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Feb 21 2024

SC Court of Appeals

IN 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 and Special Circuit Court Judge

Appellate Case No. 2020-001275

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

v.

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

RESPONDENT’S REPLY TO APPELLANT’S RETURN TO THE MOTION FOR COSTS

Respondent Westbury Park Residential Association, Inc., filed a motion for costs, and Appellant Estate at Westbury Owners Association, Inc., filed a return in opposition. The return provides no legal basis for denying the motion and, therefore, Respondent requests that the Court grant the motion for costs.

Appellant argues that “costs are not allowed upon dismissal without prejudice” (Return p. 1). That is not the law. Under Rule 222, SCACR, “Unless otherwise ordered by the appellate court or agreed by the parties, costs **shall** be taxed against the appellant when the appeal is **dismissed** or judgment on appeal is affirmed.” Rule 222(a), SCACR (emphasis added). Here, there is no appellate court order or agreement by the parties and, therefore, costs shall be taxed because the appeal is dismissed. Rule 222 does not differentiate between appeals dismissed with or without prejudice.

Appellant appears to argue that case law has altered the plain language of the rule. This argument is flawed because, in each of the three cases that Appellant cites to, the appellate court itself ruled that costs were not allowed in the opinion that dismissed the appeal. *See Johnson v. Paraplane Corp.*, 321 S.C. 316, 317, 468 S.E.2d 620 (1996) (“No costs or attorneys’ fees pursuant to Rule 222, SCACR, shall be assessed.”); *Peterkin v. Brigman*, 319 S.C. 367, 369, 461 S.E.2d 809, 810 (1995) (“No costs or attorneys fees shall be assessed against either party under Rule 222, SCACR.”); *Ballenger v. Bowen*, 313 S.C. 476, 478, 443 S.E.2d 379, 380 (1994) (“Costs under Rule 222, SCACR, shall not be assessed against any party.”). That situation falls under this clause of Rule 222(a) stating costs “shall be” assessed “[u]nless otherwise ordered by the appellate court.” Here, the Court did not include any order on costs in its opinion dismissing the appeal.

Perhaps more importantly, none of the cases cited by Appellant state that costs are not allowed when a case is dismissed “without prejudice.” They simply state that costs are not assessed in that particular case.

Finally, it is significant in this case that Respondent moved to dismiss as unappealable, and Appellant opposed that motion. This resulted in significant cost and time for Respondent to fully brief not only the issue of appealability but also the merits of the appeal. That expense was solely due to Appellant’s insistence that the case was appealable—an issue that Respondent ultimately prevailed on after much unnecessary expense and years of delay. This should weigh heavily in favor of following the plain language of Rule 222, SCACR, and awarding costs.

Respondent requests the Court grant the motion for costs.

February 21, 2024

Respectfully submitted,

s/Kathleen C. Barnes

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PROOF OF SERVICE

The undersigned certifies that a copy of the Respondent’s Reply to Appellant’s Return to the Motion for Costs has been served upon counsel for Appellant via electronic mail at the email addresses stated in the Attorney Information System as set forth below on February 21, 2024.

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