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Feb 27 2025

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals
APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Appellate Case No.: 2023-000082

Audra Starnes,Respondent

v.

Craig Stoneburner and Citivest Corporation.....Appellants

REPLY TO APPELLANTS’ RETURN TO MOTION FOR COSTS

Pursuant to Rule 240(f), SCACR, counsel for Respondent submits this Reply to the Appellants’ Return filed on February 26, 2025.

I. Respondent Incurred Costs

Appellants assert that costs are not recoverable to the extent that Respondent did not incur them. However, Respondent did incur costs. South Carolina Legal Services (“SCLS”) does not cover costs for its clients as a matter of course. Respondent signed SCLS’s standard retainer agreement, which says the following about costs:

4. I am responsible for any money that I am ordered to pay. I will pay for costs to include, but not be limited to, filing fees, service fees, Guardian-ad-Litem fees, costs of any appeal, whether my case is won or lost. The money for these expenses may be kept in a trust account and spent as needed. Any money left will be refunded to me. SCLS may send any interest earned while my money is in the bank to the SC Bar Foundation to help fund free legal services for the indigent.

Thus, Respondent “actually incurred” costs in the amount set out in Respondent’s Itemization.

II. Rule 222, SCACR, Contains No Basis for Denying the Attorney's Fee

Appellants separately assert that the Court may not grant the attorney fee provided by Rule 222 because SCLS does not charge its clients an attorney fee in exchange for its legal work. This assertion fails because SCLS is permitted by the text of Rule 222, SCACR, federal law, and its retainer agreement with Respondent to seek and retain recoverable attorneys' fees.

Rule 222(a) says, "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." The Court affirmed the judgment on appeal. Thus, Respondent is a person to whom costs are allowed under Rule 222(a).

Subsection (b) then states, "In addition [to the five categories of recoverable costs], the party shall be entitled to recover an attorney's fee in an amount which shall be set by order of the Supreme Court." That fee currently is \$2,500. Appellants' contention that the attorney's fee be "actually incurred" by Respondent is not consistent with the text of the rule. The prepositional phrase "to the extent the party actually incurred these costs" under Rule 222(b) limits recovery of the five cost categories, not the attorney's fee. The Rule's plain language permits Respondent to recover an attorney's fee. *Cf. Whitfield v. Schimpf*, Op. No. 28250 (S.C. Sup. Ct. filed Jan. 8, 2025) (Davis Adv. Sh. No. 2 at 36, n.7) ("This Court has recently emphasized that trial courts should apply the language of the Rules [of Civil Procedure].").

Federal law also permits SCLS to request and retain attorney's fees in this case. SCLS is the only statewide legal aid law firm in South Carolina. It is funded in part by the Legal Services

Corporation (LSC), a Congressionally chartered corporation.¹ From 1996 to 2010, Congress prohibited LSC from funding any recipient that “claims (or whose employee claims), or collects and retains, attorneys’ fees pursuant to any Federal or State law permitting or requiring the awarding of such fees.” Pub. L. No. 104-134, 110 Stat. 1321-55. Congress eliminated this restriction in 2010 through Section 533(c) of the Consolidated Appropriations Act, 2010. Pub. L. No. 111-117, 123 Stat. 3034, 3157.

Thereafter, LSC issued regulations governing the circumstances under which a recipient of LSC funds may recover and retain attorney’s fees. 45 C.F.R. §§1609.1—1609.6. One such rule is that SCLS may not accept a fee-generating case² for representation unless the client’s case “has been rejected by the local lawyer referral service, or by two private attorneys.” 45 C.F.R. §§1609.3(a)(1). In accordance with LSC’s “two-attorney turndown” rule, as the rule is informally known, Respondent told her attorney, the undersigned, that she had consulted with two local attorneys and that both declined representation. Thus, SCLS was permitted by this regulation to file and litigate this fee-generating case.

Courts in numerous jurisdictions have examined and affirmed awards of attorneys’ fees to pro bono law firms under various fee shifting statutes. Recovering an attorney’s fee under Rule 222, SCACR is no different. The U.S. Supreme Court approved an award of fees to volunteer counsel under the Civil Rights Attorney’s Fees Awards Act of 1976 (42 U.S.C. §

¹ LSC is “the largest national funder of civil legal aid for low-income Americans, ensuring equal access to justice for those who need it most. Since it was established by Congress in 1974, LSC has operated as an independent nonprofit 501(c)(3) organization, providing essential grants to support high-quality civil legal assistance for individuals facing economic hardships.” See <https://www.lsc.gov/about-lsc/who-we-are> (last visited Feb. 26, 2025). LSC receives appropriations from Congress and “distributes over 90% of its funding to 130 independent nonprofit legal aid programs, which together operate more than 800 offices across the country.” *Id.* SCLS is one such nonprofit.

² A fee generating case, subject to certain exceptions not relevant here, “means any case or matter which, if undertaken on behalf of an eligible client by an attorney in private practice, reasonably may be expected to result in a fee for legal services from an award to a client.” 45 C.F.R. §1609.2(a).

1988) based on the text of the statute permitting such fees to a prevailing party and without regard to the clients' obligation to pay the attorneys. *Blum v. Stenson*, 465 U.S. 886, 894 (1984) (“Congress did not intend the calculation of fee awards to vary depending on whether plaintiff was represented by private counsel or by a nonprofit legal services organization.”). The Fourth Circuit Court of Appeals has also so held. *Brinn v. Tidewater Transp. Dist. Comm’n*, 242 F.3d 227, 234-235 (4th Cir. 2001) (noting in an ADA and Rehabilitation Act case, that “courts have consistently held that entities providing pro bono representation may receive attorney’s fees where appropriate, even though they did not expect payment from the client and, in some cases, received public funding.”).

In a case closer to home, the Honorable Joseph F. Anderson, Jr., awarded the law firm of Nelson Mullins attorneys’ fees under 42 U.S.C. § 1988 even though their attorneys, “entered the case on a pro bono basis.” *Alexander S. v. Boyd*, 929 F. Supp. 925, 933 (D.S.C. 1995). Regarding the argument that the attorneys’ pro bono status ought to override the language of the fee-shifting statute, Judge Anderson noted, “Defendants cite no authority for this proposition, and the court’s own independent research has disclosed none. Indeed, every court that has considered the question has concluded to the contrary.” *Id.*

The justifications given by these courts and others primarily focus on the text of the governing statute or rule. *E.g. Blum*, 465 U.S. at 893 (stating that a resolution to the argument that pro bono counsel are not entitled to market rates “begins and ends with an interpretation of the attorney’s fee statute.”).

Policy justifications also support an award to pro bono counsel to the same. Two such justifications are to “encourage enforcement of individual rights and to deter socially harmful conduct.” *Alexander S.*, 929 F. Supp. at 934 (quoting *Rodriguez v. Taylor*, 569 F.2d 1231 (3d

Cir. 1977)). Additionally, disallowing SCLS from recovering an attorney's fee that is otherwise recoverable under the text of the statute or rule puts the pro bono firm's client at a disadvantage in litigation. This is one reason that LSC implemented its regulation to permit recipients of its grants to pursue fee generating cases. 75 Fed. Reg. 6816, 6817 ("Restricting a recipient's ability to avail itself of this strategic tool puts clients at a disadvantage and undermines clients' ability to obtain equal access to justice."). Disallowing an attorney's fee also creates a windfall to the losing party and creates an incentive to engage in excessive litigation on the theory that they will not have to pay a pro bono litigant's attorney's fee. *West v. French*, 51 Ore. App. 143, 149, 625 P.2d 144, 152 (Ore. App. 1981) (examining a fee-shifting statute applicable to landlord tenant cases and concluding "that the clear choice is to give uniform, mutual effect to the right of the prevailing party to a reasonable attorney fee -- hopefully, to induce resolution of disputes and to minimize landlord-tenant litigation."). Finally, permitting the recovery of attorneys' fees to SCLS will enable it to allocate its scarce resources to other clients given the fact that the number of individuals eligible for SCLS's services far exceeds its capacity to serve them. *See SC Access to Justice Commission, Measuring South Carolina's Justice Gap*, 2021, at p. 5 (noting that SCLS answered 20,000 plus calls and performed 10,000 plus case intakes annually and that "many callers must be turned away due to resource limitations." (available at <https://www.scaccesstojustice.org/the-sc-justice-gap>) (last visited Feb. 27, 2025)). LSC shares this view. *See* 75 Fed. Reg. 6816, 6817 ("If a recipient could collect and retain attorneys' fees, it would free up other funding of the recipient to provide services to additional clients and help close the justice gap.")

Justifications for permitting pro bono counsel to recover under fee-shifting statutes also apply to court rules. In *Centennial Archaeology, Inc. v. Aecom, Inc.*, 688 F.3d 673 (10th Cir.

2012), the Tenth Circuit Court of Appeals rejected the argument that a party should not have to pay the other party's attorney's fees in a discovery dispute under Rule 37, FRCP, just because its actions did not increase the amount of fees that the prevailing party had to pay its attorney to litigate the case. The Tenth Circuit canvassed numerous other judicial opinions where courts granted attorneys' fees in cases where the client(s) did not directly compensate the attorney. It concluded, "We see no reason to impose a different construction on the language of Rule 37 . . ." *Id.* at 680. *See also Windham v. Windham*, 2015 WY 61, 348 P.3d 836 (2015) (relying on *Centennial Archaeology, Inc.* to award pro bono counsel attorneys' fees under Rule 37 of Wyoming's Rules of Civil Procedure).

As with the Rules of Civil Procedure, there is no reason to treat Rule 222, SCACR, differently from how courts generally treat fee-shifting statutes involving pro bono counsel. Rule 222(b)'s text is plain and straightforward. It says that the party entitled to recover costs "shall be entitled to recover an attorney's fee in an amount which shall be set by order of the Supreme Court." There is no reason in the Rule itself to add an "actually incurred" requirement to recovery of the attorney fee that the Rule's drafters saw fit to apply only to the five cost categories.

Respondent's retainer also contemplates recovering attorneys' fees where appropriate and awarding an attorney fee under Rule 222 will not create a windfall to her. The retainer agreement says:

3. SCLS will not charge me for its services.

.....

12. Some cases allow parties to ask for attorney fees. If, in the judgment of SCLS, it is possible to claim Attorneys' fees, I authorize SCLS to seek, claim and keep any attorneys fee award it collects.

Finally, both this Court and the S.C. Supreme Court have granted the attorney's fee provided by Rule 222 in other SCLS cases. In *NHC HealthCare/Mauldin, LLC v. Wade Thompson*, Appellate Case No. 2016-002302, this Court reversed the trial court's grant of a judgment in favor of NHC and against Wade Thompson on a quantum meruit claim. Op. No. 2019-UP-378 (S.C. Ct. App. filed Dec. 11, 2019). Thompson's counsel, Susan Ingles of SCLS, then moved for costs and the attorney's fee under Rule 222. NHC opposed the motion, in part, on the ground that SCLS does not charge its clients attorneys' fees. **See Exhibit 1**. The Court granted the motion. **See Exhibit, 2**. Furthermore the S.C. Supreme Court granted Rule 222 costs plus the attorney fee to SCLS client Bobby Burdine in *Mountain View Baptist Church v. Bobby Burdine*, Appellate Case No. 2011-192466. **See Exhibit 3**.

III. Appellants' Final Two Arguments Are Meritless

Appellants also argue that the motion for costs should fail because Respondent did not draft a memorandum of law in support of the motion. The basis for the motion is obvious from the face of the motion. The motion cites Rule 222. That Rule taxes costs and an attorney's fee against the appellant when the judgment is affirmed. The judgment was affirmed in full. There is nothing more to say.

Lastly, Appellants assert that the requested costs and attorney's fee ought to be reduced under *Jackson v. Speed*, 326 S.C. 289, 486, S.E.2d 750 (1997). Appellants cite no authority for the proposition that the six-factor analysis, applicable to statutory and contractual fee-shifting provisions, applies to Rule 222(b), SCRAC. And there is legal authority indicating that these factors do not apply. *See Taylor by Taylor v. Medenica*, 332 S.C. 324, 504 S.E.2d 590 (1998) (declining to apply a fee-shifting statute in assessing an award of attorneys' fees under Rule 222(b)).

For the reasons given above, Respondent respectfully request that the Court grant her motion for costs and the attorney's fee under Rule 222(b).

SOUTH CAROLINA LEGAL SERVICES

s/ Mark Fessler

Mark Fessler, S.C. Bar No. 77376

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Attorney for Respondent

February 27, 2025

EXHIBIT 1--REPLY TO RETURN

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

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JAN 23 2020

Case No. 2014-CP-04-00373

SC Court of Appeals

Appellate Case No.: 2016-002302

NHC HealthCare Mauldin,
LLC,

Respondent,

v.

Wade Thompson and Sheila
Thompson,

Defendants.

Of Whom Wade Thompson is
the

Appellant.

RESPONDENT'S RETURN TO APPELLANT'S MOTION FOR COSTS

Appellant has filed a motion for costs pursuant to Rule 222, South
Carolina Appellate Court Rules and requested an award of \$5,176.49.

Respondent opposes this request on the following grounds.

First, the plain language of Rule 222, South Carolina Appellate Court
Rules shows that an award of fees and costs in this action is not proper.

Subsection (b) of the Rule states that a party may recover costs "to the extent the

party actually incurred these costs.” (emphasis added).

The party seeking to recover costs in this case is the Appellant, Wade Thompson. Mr. Thompson is represented by attorneys from South Carolina Legal Services, who, according to their website “provides free legal assistance in a wide variety of civil (non-criminal) legal matters to eligible low income residents of South Carolina. SCLS is a non-profit corporation, funded by grants from the federally funded Legal Services Corporation, the South Carolina Bar Foundation, local United Ways, state court filing fees, and other federal, state and local funding.”

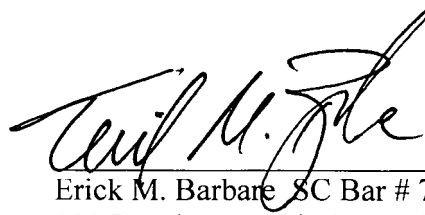
Accordingly, Appellant has made no showing that he actually incurred any of the costs or attorney’s fees sought in his motion. Rather, it should be presumed that he incurred no costs or fees and awarding him same would amount to a windfall.

Additionally, Respondent urges the Court to exercise its discretion to deny costs to the Appellant in this action due to the posture in which this case presented itself. Respondent was awarded relief by the trial court, the Trial Court, which heard the witnesses and observed their demeanor on the stand, found in favor of the Respondent, in what was primarily an equitable action. Respondent did not appeal the trial court’s adverse rulings against Respondent and only responded to the Appellant’s issues that he raised on appeal. Taxing the costs against Respondent in this case would essentially punish Respondent for simply responding to an appeal of the trial court’s ruling by the Appellant.

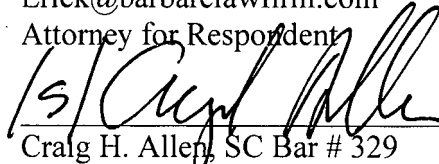
For these reasons, Respondent submits that Appellant’s motion for costs

should be denied.

Date: 1/20/2020
Greenville, South Carolina



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Attorney for Respondent

The South Carolina Court of Appeals

NHC HealthCare/Mauldin, LLC, Respondent,

v.

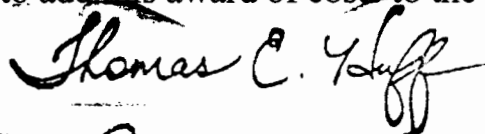
Wade Thompson and Shelia Thompson, Defendants,

Of whom Wade Thompson is the Appellant.

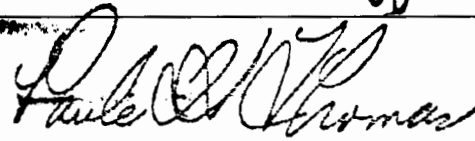
Appellate Case No. 2016-002302

ORDER

Pursuant to Rule 222 of the South Carolina Appellate Court Rules, the motion for costs filed by Appellant is granted in the amount of \$5,001.49 against Respondent. The lower court or tribunal is directed to add this award of costs to the remittitur.



J.



J.



J.

Columbia, South Carolina

FILED

cc:
Craig Horger Allen, Esquire
Susan P. Ingles, Esquire

February 20, 2020

Sharon Young Ward, Esquire
Erick Matthew Barbare, Esquire
Richard A. Shirley

EXHIBIT 3--REPLY TO RETURN

The Supreme Court of South Carolina

Mountain View Baptist Church, Respondent,

v.

Bobby Lee Burdine, Petitioner.

Appellate Case No. 2011-192466

The Honorable John C. Few
Greenville County
Trial Court Case No. 2008CP2308598

ORDER

Pursuant to Rules 222 and 242(j) of the South Carolina Appellate Court Rules, the amended motion for costs filed by the petitioner is granted in the amount of \$2,361.87 against the respondent. The clerk of the circuit court is directed to add this award of costs to the remittitur.

FOR THE COURT

BY



CLERK

Columbia, South Carolina
May 31, 2013

cc: Kirby Rakes Mitchell, Esquire
Michael Stephen Gambrell, Esquire
Candy M. Kern-Fuller, Esquire
The Honorable Paul B. Wickensimer
The Honorable John C. Few

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Feb 27 2025

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals
APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Appellate Case No.: 2023-000082

Audra Starnes,Respondent

v.

Craig Stoneburner and Citivest Corporation.....Appellants

PROOF OF SERVICE

I certify that on February 27, 2025, I served the *Reply to Appellants' Return to Motion for Costs* Appellants Craig Stoneburner and Citivest Corporation by emailing the documents to Walter B. Todd, Jr., Esq. at wtodd@wbtlaw.com, which is the email address that is the lawyer's primary e-mail address listed in the Attorney Information System (AIS). A copy of the email is attached to this Certificate of Service.

s/ Mark Fessler

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Attorney for Respondent

Greenville, South Carolina
February 27, 2025

Mark Fessler

From: Mark Fessler
Sent: Thursday, February 27, 2025 2:14 PM
To: 'Walter B Todd, Jr.'
Subject: RE: 2023-000082 Starnes v. Stoneburner -- Respondent's Reply to Appellants' Return to Motion for Costs
Attachments: Reply to Return--Motion for Costs (inclds exhibits) (starnes appeal).pdf

Walt,

Here's an updated version of the Reply. I left the exhibits out of the Reply I emailed you just a little bit ago.



Mark Fessler

**Deputy Director of Litigation & Training
South Carolina Legal Services**

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From: Mark Fessler
Sent: Thursday, February 27, 2025 2:07 PM
To: Walter B Todd, Jr. <wtodd@wbt-law.com>
Subject: 2023-000082 Starnes v. Stoneburner -- Respondent's Reply to Appellants' Return to Motion for Costs

Walt,

Attached for service is the Reply to your Return.



Mark Fessler

**Deputy Director of Litigation & Training
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