

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III,
Master-in-Equity

Appellate Case No. 2020-001275

Westbury Park Residential Association, Inc.....Respondent,

v.

Estate at Westbury Owners Association, Inc.....Appellant.

RETURN TO RESPONDENT’S MOTION FOR COSTS

Appellant Estate at Westbury Owners Association, Inc. hereby opposes Respondent Westbury Park Residential Association, Inc.’s Motion for Costs, filed on February 21, 2024.

Appellant respectfully requests that this Court would deny Respondent’s request for costs and require each party to bear its own costs on appeal. The grounds for this motion are that costs are not allowed upon dismissal without prejudice, as here. *Johnson v. Paraplane Corp.*, 468 S.E.2d 620, 321 S.C. 316 (1996) (costs not allowed on dismissal of appeal from order denying motion for summary judgment).

Respondent moved this Court to dismiss this appeal by motion filed on October 12, 2020. This Court denied Respondent's Motion to Dismiss by Order filed November 20, 2020. The parties proceeded with briefing, with both Appellant and Respondent making substantive arguments on the merits. Although this Court ultimately dismissed the appeal, it did so in an opinion which considered the arguments of the parties and upheld "the master's grant of summary judgment finding Appellant possessed an express appurtenant easement." Order, p. 2.

This Court's dismissal is without prejudice as to the issues raised by Appellant on appeal. Order, p. 2 ("all other claims and counterclaims remain preserved and ripe for trial."). The Opinion states that the issues raised may be raised again later in the proceedings, and the Estate may pursue an appeal after final judgment. *Id.*

"Case law makes clear that a dismissal must be *with* prejudice, **and when cases have been dismissed without prejudice, costs have not been allowed.**" Jean Hoefler Toal *et al.*, *Appellate Practice in South Carolina* (3rd ed. 2016), at p. 394 (emphasis added), citing *Johnson*, 468 S.E.2d 620, 321 S.C. 316 (1996) (costs not allowed on dismissal of appeal of order denying motion for summary judgment), *Peterkin v. Brigman*, 461 S.E.2d 809, 319 S.C. 367 (1995) ("the order in this case does not prevent a judgment from being rendered in the action, and appellant can seek review of the current order in any appeal from final judgment . . . **Accordingly, this appeal is dismissed without prejudice. No costs or attorney's fees shall be assessed against either party under Rule 222, SCACR.**") (emphasis added), *Ballenger v. Bowen*, 443 S.E.2d 379, 313 S.C. 476 (1994) (dismissing

appeal of order denying summary judgment and holding “Costs . . . shall not be assessed against either party.”).

CONCLUSION

For these reasons, Appellant respectfully requests that this Court would deny Respondent’s Motion for Costs.

Respectfully submitted,

FORD WALLACE THOMSON LLC

s/Ainsley F. Tillman

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Attorneys for Appellant

Charleston, South Carolina
February 21, 2024

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PROOF OF SERVICE

I certify that on February 21, 2024 I have served the *Appellant's Return to Respondent's Motion for Costs* on Respondent Westbury Park Residential Association, Inc., by sending the same to its attorneys of record, Benjamin T. Shelton and Kathleen C. Barnes, at their email addresses of record with AIS.

Respectfully submitted,

FORD WALLACE THOMSON LLC

s/ Ainsley F. Tillman

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