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Sep 05 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE COURT OF COMMON PLEAS
Thirteenth Judicial Circuit
Hon. R. Lawton McIntosh

Appellate Case No. 2021-000365
Civil Action No. 2019-CP-23-00998

McMillan Pazdan Smith, LLC, Respondent,

v.

Donza H. Mattison,Appellant.

RESPONDENT’S RETURN TO APPELLANT’S MOTION FOR COSTS

Pursuant to Rule 222(d), SCACR, Respondent McMillan Pazdan Smith, LLC (“MPS”) submits this Return to Appellant Donza Mattison’s Motion for Costs. Mattison seeks nearly \$5,000 in costs and fees in a lawsuit where she prevailed in only one of two related appeals, and even in the appeal she won, the Court agreed with only two of the five arguments she raised. Accordingly, and as explained more fully below, MPS respectfully requests this Court deny the Motion for Costs.

1. An award of costs is not warranted because Mattison was only partially successful on appeal. The Court is already acquainted with the history of this matter. Mattison is a former member and minority shareholder of MPS. After she left the firm, MPS offered to buy back her membership shares pursuant to the Separation Agreement she had signed. When she refused to tender her shares at the price MPS offered her pursuant to the Separation Agreement, MPS filed a

declaratory judgment action seeking a declaration that the Separation Agreement was valid and enforceable and that the price MPS had offered was correct. In response, Mattiso filed a third-party shareholder derivative claim against MPS's officers. After discovery, MPS moved for summary judgment both on its declaratory judgment claim and on Mattison's derivative claim. The trial court granted summary judgment for MPS on its declaratory judgment claim and, later, on the derivative claim.

Mattison appealed from both orders. Both appeals arose from the same underlying case, involved the same operative facts, and implicated similar questions and issues. Accordingly, after Mattison filed her appeal of the dismissal of her derivative claim, MPS wrote to the Court—with the express consent of Mattison's counsel—to inform the Court of the overlap between the two appeals and to ask the Court to combine them for oral argument before the same panel on the same day. *See* Letter of June 11, 2021 (Notice of related appeals and request for combined argument) attached as **Exhibit A**. The Court agreed to do so, and the two appeals were argued back-to-back before the same panel on December 6, 2023.

On August 7, 2024, the Court released two opinions in this matter. One affirmed the trial court's order granting summary judgment for MPS on the declaratory judgment claim. *See McMillan Pazdan Smith, LLC v. Mattison*, Op. No. 6079 (S.C. Ct. App., filed Aug. 7, 2024). The other reversed the trial court's order granting summary judgment for MPS on Mattison's derivative claim. *See McMillan Pazdan Smith, LLC v. Mattison*, Op. No. 6080 (S.C. Ct. App., filed Aug. 7, 2024).

Viewed together in the context of this case's procedural history and posture, the Court's two simultaneous opinions effectively affirmed the lower court in part and reversed the lower court in part. In such a scenario, Rule 222 contemplates that costs are not awarded as of right but only if

ordered by the appellate court. *See* Rule 222(a), SCACR (“When an appeal is affirmed or reversed in part or is vacated, costs shall be allowed only as ordered by the appellate court.”).

The Court should not order an award of costs. When, as here, an appellate court affirms in part and reverses in part, costs should not be taxed solely against the Respondent. *See* 5 Am. Jur. 2d Appellate Review § 815 (“Where a judgment is affirmed in part and reversed in part, the appellate court has discretion to apportion costs between the parties; the costs should not be taxed totally against the appellee, but may be equally divided between the parties or borne by the party incurring them.”) (citations omitted). Because Mattison prevailed only partially on appeal, costs are not warranted. The Court should deny her Motion for Costs.

2. An award of costs is not warranted because Mattison prevailed only on two of the five arguments she asserted against the declaratory judgment Order. An additional reason an award of costs is not justified is that even in the appeal that Mattison won, her success was only partial—both in terms of the issues she raised and the non-finality of the result. Mattison’s brief challenging the trial court’s order granting summary judgment on MPS’s declaratory judgment claim raised five discrete issues and asserted five separate argument headings. *See* Final Brief of Appellant, filed January 20, 2022 (appellate case no. 2021-000365). The Court, however, agreed with Mattison on only two of her arguments, one of which the Court had to resurrect by inferring an argument Mattison admittedly had not made. *See McMillan Pazdan Smith, LLC v. Mattison*, Op. No. 6080 (S.C. Ct. App., filed Aug. 7, 2024) at 9 (holding Mattison’s first argument was not preserved for appeal), 6–8 (rehabilitating Mattison’s second argument by *sua sponte* interpreting that argument as challenging the trial court’s finding that the Separation Agreement was clear and unambiguous); 8–9 (agreeing with Mattison’s third argument regarding discovery), and 9–10

(declining to rule on Mattison's fourth and fifth arguments). Mattison's seeming success on appeal was partial at best.

The incomplete nature of Mattison's partial victory is also evident from its non-finality. The case is not concluded. Rather, it has been remanded to the trial court for further proceedings. Mattison may lose again at the trial court, and if she appeals from that ruling, she may ultimately lose on appeal. The Court's ruling does not establish a final and conclusive outcome, much less a final victory for Mattison. She prevailed only partially on appeal, and her success at this intermediate stage may prove transitory.

Because Mattison prevailed in only one of the two appeals she filed in this case and because, even then, she succeeded in persuading the Court only on two of the five issues she raised in that appeal, MPS respectfully suggests this Court should deny her Motion for Costs.

NELSON MULLINS RILEY & SCARBOROUGH LLP

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Attorneys for Respondent McMillan Pazdan Smith, LLC

September 5, 2024
Greenville, South Carolina

McMillan Pazdan Smith, LLC v. Donza H. Mattison

Appellate Case No. 2021-000365

Exhibit A

to Respondent's Return to Appellant's Motion for Costs

June 11, 2021

Via electronic mail

The Honorable Jenny Abbott Kitchings
Clerk of Court
The South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RECEIVED
Jun 11 2021
SC Court of Appeals

RE: Notice of related appeals and request for combined argument
McMillan Pazdan Smith, LLC v. Donza H. Mattison
Appellate Case No. 2021-000365
Civil Action No. 2019-CP-23-00998
Our File No. 058964/01500

Dear Ms. Kitchings:

We represent McMillan Pazdan Smith, LLC (“MPS”), the Respondent in the above-referenced appeal. I write with the consent of counsel for Appellant Donza H. Mattison to alert the Court that another appeal between these parties is also pending before this Court, *McMillan Pazdan Smith, LLC v. Mattison* (Appellate Case No. 2020-001645), and to request that the two appeals be set for argument on the same day.

Both appeals arise from the same civil action and involve common facts, common parties, and some common questions. The appeals arise from different Orders, however, which relate to different claims asserted by the parties. There are no claims remaining before the trial court.

Briefing in the earlier-filed appeal (2020-001645) is ongoing. Ms. Mattison filed her Final Brief and Final Reply Brief on June 10, 2021. MPS’s Final Brief is due on June 17, 2021. No briefs have yet been filed in the later-filed appeal (2021-000365) as Ms. Mattison is awaiting delivery of the transcript.

The parties’ counsel thought it prudent to alert the Court of the relationship between the appeals. If we can provide any other information that would be of help, or if we can be of service in any other way, please do not hesitate to let us know.

Very truly yours,



Miles E. Coleman
Counsel for Respondent

CC: Samuel W. Outten, Esq.
A. Mattison Bogan, Esq.
Thomas H. Keim, Jr.
David E. Rothstein, Esq.

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McMillan Pazdan Smith, LLC,Respondent,

v.


Donza H. Mattison, Appellant.

PROOF OF SERVICE

Pursuant to Rule 262(c)(3), SCACR and Section (d)(1) of the Supreme Court’s Order dated April 24, 2024, undersigned counsel hereby certifies I have served a copy of Respondent’s Return to Appellant’s Motion for Costs on counsel of record by electronic mail (see attached sent email):

Counsel Served:

David E. Rothstein
Rothstein Law Firm, PA
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By: 
Miles E. Coleman

Attorney for Respondent

September 5, 2024
Greenville, South Carolina

Miles Coleman

From: Miles Coleman
Sent: Thursday, September 5, 2024 11:52 AM
To: drothstein@rothsteinlawfirm.com
Cc: Sam Outten; Matt Bogan; tkeim@fordharrison.com
Subject: MPS v. Mattison (no. 2021-000465) -- Return to Motion for Costs
Attachments: 2024.9.5 -- MPS v. Mattison -- MPS's Return to Motion for Costs.pdf

David, please find attached for service upon you a copy of MPS's Return to Appellant's Motion for Costs, which we'll be filing shortly with the Court of Appeals.

Miles



MILES COLEMAN PARTNER

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