemed unenforceable based on unconscionability.

C. This agreement is not supported by consideration since it was a "conditional offer" of at-will employment, and it was "co-extensive with" the whims of a third party.

Ms. Gibbons did not even get at-will employment for allegedly electronically signing the fee-shifting contract at issue. *See, Riedman Corp. v. Jarosh*, 290 S.C. 252, 253, 349 S.E.2d 404, 405 (1986) (At-will employment sufficient to support a noncompete agreement); *but see, Poole v. Incentives Unlimited, Inc.*, 338 S.C. 271, 272, 525 S.E.2d 898, 899 (Ct. App. 1999), *aff'd*, 345 S.C. 378, 548 S.E.2d 207 (2001) (Continued at-will employment not sufficient to support a noncompete agreement). Here, Ms. Gibbons was given a "conditional offer" of "co-extensive" employment. (R. pp. 184-186). That means that the asserted contract did not guarantee her the commencement of employment in the first place, as starting and continuing employment, according to the contract's language, was entirely contingent on the whims of Schneider Electric, a third party; this promise then was illusory. *See, Poole*, 338 S.C. at 275, 525 S.E.2d at 900 ("The promise of continued employment was illusory because even though Poole signed the covenant, Incentives retained the right to discharge her at any time."); (R. pp. 184-

186). The illusory offer to Ms. Gibbons of "contingent employment" does amount to sufficient consideration for Ms. Gibbons to give up the grave rights at issue.[9]

D. Equitable Defenses of Waiver and Laches Preclude Appellant's Claim for Attorney Fees.

As noted above, Aerotek waived its contractual claim to attorney's fees and costs when it failed to plead the existence of the fee-shifting contract in its Answer. *Provident Life and Accident Ins. Co. v. Driver*, 317 S.C. 471, 451 S.E.2d 924, 928 (Ct. App. 1994). ("Waiver is the voluntary and intentional relinquishment of a known right."). In addition to failing to plead, Aerotek noticeably omitted discussion about the existence of this fee-shifting agreement throughout the course of litigation. (*See*, R. pp. 179-182). This Court can and should infer from Aerotek's omission of any discussion about its purported fee-shifting agreement until after it received a directed verdict amounts to an implied waiver. *Lyles v. BMI, Inc.*, 292 S.C. 153, 158-59, 355 S.E.2d 282, 285 (Ct. App. 1987) ("An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable."). The doctrine of laches applies for the same reason. Laches is an affirmative defense and must be pled. *Emery v. Smith* 361 S.C. 207, 603 S.E.2d 598 (Ct. App. 2004). "Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights." *Id.*, 603 S.E.2d at 602. In other words, laches is neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence to do what in law

[9] Forecasting, Aerotek may respond that Ms. Gibbons gained the prospect of fee-splitting in her favor and that amounts valid consideration. This suspected assertion overlooks the grave financial imbalance of either side to pay attorney fees and the true exchange of risk that occurred. Furthermore, many employment law statutes already grant a successful employee (but not a successful employer) attorney's fees; again showing Ms. Gibbons got very little but gave up so much.

should have been done. *See, Paine Gayle Properties, LLC v. CSX Transp.*, 400 S.C. 568, 587-88, 735 S.E.2d 528, 538-39 (Ct. App. 2012). Aerotek had plenty of opportunity to raise its fee-shifting agreement but did not do so. Allowing Aerotek to raise the fee-shifting contract now would cause detrimental harm to Ms. Gibbons that is not warranted based on Aerotek's behavior in this litigation.

"Courts have the inherent power to do all things reasonably necessary to ensure that just results are reached to the fullest extent possible". *Ex parte Dibble*, 279 S.C. 592, 595, 310 S.E.2d 440, 442 (Ct. App. 1983). This Court, applying the equitable doctrines of laches and waiver to ensure a just result, ought to reject Aerotek's claim for fees and costs.

E. Appellant's request for $211,815.60 in attorney's fees and costs in a case where Appellant faced $24,960.00 "maximum" in liability is patently unreasonable.

Aerotek is seeking $211,815.60 in a case where the total liability at issue was $24,960.00. (*See,* R. pp. 179-182).

The amount of fees and costs sought in this case does not pass the straight-face test. The factors to be considered in determining the reasonableness of attorneys' fees are:

1. The nature, extent and difficulty of the legal services rendered;
2. The time and labor necessarily devoted to the case;
3. The professional standing of counsel;
4. The contingency of compensation;
5. The fee customarily charged in the locality for similar legal services; and
6. The beneficial results obtained.

Dedes v. Strickland, 307 S.C. 155, 161, 414 S.E.2d 134, 137 (1992). Aerotek loses support on factors 1, 2, and 6.

Further, from the outset, Aerotek inappropriately seeks fees and costs on both the Plaintiff's statutory and contract claims even though they stipulated to the dismissal of the contract claim with each side to "bear its own costs and fees." (R. pp. 98-100); (R. pp. 139-142); (R. pp. 144-149); (R. pp. 26-29). This means substantial cuts to the $211,815.60 sought would obviously need to be made.

This was a simple case. There are only three appellate decisions that mention S.C. Code Ann. § 41-1-70. *Connelly v. Wometco Enterprises, Inc.*, 314 S.C. 188, 442 S.E.2d 204 (Ct. App. 1994); *Patterson,* 295 S.C. at 368, S.E.2d 215; *Wallace v. Milliken & Co.*, 300 S.C. 553, 389 S.E.2d 448 (Ct. App. 1990), *aff'd as modified,* 305 S.C. 118, 406 S.E.2d 358 (1991). Less than 600 total documents were produced in this case.[10] Only one person was deposed, and only one dispositive motion was filed.

Aerotek used nine lawyers to run up a $211,815.60 bill against a maximum of $25,000.00 in liability. (Id.). Appellant alleges to have cumulatively spent 527.5 hours of work from attorneys on this straightforward case, or, in other terms, over three straight months of full-time work on this case. (Id.). Aerotek's approach is its own problem, not Ms. Gibbons'.

Spending $211,815.60 on a $24,960 claim is ridiculous. Aerotek should not be rewarded for overkill and waste.

CONCLUSION

The Circuit Court's Order denying $211,815.60 in costs and fees to Appellant should be affirmed based on the several grounds raised above.

Respectfully Submitted,

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[10] Yet, Aerotek seeks $2,250.00 for document storage. (R. pp. 150-152).

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.,..... Appellants.

CERTIFICATION OF COUNSEL

I, the undersigned attorney of Cromer Babb Porter & Hicks, LLC, certify that Respondent's Final Brief complies with Rule 211(b), SCACR.

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