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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable J. Cordell Maddox, Jr.
Circuit Court Judge

Opinion No. 2024-UP-114 (S.C. Ct. App. filed April 3, 2024)
Case No. 2016-CP-02-00263
Appellate Case No. 2024-001037

Robin Napier, individually and on behalf of all others similarly situated, Petitioner-Respondent,

v.

Mundy's Construction, Inc. d/b/a Mundy Construction, Respondent-Petitioner.

PETITIONER-RESPONDENT'S RETURN TO RESPONDENT-PETITIONER'S MOTION FOR COSTS

Respondent-Petitioner Mundy's Construction, Inc. d/b/a Mundy Construction (hereinafter "Mundy"), has filed a cross-Motion for Costs pursuant to Rules 222 and 242(j), SCACR. Mundy argues that it is entitled to costs because it was the "prevailing party on appeal." (*See* Mot. for Costs, filed Feb. 27, 2025). Mundy was not the prevailing party. For the reasons set forth herein, Petitioner-Respondent Napier (hereinafter "Napier") objects to Mundy's motion and reasserts in full its Motion for Costs filed with this Court on February 18, 2025.

Rule 222(a) provides as follows regarding costs on appeal:

> **To Whom Allowed.** 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.

See Rule 222(a), SCACR.[1] The rule makes clear that, absent the court ordering otherwise or agreement of the parties, costs are taxed against the appellant *only* when the appeal is dismissed or the judgment on appeal is affirmed. Conversely, if a judgment is reversed, costs are taxed against the respondent. In a situation where an *appeal* (not a judgment) is affirmed in part or reversed in part, "costs shall be allowed only as ordered by the appellate court." *See id.*

Here, the trial court order at issue was affirmed in part, reversed in part, and remanded by the Court of Appeals for a recalculation of damages. (*See* Opinion No. 2024-UP-114). Subsequently, this Court affirmed the Court of Appeals' opinion *as modified*. (*See* Opinion No. 2025-MO-026). Because the *appeal* was not affirmed in part, reversed in part, or vacated, the final sentence of Rule 222(a) does not apply here.

The singular question as it relates to who is entitled to costs is this: when an appellant succeeds in reversing—even in part—a trial court judgment, resulting in a significant modification of the trial court's order, is the appellant entitled to costs on appeal. South Carolina jurisprudence answers this question in the affirmative.

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[1] Rule 242(j), SCACR, contains similar language:

> **(j) Costs When a Writ of Certiorari Has Been Granted.**
> (1) *To Whom Awarded.* Unless otherwise ordered by the Supreme Court or agreed to by the parties, costs shall be assessed against the appellant if the decision of the Supreme Court has the effect of affirming the judgment of the lower court or tribunal which was reviewed by the Court of Appeals. When the decision of the Supreme Court has the effect of reversing the judgment of the lower court or tribunal which was on appeal, costs shall be assessed against the respondent before the Court of Appeals. When the decision of the Supreme Court has the effect of affirming or reversing in part or vacating the judgment of the lower court or tribunal which was on appeal, costs shall be allowed only as ordered by the Supreme Court.

If an appellate court modifies a trial court order, the appellant is the prevailing party and is entitled to costs on appeal. *See Lemmon v. Wilson*, 205 S.C. 297, 31 S.E.2d 745, 745 (1944) ("Modification of a judgment upon appeal entitles the appellant to his costs incurred in this Court."); *see also Home Bldg. & Loan Ass'n of Spartanburg v. Cohen*, 179 S.C. 159, 183 S.E. 775, 775 (1936) ("If Supreme Court modifies judgment, appellant is regarded as prevailing party and entitled to taxation of his costs."). This is true even if the trial court order is reversed in part and affirmed in part:

> That the appellant in that case succeeded in reversing in part the judgment appealed from, or at least in modifying it, is patent. It follows that she was entitled to tax the cost on appeal to the Supreme Court.

Home Bldg. & Loan Ass'n of Spartanburg v. Cohen, 179 S.C. 159, 183 S.E. 775, 775 (1936).

These cases from the first half of the twentieth century, and even earlier, predate the appellate court rules in their current form. However, it is this line of cases which interpret the previous versions of the South Carolina code which introduced the modern and continuing notion that a "prevailing party" on appeal is entitled to its costs. This line of cases makes clear that the reversal of a trial court judgment, even in part, renders the appellant the prevailing party; and, importantly, that it is the success in modifying the appealed judgment that matters when assessing which party prevailed, and *not* whether one party or the other came out better in the trial court. *See Heath v. Town of Darlington*, 176 S.C. 252, 180 S.E. 52, 54 (1935) ("It must now be regarded as settled that the prevailing party in an appeal, whether he be appellant or respondent, is entitled to his costs in prosecuting his appeal, or resisting that of his adversary, without regard to the final result of the action in the circuit court.").

Briefly, the facts in *Gathings v. Great Atl. & Pac. Tea Co.*, 170 S.C. 219, 170 S.E. 153, 154 (1933), warrant mention as relevant to the issue before this Court. There, the Defendant-Appellant lost at trial to the tune of $2,000 in actual damages and $400 in punitive damages. *See*

id. As one would expect, Defendant-Appellant appealed the judgment in full. The South Carolina Supreme Court affirmed the actual damages award but reversed the punitive damages award. *See id.* The Plaintiff-Respondent, therefore, was able to sustain its award of actual damages, but the Defendant-Appellant was successful in modifying (eliminating) the award of punitive damages. *See id.* If one were to compare relative "success" only in terms of monetary awards in the trial court, the Plaintiff-Respondent's retention of its $2,000 in damages outweighs the Appellant's reversal of $400 in punitive damages. However, the Court there made clear that relative success in the trial court was not relevant to determining which party "prevailed" on appeal:

> The amount of the actual damages was $2,000 and of the punitive damages, $400. So that the defendant, in securing the elimination of the punitive damages assessed by the jury at $400, secured a substantial modification of the judgment below and, under my interpretation of the decisions of this court, is entitled to tax the entire costs of appeal against the plaintiff–respondent. […]
>
> As I understand the case, the doctrine on this subject is that if on appeal the Supreme Court modifies the judgment of the circuit court, then the appellant is to be regarded as the prevailing party and is entitled to the taxation of his costs.

Gathings v. Great Atl. & Pac. Tea Co., 170 S.C. 219, 170 S.E. 153, 154 (1933).

These early cases provide insight that is not available in more modern cases interpreting the term "prevailing party" because these recent cases interpret the term as it is used when applying a fee shifting statute in the trial court. *See, e.g., Hueble, infra*; *see also Heath v. Cnty. of Aiken*, 302 S.C. 178, 181, 394 S.E.2d 709, 711 (1990).[2] Mundy uses *Heath v. Cnty. Of Aiken* to assert that it should be regarded as the prevailing party because Napier's appeal only succeeded in

[2] In *Heath v. County of Aiken*, the Court was reviewing the trial court's award of attorney's fees under Section 15–77–300 of the South Carolina code: "the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency […]." S.C. Code Ann. § 15-77-300. Clearly, the inquiry there concerned the relative success of the parties in the trial court without regard to how either fared on appeal. *Heath v. Cnty. of Aiken*, 302 S.C. 178, 182, 394 S.E.2d 709, 711 (1990).

increasing the trial court's damage award by approximately $2 million, when Napier originally sought over $8 million in damages in the trial court. And, when weighing relative "success," Mundy argues, it came out on top, having saved approximately $6 million in the grand scheme, even with the reversal and remand.

Respectfully, that is simply not in accord with either the applicable rules of appellate procedure or the jurisprudence interpreting the concept of taxing costs on appeal. Before the resolution of this appeal, Napier had an enforceable judgment of $240,000. (*See* Record on Appeal, pp. 40, 42). Now, and assuming the full amount of damages deducted for the unpled and unproven deduction of "wear and tear" is reinstated, Napier will have an enforceable judgment of approximately $2.2m or more. *See id.* Under *Gathings* and its progeny, Napier is the prevailing party for the purposes of assessing costs on appeal.

However, should this Court choose to use the case law interpreting "prevailing party" in the related but distinct context of fee shifting statutes, Napier is still the "prevailing party" on appeal.

This Court recently adopted the two-part test set forth in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources,* 532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001), to determine which party is a "prevailing party":

> The Supreme Court held that for a party to be considered a prevailing party, there must be a "material alteration of the legal relationship of the parties," and there must be "judicial imprimatur on the change." Thus, it is not enough for a desired outcome to occur to attain "prevailing party" status. Rather, it requires both a change on the part of the parties and an enforceable acknowledgement by a court.

Hueble v. S.C. Dep't of Nat. Res., 416 S.C. 220, 230, 785 S.E.2d 461, 466 (2016) (internal citations omitted).[3] This Court in *Hueble* explained that a judgment which imposes a legal obligation on one party to pay the other party materially alters the legal relationship of the parties, thereby satisfying the first prong of the *Buckhannon* test. *See id.* And, this Court explained, this is true even if the party being paid did not receive all the relief it sought. *See id.* ("While Hueble did not receive all of the requested relief, that is not the test; rather, the test is whether he received meaningful relief."). The second prong—judicial imprimatur—is satisfied because "a trial court has the authority to enforce a judgment of record." *See id.*

Here, Napier is unquestionably the "prevailing party" using the two-prong test laid out in *Hueble*. The trial court found Mundy liable for approximately $2,211,688 in actual damages but reduced the damages award to $240,000 because of "general wear and tear." (*See* Record on Appeal, pp. 40, 42). As a result of Napier's appeal, the court of appeals reversed the trial court's award of damages and remanded to the trial court for "recalculation of damages excluding any deduction for wear and tear depreciation." (*See* Opinion No. 2024-UP-114). This Court affirmed the reversal and remand. (*See* Opinion No. 2025-MO-026) ("Thus, we affirm the court of appeals' reversal of the trial court's award of damages and remand to the trial court for a recalculation of damages excluding any reduction for wear and tear depreciation."). Again, assuming the full amount of damages deducted for the unpled and unproven deduction of "wear and tear" is reinstated, Napier will have an enforceable judgment of approximately $2.2m or more. According to *Hueble*, Napier achieved meaningful relief, albeit not all the relief it sought.

[3] *Hueble*, like *Heath v. Cnty. of Aiken*, 302 S.C. 178, 181, 394 S.E.2d 709, 711 (1990), cited by Mundy in support of its "prevailing party" argument, concerns the interpretation of "prevailing party" in the context of a fee shifting statute. More specifically, these cases involve appeals of a trial court's award of attorneys' fees pursuant to statute, rather than the appellate court's award of costs pursuant to Rule 222 or Rule 242, SCACR.

For the above stated reasons, Napier respectfully requests that this Court deny Mundy's Motion for Costs and grant Napier's Motion for Costs.

JUSTIN O'TOOLE LUCEY, P.A.

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