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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

W-T HOLDINGS, LLC
d/b/a WINDOW WORLD **APPELLANT**

V. **CASE NO. 2018-CA-01488**

ROBERT A. GILCHRIST **APPELLEE**

APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

MOTION FOR REHEARING
OF APPELLANT W-T HOLDINGS, LLC d/b/a WINDOW WORLD

COMES NOW, Appellant W-T Holdings, LLC d/b/a Window World ("Window World"), by and through counsel of record, pursuant to Rule 40 of the Mississippi Rules of Appellate Procedure, and moves this Court to grant rehearing of its decision handed down in this matter on December 17, 2019. In support thereof, Window World would show unto this Court the following:

ARGUMENT

This Court construes the contract to require specific evidence of Window World saying they specifically incurred the charges in Attorney Weldy's billing statement. There is no case law specifically requiring this. In Window World's Motion for Attorney's fees, they followed the case law at the time and had their attorney submit an affidavit with his billing statements. This is not fair to, on appeal, interpret the contract in this way and then to say that retroactively Window World did not satisfy this Court's interpretation.

In cases where an appellate court found that the trial court abused its discretion in awarding attorney's fees, the appellate courts have remanded to the trial court to make

appropriate findings of fact and conclusion of law to support any such award of attorney's fees. Here the court is handing Window World a double whammy by taking away its award of attorney's fees on a case it expended over 200 hours AND preventing it from offering evidence to support its fees on remand under this Court's interpretation of the contract.

1. This Court erred when it applied a *de novo* standard of review to an award of attorney's fees rather than the abuse of discretion standard.

This Court relies on *Keesler* for the proposition that issues of contract interpretation and construction are reviewed *de novo*. *Keesler Fed. Credit Union v. Saucier*, 248 So. 3d 920 (Miss.Ct. App. 2018). (Op. ¶25). In *Keesler* the trial court's judgment stated that attorney's fees were not awarded on the contract because there was no contract provision concerning attorney's fees. *Id*. However, there WAS a contract provision concerning attorney's fees. *Id*. The Court of Appeals reversed the judgment and remanded for the trial court to reconsider the demand for attorney's fees in light of the decision. *Id*. There was no award of attorney's fees to be reviewed under an abuse of discretion standard in this case; the trial court had refused to grant an award of attorney's fees.

The Court relies on *Epperson* for the proposition that issues of contract interpretation and construction are reviewed *de novo*. *Epperson v. SOUTHBank*, 93 So. 3d 10, 16 (Miss. 2012)). (Op. ¶25). In *Epperson* the language of the contract at issue did not involve attorney's fees; it involved how a bank customer could withdraw funds from a CD account. *Id*. The Court found there was no language in the contract requiring the presentation of the original CDs for withdrawal of the funds at any time, which is what the bank was requiring when it refused to allow withdrawal of the funds for that reason. *Id*. This issue was truly an issue of contract interpretation, so it was properly reviewed *de novo*. In the present case we are dealing with an

award of attorney's fees, which is properly reviewed under an abuse of discretion standard. *T. Jackson Lyons & Assocs. P.A. v. Precious T. Martin Sr. & Assocs. PLLC*, 87 So. 3d 444, 448 (¶10) (Miss. 2012) and (*Mark S. Bounds Realty Partners Inc. v. Lawrence*, 34 So. 3d 1224, 1227 (¶8) (Miss. Ct. App. 2010).

This Court relies on *Hamilton* for the proposition that attorney's fees are recoverable only to the extent they are permitted by the language of the contract. *Hamilton v. Hopkins*, 834 So. 2d 695 (Miss. 2003). (Op. ¶25). In *Hamilton* the Mississippi Supreme Court found that the trial court erred as a matter of law in awarding attorney's fees to the Hopkinses, the sellers. *Id*. The contract at issue in *Hamilton* said that, "If it becomes necessary to insure the performance of the conditions of this contract **for purchaser to initiate litigation**, then the losing party agrees to pay reasonable attorney's fees and court costs in connection therewith." *Id*. at 699. The trial court awarded attorney's fees to the Hopkinses, who were the sellers, and who initiated the litigation. *Id*. The court found that the right to payment of attorney's fees was contingent on the purchaser, Hamilton, initiating litigation. *Id*. Therefore, an award of attorney's fees to the sellers, who initiated the litigation, was not authorized by the contract, and the trial court erred as a matter of law in awarding attorney's fees to the sellers. *Id*.

The cases this court relied upon do not support reviewing an award of attorney's fees *de novo*. The above cases support a *de novo* review in only two situations: 1) where attorney's fees should have been awarded, but were not; and 2) where attorney's fees should not have been awarded, but were awarded. The case at hand involves the award of attorney's fees when attorney's fees should have been awarded. The issue is the amount of the attorney's fees which should be reviewed under an abuse of discretion standard. This court's opinion departs from

established precedent and subjects all contractual awards of attorney's fees to a new *de novo* standard of review.

2. This Court erred when it determined Window World presented no evidence it incurred the attorney's fees submitted to the County Court.

In *Lyons* the Mississippi Supreme Court found that a detailed billing statement was enough to satisfy the requirement that an award of attorney's fees must be supported by credible evidence. *T. Jackson Lyons & Assocs. P.A. v. Precious T. Martin Sr. & Assocs. PLLC*, 87 So. 3d 444, 454 (Miss. 2012). In the case at hand, detailed billing statements were submitted to the trial court. (Co. R. at 236; R.E. 31). An attorney's fee affidavit submitted with the detailed billing statements specifically says "fees charged" referring the detailed billing statements/timesheets. (Co. R. at 230; R.E. 26) The trial court, finder of fact, determined that there was substantial evidence to find that Window World incurred the awarded attorney's fees.

3. This Court further erred when it determined the contingency fee contract was the controlling factor for the award of attorney's fees.

There is no precedent for this Court to determine that the contingency contract was the controlling factor for the award of attorney's fees; in fact, the opposite is true. As the dissent noted:

> The supreme court has adopted the "lodestar" method of calculating reasonable attorney's fees: "the most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation, multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services[.]"Mauck v. Columbus Hotel Co., 741 So. 2d 259, 271 (¶36) (Miss. 1999) (quoting Hensley v. Eckerhart, 461 U.S. 424, 433 (1983)). (Op. ¶47).

And at least in the situation of considering reasonable attorney's fees when statutorily allowed, the Mississippi Supreme Court has held that a contingency fee agreement does not control the trial court's exercise of discretion. *McCain v. Memphis Hardwood Flooring Co.*, 725 So. 2d 788, 796 (¶32) (Miss. 1998), *overruled on other grounds by Stockstill v. Gammill*, 943 So. 2d 35, 49 (¶28) (Miss. 2006); *see also* 1 Jeffrey Jackson, Mary Miller & Donald Campbell, *Encyclopedia of Mississippi Law* § 8:2 n.1 (2d ed. Oct. 2019). (Op. ¶48).

WHEREFORE PREMISES CONSIDERED, Window World respectfully requests that this Court grant this Motion for Rehearing.

Respectfully submitted this 31st day of December, 2019.

W-T HOLDINGS, LLC
d/b/a Window World

By: /s/ Christopher J. Weldy
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CERTIFICATE OF SERVICE

I, Christopher J. Weldy, do hereby certify that I have this day served via MEC, a true and correct copy of the above and foregoing document to:

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This the 31st day of December, 2019.

By: /s/ Christopher J. Weldy
CHRISTOPHER J. WELDY