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**Nov 23 2021**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Maite Murphy, Circuit Court Judge

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Appellate Case No. 2021-000501  
Case No. 2017-CP-10-5493

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Shem Creek Development Group, LLC,..... Respondent,

v.

The Town of Mount Pleasant, South Carolina,..... Appellant.

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**BRIEF OF APPELLANT**

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ANDREW F. LINDEMANN  
LINDEMANN & DAVIS, P.A.  
5 Calendar Court, Suite 202  
Post Office Box 6923  
Columbia, South Carolina 29260  
(803) 881-8920

DAVID PAGLIARINI  
Corporation Counsel  
Town of Mount Pleasant  
100 Ann Edwards Lane  
Mount Pleasant, South Carolina 29465  
(843) 849-2020

*Counsel for Appellant Town of Mount Pleasant*

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## STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court err in its refusal to rule that the court was divested of jurisdiction to consider or enter a judgment on the request for attorney's fees where an appeal was already pending in the Court of Appeals?
  
- II. Did the trial court err in *sua sponte* "deferring" a ruling on the Respondent's Motion to Vacate or Otherwise Alter or Amend Order Awarding Plaintiff Attorney's Fees and Costs without also vacating the attorney's fees judgment that was already enrolled as a judgment and accruing post-judgment interest?

## STATEMENT OF THE CASE

This is a breach of contract action. The Respondent Shem Creek Development Group, LLC (“SCDG”) brought an action against the Appellant Town of Mount Pleasant (“Town”) alleging state law claims for breach of contract and quantum meruit/unjust enrichment.<sup>1</sup> The contract claim focused on a Parking License Agreement (“PLA”) that was entered between SCDG and the Town on October 17, 2013. (R. 206-219). The PLA involved a project “consisting of a multi-level structured parking garage, comprised of 276 total parking spaces, and a proposed office complex” to be built on Coleman Boulevard in the Shem Creek area of Mount Pleasant. (R. 207). The license agreement involved 132 of the 276 total parking spaces. (R. 207).

On June 23, 2016, before the project was built, SCDG terminated the PLA and sued for breach of contract. SCDG alleged that the Town was in breach of the PLA by anticipatorily refusing to pay the first year’s rent into escrow, by refusing to provide an estoppel certificate, and by violating the implied covenant of good faith and fair dealing by taking actions to interfere with SCDG’s performance under the agreement. SCDG alleged, among others, that the Town Council improperly enacted amendments to the zoning ordinances and refused to agree to an amendment of the PLA after SCDG realized that it could not provide the promised number of parking spaces.

After discovery, the case was tried non-jury by Circuit Court Judge Maite Murphy from February 3-6, 2020. On July 13, 2020, the trial court issued a Final Order entering judgment in favor of SCDG on the breach of contract action in the amount of \$2,604,316.00. (R. 43). In that Final Order, the trial court cited Section 6.01 of the PLA which states: “Both parties ... agree

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<sup>1</sup> The quantum meruit/unjust enrichment was not pursued at trial. (R. 21).

that the prevailing party in any dispute shall be entitled to an award of costs and attorney's fees, including the cost of trial and any appeals." (R. 211). Relying on that provision, the trial court found that SCDG qualifies as a "prevailing party" and ordered that it is entitled to an award of attorney's fees and costs. (R. 42-43).

The Town filed post-trial motions, including a motion for new trial absolute and a motion reconsider, alter, or amend under Rule 52(b). (R. 113-130). Those motions were denied by order filed September 17, 2020. (R. 51-64).

The Town thereafter filed a timely Notice of Appeal on October 16, 2020. That appeal was designated as Appellate Case Number 2020-001387. (R. 220-222).

Subsequent thereto, on January 11, 2021, the trial court issued an order awarding attorney's fees and costs in the amount of 298,965.22, which was enrolled as a judgment on that same date. (R. 66-74). On January 21, 2021, the Town filed a Motion to Vacate or Otherwise Alter or Amend Order Awarding Plaintiff Attorney's Fees and Costs which raised several issues including the fact that the trial court had been divested of jurisdiction at the time the January 11, 2021 order was issued. That motion specifically requested that the judgment in the amount of 298,965.22 be vacated. (R. 187-190). Thereafter, on April 12, 2021, the trial court issued a form order citing to Rule 54(d), SCRCP, and *sua sponte* "deferring" any ruling on the Town's Motion to Vacate or Otherwise Alter or Amend Order "until the appeal of this case is complete." (R. 75-77). The form order did not, however, include a vacatur of the award of attorney's fees and costs in the amount of 298,965.22, which remained enrolled as a judgment and accruing post-judgment interest despite the trial court deferring from making a final ruling on the attorney's fees award.

The Town filed a timely Notice of Appeal on May 12, 2021. That appeal was designated as Appellate Case Number 2021-000501. (R. 223-224).

## **STANDARD OF REVIEW**

The standard of review for questions of law is *de novo*. The appellate court “may reverse where the decision is affected by any error of law.” *Murphy v. Owens Corning*, 393 S.C. 77, 710 S.E.2d 454, 457 (Ct. App. 2011). The appellate courts are “free to decide matters of law with no particular deference to the fact finder.” *Id.*

In *Chew v. Newsome Chevrolet, Inc.*, 315 S.C. 102, 431 S.E.2d 631 (Ct. App. 1993), this Court explained that “[t]he question of subject matter jurisdiction is a question of law for the court.” 431 S.E.2d at 631. This Court reaffirmed the long-standing principle that “every court has the power and duty to determine whether it has jurisdiction which includes the power to decide all questions, whether of law or fact, the decision of which is necessary to determine the question of jurisdiction.” 431 S.E.2d at 632.

## ARGUMENTS

**I. The trial court erred in its refusal to rule that the court was divested of jurisdiction to consider or enter a judgment on the request for attorney’s fees where an appeal was already pending in the Court of Appeals.**

On September 17, 2020, the trial court issued its Order Denying Defendant’s Motions for New Trial and to Reconsider, Alter or Amend Order. Thereafter, on October 16, 2020, the Appellant Town of Mount Pleasant filed a timely notice of appeal with this Court, and that appeal remains pending. Importantly, that appeal, bearing Appellate Case Number 2020-001387, was pending at the time the trial court issued its Order Awarding Plaintiff Attorney’s Fees and Costs on January 11, 2021. Therefore, the Order Awarding Plaintiff Attorney’s Fees and Costs was issued by the trial court in the absence of jurisdiction.

As our Supreme Court has held, “the service of a notice of appeal divests the trial court of jurisdiction over matters affected by the appeal.” *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 787 S.E.2d 485, 493 (2016). Rule 241(a), SCACR, also provides:

*As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court. The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.*

Rule 241(a), SCACR.

In this case, SCDG’s entitlement to the recovery of attorney’s fees and costs under Section 6.01 of the PLA is clearly affected by the issues on appeal. The Town contends on appeal that the trial court erred in entering judgment in favor of SCDG and in finding that SCDG

is a “prevailing party” under Section 6.01. If the Town is successful on appeal, the judgment will be reversed. In that event, SCDG will not qualify as a “prevailing party” under Section 6.01 and will not be entitled to any award of attorney’s fees and costs. Instead, the Town would be the “prevailing party” and entitled to the recovery of its attorney’s fees and costs.

Accordingly, the trial court’s ruling that SCDG qualifies as a “prevailing party” under the PLA is a ruling that is currently stayed. That ruling was stayed as of the filing of the Town’s notice of appeal on October 16, 2020. Because that ruling is stayed, and is subject to reversal on appeal, the trial court lacked jurisdiction to proceed with an award of attorney’s fees which is necessarily premised on that stayed ruling. Given the absence of jurisdiction when entered, the Order Awarding Plaintiff Attorney’s Fees and Costs should be vacated.

In the court below, SCDG argued that South Carolina law allows a circuit court to retain jurisdiction after a notice of appeal is filed in order to adjudicate a motion for attorney’s fees and costs. SCDG insisted that an award of attorney’s fees and costs is not a matter affected by the appeal. As for state law authorities, SCDG cited only to the case of *Jackson v. Speed*, 326 S.C. 289, 486 S.E.2d 750 (1997), which is inapposite. In *Jackson*, the Supreme Court found that the circuit court’s ruling on a motion for attorney’s fees did not affect the appeal because the appellant had not appealed “the propriety of awarding attorney’s fees.” 486 S.E.2d at 761. The present case is clearly different. As mentioned above, in its pending appeal in Appellate Case Number 2020-001387, the Town has asked this Court to reverse the trial court’s finding that SCDG qualifies as a “prevailing party” and is entitled to an award of attorney’s fees and costs. Thus, unlike in *Jackson*, SCDG’s entitlement to attorney’s fees and specifically “prevailing party” status under the PLA is most certainly at issue on appeal. That alone distinguishes the *Jackson* case.

In sum, the award of attorney’s fees was made and enrolled as a judgment long after the appeal bearing Appellate Case Number 2020-001387 was filed. That divested the trial court of jurisdiction over SCDG’s attorney’s fees request, and the judgment in the amount of \$298,965.22 in attorney’s fees and costs was entered in the absence of jurisdiction. That judgment must be vacated.

**II. The trial court erred in *sua sponte* “deferring” a ruling on the Respondent’s Motion to Vacate or Otherwise Alter or Amend Order Awarding Plaintiff Attorney’s Fees and Costs without also vacating the attorney’s fees judgment that was already enrolled as a judgment and accruing post-judgment interest.**

The trial court nonetheless refused to rule on the jurisdictional issue.<sup>2</sup> By form order filed April 12, 2021, the trial court, citing to Rule 54(d), SCRCF, *sua sponte* chose to defer ruling on the Town’s Motion to Vacate or Otherwise Alter or Amend Order Awarding Plaintiff Attorney’s Fees and Costs until after the pending appeal is fully adjudicated. (R. 75-77). The trial court, however, lacks the authority to defer ruling on a Rule 52(b) or Rule 59(e) motion *after* the judgment has already been entered and is thus accruing post-judgment interest.

Contrary to the trial court’s ruling, Rule 54(d) did not grant the trial court the authority to defer ruling on the Town’s Motion to Vacate or Otherwise Alter or Amend Order filed January 21, 2021. Rule 54(d) states, in pertinent part:

*Upon notice that the matter has been appealed, the clerk may delay the taxation of costs until the appeal is completed. A party who prevails for the first time on appeal may file a motion for costs, as provided herein, within 10 days of written notice of the*

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<sup>2</sup> “Lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised *sua sponte* by the court.” *Lake v. Reeder Construction Co.*, 330 S.C. 242, 498 S.E.2d 650, 653 (Ct. App. 1998). *See also, Eaddy v. Eaddy*, 283 S.C. 582, 324 S.E.2d 70, 72 (1984) (“subject matter jurisdiction ... may be raised at any stage of the proceeding”).

entry of the final judgment after appeal. After an appeal, the clerk shall include the costs incurred in the appeal as taxable costs as provided in Rule 58(b). Costs may be taxed by the clerk on one day's notice. On motion served within 10 days after receipt of notice, the action of the clerk may be reviewed by the court.

Rule 54(d), SCRC. (Emphasis added). By its explicit terms, Rule 54(d) authorizes the clerk of court – not the trial court – to defer or delay the taxation of costs while an appeal is pending. Rule 54(d) does not bestow that same authority or discretion on the trial court. In fact, under the process created by Rule 54(d), the trial court does not even get involved in the process of awarding costs except where by motion a party seeks the review of the clerk's taxation of costs by the trial court. Thus, if or when the trial court is involved in the process, costs have already been awarded and the decision whether or not to delay or defer has already been made by the clerk of court.

Moreover, Rule 54(d) has no application to an award of attorney's fees under the circumstances presented by the case at bar. The South Carolina version of Rule 54(d) addresses "costs" and not "attorney's fees." South Carolina law has generally held that "costs and disbursements [under Rule 54(d)] do not, however, include attorney fees." *Black v. Roche Biomedical Laboratories*, 315 S.C. 223, 433 S.E.2d 21, 24 (Ct. App. 1993). The original Rule 54, as adopted in 1985, did not include a subsection (e) or an equivalent provision setting forth a list of taxable costs. Instead, the original Rule 54 was intended to follow existing statutory law for determining eligible costs for taxation. That changed in 1993, when Rule 54 was amended to include, in part, subsection (e). However, subsection (e) only mentions expressly attorney's fees awarded as a court-ordered sanction, although the subtitle includes the terms "costs authorized by statute." Yet, subsection (e) has no applicability to attorney's fees that are not awarded as a sanction or even on a statutory basis. The attorney's fees awarded in the case at bar are pursuant

to a *contractual provision*, and clearly that does not fall within the scope of “taxable costs” under Rule 54. Therefore, for that additional reason, the trial court erred in deferring a ruling on the Town’s Motion to Vacate or Otherwise Alter or Amend Order filed January 21, 2021.

Nonetheless, the Supreme Court or this Court may ultimately conclude that a trial court has the inherent authority to defer an award of attorney’s fees and costs until the appeal is complete and subject matter jurisdiction is returned by the issuance of a remittitur. In the interests of fairness and justice, however, such a “deferral” of an award of attorney’s fees would require that the status quo be maintained, meaning that no judgment be entered as to the attorney’s fees before or at the time the “deferral” is made. In this case, the trial court had already entered a judgment in the amount of \$298,965.22 in attorney’s fees and costs when the court decided to “defer” its final ruling on the attorney’s fees award. Due to that unusual sequence of events, the attorney’s fees judgment, as mentioned above, is currently accruing post-judgment interest even though there is not a “final” decision from the trial court on the award of attorney’s fees.

Consequently, a proper “deferral” of the attorney’s fees issue, as purportedly made by the trial court in the form order filed April 12, 2021, would require a vacatur of the existing judgment pending a final decision on appeal. Otherwise, the Town is significantly prejudiced because there is not a “final ruling” on the attorney’s fees issue such that the Town is precluded from appealing and obtaining judicial review of the award of the attorney’s fees at this time. Yet, at the same time, the award which is not “final” and not yet appealable is nonetheless accruing post-judgment interest. That constitutes a clear error of law and must be corrected on appeal.

In effect, if a trial court has the inherent authority to defer a ruling on an attorney’s fees award pending an appeal over the underlying liability claims, no judgment should be enrolled

awarding attorney's fees while the appeal is pending. That is precisely the scenario in this case given the fact that the trial court *sua sponte* deferred ruling on the Town's Motion to Vacate or Otherwise Alter or Amend Order, without also vacating the judgment in the amount of \$298,965.22 which had been enrolled on January 11, 2021.

**CONCLUSION**

Based on the foregoing discussion and analysis, the Appellant Town of Mount Pleasant respectfully requests that the Court vacate or otherwise reverse the trial court's award of attorney's fees and costs and its enrollment on January 11, 2021, of a judgment in the amount of \$298,965.22 in attorney's fees and costs.

Respectfully submitted,

LINDEMANN & DAVIS, P.A.

BY: s/ Andrew F. Lindemann  
ANDREW F. LINDEMANN #13030  
5 Calendar Court, Suite 202  
Post Office Box 6923  
Columbia, South Carolina 29260  
(803) 881-8920

DAVID PAGLIARINI #8850  
Corporation Counsel  
Town of Mount Pleasant  
100 Ann Edwards Lane  
Mount Pleasant, South Carolina 29465  
(843) 849-2020

*Counsel for Appellant Town of Mount Pleasant*

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**CERTIFICATE OF COUNSEL**

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The undersigned counsel for the Appellant certifies that the Final Brief of Appellant complies with Rule 211(b), SCACR.

LINDEMANN & DAVIS, P.A.

BY: s/ Andrew F. Lindemann

ANDREW F. LINDEMANN #13030

5 Calendar Court, Suite 202

Post Office Box 6923

Columbia, South Carolina 29260

(803) 881-8920

DAVID PAGLIARINI #8850

Corporation Counsel

Town of Mount Pleasant

100 Ann Edwards Lane

Mount Pleasant, South Carolina 29465

(843) 849-2020

CLAUDIUS O. TACKETT, II #72988

CLAUDE TACKETT LAW FIRM, LLC

Post Office Box 429

Mount Pleasant, South Carolina 29465

(843) 800-1126

*Counsel for Appellant Town of Mount Pleasant*

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**CERTIFICATE OF COMPLIANCE**

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The undersigned counsel for the Appellant certifies that the Final Brief of Appellant complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

LINDEMANN & DAVIS, P.A.

BY: s/ Andrew F. Lindemann

ANDREW F. LINDEMANN #13030  
5 Calendar Court, Suite 202  
Post Office Box 6923  
Columbia, South Carolina 29260  
(803) 881-8920

DAVID PAGLIARINI #8850  
Corporation Counsel  
Town of Mount Pleasant  
100 Ann Edwards Lane  
Mount Pleasant, South Carolina 29465  
(843) 849-2020

CLAUDIUS O. TACKETT, II #72988  
CLAUDE TACKETT LAW FIRM, LLC  
Post Office Box 429  
Mount Pleasant, South Carolina 29465  
(843) 800-1126

*Counsel for Appellant Town of Mount Pleasant*

November 23, 2021