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Sep 10 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas, Business Court Program

R. Lawton McIntosh, Circuit Court Judge

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

McMillan Pazdan Smith, LLC, Plaintiff-Respondent,

v.

Donza H. Mattison, Defendant-Appellant.

APPELLANT’S REPLY IN SUPPORT OF MOTION FOR COSTS

David E. Rothstein, SC Bar No. 66295
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Attorney for Appellant

Appellant, Donza H. Mattison, by and through her undersigned counsel, hereby files this Reply in Support of Motion for Costs, pursuant to Rule 222, SCACR. Despite the arguments raised in Respondent's Return to Appellant's Motion for Costs, Appellant fully prevailed on her second appeal and, therefore, should be awarded costs relating to that appeal only, which is what Appellant is seeking in her Motion for Costs.

Respondent wrongly tries to combine the two separate appeals¹ in this case into a single appeal and then argues that Appellant should not be awarded costs under Rule 222(a), SCACR, because she only achieved partial success in the entire appeal. Respondent incorrectly asserts that "Both appeals arose from the same underlying case, involved the same operative facts, and implicated similar questions and issues." (Ret., at 2). The two appeals were actually quite distinct, even though they were both set in motion by the same underlying event, viz., Appellant's dissociation as a member of the LLC. The first appeal, which involved the dismissal of Ms. Mattison's derivative action, contained different parties: Ms. Mattison brought the third-party complaint in a derivative capacity on behalf of MPS against the four largest shareholders of MPS individually; the second appeal involved the dismissal of the declaratory judgment action brought by MPS, as well as Ms. Mattison's counterclaims against MPS regarding the valuation of her ownership interests. Although some of the underlying factual allegations overlap between the

¹Respondent's Return has the two cases backwards. (Ret., at 2). The first appeal was from Judge McIntosh's decision granting summary judgment in favor of the individual Respondents on the derivative action, which order was dated September 20, 2020. The notice of appeal regarding that order was filed on April 5, 2021. The second appeal was from Judge McIntosh's decision granting summary judgment in favor of MPS on the declaratory judgment action, which order was dated February 21, 2021. The notice of appeal regarding that order was filed on April 5, 2021. The first opinion from this court filed on August 7, 2024 (Op. No. 6079) was on the derivative action appeal, which was Appellate Case No. 2020-001645. The second opinion was on the declaratory judgment appeal, which was Appellate Case No. 2021-000365.

original action and the third-party complaint, the legal issues between the two appeals do not overlap in the slightest. The first appeal involves the question of whether Ms. Mattison could fairly and adequately represent the interests of the company in a derivative action as a class of one, where she is the only member of the firm who is not also a current employee of the firm. The second appeal involved the valuation of Ms. Mattison's membership units pursuant to the language in the Severance Agreement signed upon Ms. Mattison's voluntary resignation as an employee of the firm. The only factual overlap between the two appeals is the operative language in the Severance Agreement and the underlying self-dealing transactions alleged in the derivative action, which would also be relevant to the normalization calculations in the valuation case.

Respondents previously recognized the dissimilarity of the derivative action from the declaratory judgment action when they opposed Ms. Mattison's motion to stay the remainder of the case after the first notice of appeal of the derivative action was filed. Judge McIntosh agreed with Respondent MPS's argument in opposition to the motion to stay, ruling that "Mattison may obtain complete relief on her equity claim, and on the derivative claim, even though they may proceed separately." (Order of Feb. 9, 2021, at 1) (R. p. 36).

Respondent's Return cites to a letter dated June 11, 2021, in which Respondent's counsel asked the court "to request that the two appeals be set for argument on the same day." The court did not grant actually this request, but instead originally scheduled the oral argument in the first case for November 8, 2023, and in the second case for December 6, 2023. Only when Respondents' counsel failed to show up for the first argument did the court reschedule both arguments for the same day, December 6, with Appellant's express consent as a matter of professional courtesy, even though Appellant and her counsel had traveled to the court from the Upstate and were prepared to argue the

first case on November 8, 2023. Importantly, the parties did not move to consolidate the two appeals under Rule 214, SCACR. Appellant’s counsel expressly opposed consolidation because of the dissimilarity of the issues presented in the two appeals and the likely constraints on the length of briefs and on the time for argument in a consolidated appeal. The mere facts that the two appeals were ultimately heard on the same day, by the same panel, and that the opinions were issued on the same day does not mean that the two cases were “effectively” one appeal for purposes of Rule 222(a), SCACR, as asserted by Respondent.

As the court is undoubtedly aware, Appellant filed a petition for reconsideration of the first appeal involving the derivative action, on August 22, 2024, which is currently pending. Respondent did not file a motion for reconsideration of the opinion in the second appeal, so the mandate has already issued in that appeal. If the individual Respondents ultimately prevail on the first appeal on rehearing and certiorari, they will undoubtedly seek an award of costs under Rule 222, SCACR, for the first appeal, notwithstanding the position they have argued in their Return here.

Respondent also argues that Appellant should not be awarded costs in this appeal because the court ruled in her favor on only two of the five arguments she raised on appeal. There is nothing in Rule 222 to support Respondent’s argument in this regard, nor has Respondent cited any case-law in support of its position. In any event, the court of appeals ruled in Appellant’s favor on the two main, substantive arguments presented to it: the interpretation of the language in the Severance Agreement regarding the valuation of Appellant’s membership units and the lack of discovery allowed by the circuit court before ruling on summary judgment. Because the court reversed and remanded the case back to the circuit court for further proceedings, it declined to consider the last two of Appellant’s arguments: the propriety of discounts for lack of control and marketability, and

the availability of pre-judgment interest. With respect to the issue Appellant raised about the requested stay of the proceedings pending the first appeal of the derivative action, the court simply ruled that that issue was not preserved for appeal because Appellant did not attach the relevant order to the notice of appeal. Respondent's argument that "Mattison's seeming success on appeal was partial at best," (Ret., at 4), is misleading and ignores the result that the summary judgment order was fully reversed and the case was remanded.

Rule 222(a), SCACR, affords considerable discretion to the court of appeals to make an award of costs on appeal, but seems to create a default rule that costs are normally awarded to the prevailing party on the appeal, either the appellant or the respondent. The rule provides as follows:

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. When a judgment is reversed, costs shall be taxed against the respondent unless the court orders otherwise. When an appeal is affirmed or reversed in part or is vacated, costs shall be allowed only as ordered by the appellate court.

Rule 222(a), SCACR. The first two sentences of Rule 222(a) change the location of the phrases "unless otherwise ordered" or "unless the court orders otherwise," but still create the presumption that "costs shall be taxed" against the losing party on the appeal. *Id.* (emphasis added). On the other hand, the final sentence of Rule 222(a), which applies to a split decision on appeal affirming or reversing in part, creates a presumption that costs are not allowed to either party, unless the court orders otherwise. Rule 222(a) speaks in terms of the prevailing party on "an appeal" or "a judgment," not some type of issue-by-issue tally.

There is also nothing in Rule 222(a), SCACR that requires finality of the entire case before costs are awarded for a successful appeal. Very frequently, almost by definition, when a judgment is reversed and the case is remanded for further proceedings, such as a new trial or a trial on the

merits, the case is not final once the appeal is decided. There may be multiple appeals in a case like this one; thus, there may be multiple awards of costs to the prevailing party on each of those appeals under Rule 222(a), SCACR.

For all of the foregoing reasons and for the reasons previously stated in the original motion, Appellant respectfully request that the Court award costs of this appeal, including the limited \$2,500 award of attorney's fees, as requested in Appellant's Motion for Costs.

Respectfully submitted,

September 10, 2024

s/ David E. Rothstein
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Appellate Case No. 2021-000365

McMillan Pazdan Smith, LLC, Plaintiff/Counterclaim Defendant-Respondent,

v.

Donza H. Mattison,. Defendant/Counterclaimant-Appellant.

PROOF OF SERVICE

I certify that I have served Appellant’s Reply in Support of Motion for Costs on Respondent, McMillan Pazdan Smith, LLC, by email on September 10, 2024, addressed to their following attorneys of record: Samuel W. Outten and Miles Coleman, Nelson Mullins Riley & Scarborough LLP, 2 W. Washington St., Suite 400, Greenville, SC 29601; Thomas H. Keim, Jr., Ford Harrison, 100 Dunbar St., Suite 300, Spartanburg, SC 29306; and A. Mattison Bogan, Nelson Mullins Riley & Scarborough, LLP, 1320 Main St., 17th Floor, Columbia, SC 29201.

September 10, 2024

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September 10, 2024

VIA EMAIL (ctappfilings@sccourt.org)

Hon. Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

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SC Court of Appeals

Re: McMillan Pazden Smith, LLC v. Donza H. Mattison,
Appellate Case No. 2021-000365

Dear Ms. Kitchings:

Enclosed please find Appellant's Reply in Support of Motion for Costs in the above-referenced case. As indicated in the Proof of Service, I am hereby serving the reply brief motion on Respondent's counsel. Please file the original of this document and email a stamped copy to me for my records.

Thank you in advance for your attention to this matter. If you have any questions or need anything else, please do not hesitate to call me or email me.

Sincerely yours,


David E. Rothstein

Enclosure

cc: Samuel W. Outten, Esq. (all via email w/ encl.)
Miles Coleman, Esq.
Thomas H. Keim, Jr., Esq.
H. Mattison Bogan, Esq.