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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas
Maite Murphy, Circuit Court Judge

Appellate Case No. 2023-000757
Civil Action Case No. 2021-CP-18-1486

John Trenton Pendarvis ..... Respondent,

v.

L. C. Knight, in his official capacity as Dorchester County Sheriff; Mark Keel, in his official capacity as Chief of the South Carolina Law Enforcement Division; Hugh E. Weathers, in his official capacity as the South Carolina Commissioner of Agriculture; and John Doe(s), ... Defendants,

Of whom Mark Keel, in his official capacity as Chief of the South Carolina Law Enforcement Division is the Appellant Appellant.

REPLY IN SUPPORT OF MOTION FOR COSTS ON APPEAL

The Respondent, John Trenton Pendarvis, pursuant to Rule 240(4), SCACR, replies to Appellant, Mark Keel, in his official capacity as Chief of the South Carolina Law Enforcement Division's return to the Respondent's motion for costs pursuant to Rule 222(d), SCACR.

I. Respondent's motion is timely, as no notification of the issuance of remittitur was received until after December 27, 2023.

Appellant argues that Respondent's motion is untimely as Respondent's motion was not filed "within fifteen (15) days of the issuance of the remittitur." Rule 222(d), SCACR.

Respondent argues "this Court issued the remittitur to the lower court on December 14, 2023 – *not* December 27, 2023, as claimed by Respondent." Return, p.2.

This argument ignores the fact that Appellant had no notice that remittitur had been issued until **after** the December 14, 2023 remittitur was filed with the Dorchester County Court of Common Pleas on December 27, 2023.

As documented in the accompanying affidavit (**Exhibit 1**) to this reply, Respondent did not receive notice that remittitur had been issued this Court. It was not until Respondent's counsel logged in to the public index to download a copy of the December 27, 2023 filed Amended Order on discovery, believed to have occurred on January 2, 2024, that Respondent learned remittitur had been issued by this Court. Respondent filed the current motion for costs within six (6) days of learning of the issuance of the remittitur.

This Court has previously found that a request by a party for costs on appeal pursuant to Rule 222(d) SCACR is not properly before the Court if it has been made prior to the issuance of the remittitur. *See* Prince v. Beaufort Mem. Hosp., 392 S.C. 599, 611 (Ct. App. 2011) (declining to address appellant's "request for his costs on appeal as premature," because remittitur yet to be issued).

Rule 263(b) SCACR states that "the time prescribed by these Rules for performing any act except the time for serving the notice of appeal under Rules 203 and 243 may be extended or shortened by the appellate court, or by any judge or justice thereof..."

Respondent respectfully argues that it would be unfair and unjust to find that a time deadline began to run on his rights prior to Respondent being provided notice that the triggering event for accrual of time had commenced. The record reflects that Respondent promptly acted on his rights as soon as he received notice and had good cause for not acting sooner.

In the event the Court finds Respondent's motion to tax costs was untimely, Respondent would respectfully ask that the Court grant Respondent leave to file out of time or extend the time and accept the January 8, 2024 motion. To that end, Respondent is filing a motion requesting that relief pursuant to Rule 240 SCACR contemporaneously with the filing of this reply.

II. Appellant's argument that they prevailed in part ignores the fact that the relief imposed by the Supreme Court exercising the "exceptional" common law writ was necessitated by Appellant's conduct.

Appellant argues that the Court should exercise its discretion and decline to award costs because "both parties prevailed in part." Return, p.3. This argument is based on the fact that after denying Appellant's petition for certiorari "because the court of appeals correctly held the discovery order was not immediately appealable," the Supreme Court then issued a common law writ of certiorari directing the trial judge to amend the discovery order to include language adequately protecting the requested personnel files.

Appellant's argument ignores that as documented in the trial court's original order, and subsequently in Respondent's Reply in support of his motion to dismiss to this Court, Appellant never made a motion for such protection as required under the rules, nor had Appellant ever made any arguments that rose above stereotyped and conclusory statements. Reply, p.11, citing to Order, p.14-15. Appellant never requested such protection, instead objecting based on relevancy and no limitations to time or scope, and refusing to produce the files, attempting to improperly shift the burden for seeking protection onto the Respondent during the hearing before the trial court. Then, in argument to this Court, Appellant failed to inform this Court that Respondent had specifically consented during Appellant's arguments for reconsideration before the trial court to the redaction of personal identifiers and information consistent with Supreme

Court orders governing such practice when filing documents with the court to address privacy concerns. Reply, p.12.

In short, Appellant pursued an improper appeal of an unappealable interlocutory order, lost that appeal, but is now claiming to have prevailed in part by obtaining "relief" which Appellant failed to properly seek pursuant to the Rules of Civil Procedure. Put simply, Appellant's conduct was the sole reason "exceptional circumstances" existed necessitating the common law writ.

To allow Appellant to have further delayed discovery in this matter now for almost an entire year with an appeal this Court dismissed because it was not immediately appealable, and escape with no financial penalty for that delay, would only encourage similar conduct by this Appellant and others in the future.

III. Respondents award of fees and costs should not be reduced.

Appellant's arguments regarding reduction of the statutory fees and requested costs because their appeal was terminated in the "early stages" of the appellate process ignores the record. It is not as if Respondent filed his motion to dismiss and Appellant withdrew their appeal. Appellant contested the motion, filing a return to the motion to dismiss. That return necessitated a reply being filed by Respondent with this Court. Appellant then petitioned for rehearing of the order granting Respondent's motion to dismiss. Appellant then petitioned for a writ of certiorari with to the Supreme Court.

Respondent's counsel would respectfully submit to this Court that the amount of time expended by Respondent's counsel contesting this appeal prior to Appellant's petition for writ of certiorari to the Supreme Court on September 28, 2023, would vastly exceed the statutory fee of $2500 if it was being taxed at the hourly rate of $500/hour the trial court found reasonable and justified in awarding Respondent's counsel attorney fees in the order being appealed.

Respondent's counsel would also respectfully submit to this Court that the filing fee for a motion to dismiss that is granted, the granting of which is upheld by the Supreme Court in denying a writ of certiorari, is a cost that should recoverable under Rule 222(b) SCACR in those circumstances.

As such, Respondent respectfully requests that his motion to tax costs be granted.

Respectfully submitted,

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