

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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JUL 28 2014

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

SC Court of Appeals

Perry M. Buckner, Circuit Court Judge
Carmen Tevis Mullen, Circuit Court Judge

Case No. 2009-CP-25-284
Case No. 2009-CP-25-285

Patrice Smart, Respondent,
v.
James Allen Grady, Louis Daniel Moffett, Lynwood Brantley
d/b/a Brantley Hauling and Randolph Murdaugh, III, Defendants,
of whom
James Allen Grady is Appellant.

Gary Smart, Respondent,
v.
James Allen Grady, Louis Daniel Moffett, Lynwood Brantley
d/b/a Brantley Hauling and Randolph Murdaugh, III, Defendants,
of whom
James Allen Grady is Appellant.

**REPLY TO RETURN TO
MOTION FOR COSTS**

Appellant contends that because the dismissal of this appeal occurred before any briefs were filed this Court should deny the petition for costs and fees. Appellant then asserts “[i]t is the general practice of the appellate courts to not award costs under these circumstances,” and cites to a number of cases Appellant contends supports this statement. This Court should not be persuaded by this argument.

First, the plain language of Rule 222 provides “[u]nless 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.” (Emphasis added). There is nothing about briefing – that is, the rule does not say “when the appeal is dismissed after briefing” or the like. It simply says “appeal is dismissed.”

Second, this was not the “run of the mill” dismissal of an appeal. Appellants challenged vigorously the issue of appealability in this case, requiring Respondents to repeatedly brief the issues raised. This case did not involve a routine motion to dismiss that was granted – instead, it has involved multiple levels of informal briefing. All of this argument was in the face of settled precedent that unambiguously stated the orders in this case were not immediately appealable. Yet Appellant has dragged this matter out over the course of nearly three years in the appellate courts.

The following procedures have occurred in this case:

1. August 8, 2011 – Appellants filed and served the notices of appeal in the two cases.
2. December 5, 2011 – Appellants filed and served a 19-page Motion in the Supreme Court to Certify Appeals, Consolidate Appeals and Correct Caption, Determine Appealability and Exercise Pendent Jurisdiction, or in the Alternative a Petition for Writ of Certiorari to the Court of Common Pleas;
3. December 5, 2011 – Appellant filed a motion in this Court to hold the appeals in abeyance;
4. **January 4, 2012** – Respondents filed a Return in the Supreme Court to the various Motions that Appellants filed on December 5, 2011 (that Return required briefing of four (4) separate arguments);
5. April 5, 2012 – the Supreme Court denied the various Motions contained in the

- Appellant's December 5, 2011, Petition;
6. **April 26, 2012** – Respondents filed a Motion to Dismiss Appeals, in which Respondents outlined settled Supreme Court precedent regarding the fact that these appeals were from unappealable orders;
 7. June 11, 2012 – Appellant filed a Return to the Motion to Dismiss, asserting the settled precedent from the Supreme Court was, in fact, stale and further was incorrectly decided;
 8. June 11, 2012 – Appellant filed a Motion to Consolidate Appeals and Correct Captions;
 9. **June 19, 2012** – Respondents filed a 22-page Reply to the Return to the Motion to Dismiss, briefing the various issues Appellant raised in his Return and explaining why the settled precedent was not stale nor wrongly decided;
 10. September 21, 2012 – Chief Judge John C. Few issued an order granting the Motion to Dismiss the appeal;
 11. October 9, 2012 – this Court issued the remittitur in “Gary Smart v. James Grady” to the lower court;
 12. October 11, 2012 – this Court recalled the remittitur in Gary Smart’s case;
 13. October 18, 2012 – this Court sent the remittitur in “Patrice Smart v. James Grady” to the lower court;
 14. October 23, 2012 – Appellant filed a Petition for Rehearing and Reinstatement of the Appeal only as to Gary Smart, contending the Supreme Court’s precedent was stale and wrongly decided;

15. **October 29, 2012** – Respondent Gary Smart filed a 22-page Return to the Petition for Rehearing and Reinstatement of the Appeal, explaining the continued validity of the Supreme Court’s precedents;
16. November 5, 2012 – Appellant filed a Reply to the Return;
17. January 31, 2013 – A three-judge panel of this Court denied the Petition for Rehearing and denied Respondents’ motion for costs and fees as “premature”;
18. June 7, 2013 – Appellant filed a Motion in the Supreme Court to Correct the Caption;
19. June 7, 2013 – Appellant filed a 23-page Petition for Writ of Certiorari in the Supreme Court, arguing that its precedents on appealability were stale and further were wrongly decided;
20. **July 8, 2013** – Respondents filed a 16-page Return to the Petition for Writ of Certiorari, briefing the issues of whether the Court should grant the writ and whether its settled precedents were still controlling and were correctly decided;
21. July 11, 2013 – the Supreme Court entered an order denying the “Motion to Correct Caption and Name Randolph Murdaugh III as a Respondent”;
22. July 29, 2013 – Appellant filed a Reply to the Return to the Petition for Writ of Certiorari;
23. June 11, 2014 – the Supreme Court denied the Petition for Writ of Certiorari.

As the Court can see by the bolded entries above, the claim that “the dismissal occurred before the filing of any briefs” is misleading. There has been *repeated* briefing caused by Appellant’s appeal in this case in the face of clear and settled precedent.

Further, the cases Appellant cites for its “general practice” statement are all distinct from this matter in very meaningful ways.

A. *Peterkin v. Brigman*, 319 S.C. 367, 461 S.E.2d 809 (1995)

Appellant cites this case for the parenthetical proposition “appeal dismissed upon respondent’s motion that order not immediately appealable – no costs awarded.” While it is true that the respondent in *Peterkin* moved to dismiss and the court ordered no costs be assessed, it is also apparent in that case that the Supreme Court was announcing the rule of appealability in that situation (appeal of an order declining to approve settlement agreement) for the very first time. In this case, it was settled that orders denying venue transfer and denying motion to compel settlement were not immediately appealable. Also, there is nothing in the Supreme Court’s order in *Peterkin* to indicate the parties engaged in the extensive briefing similar to that which occurred in this case. Lastly, the Court did not announce a rule of the denial of costs where there is a dismissal before the merits briefs are filed.

B. *Duncan v. GEICO*, 316 S.C. 266, 449 S.E.2d 580 (1994)

Appellant cites this case for the parenthetical proposition “court sua sponte dismisses appeal because order not immediately appealable – no costs awarded.” The Supreme Court did, in fact, *sua sponte* dismiss the appeal, noting it had “never addressed the question of whether an order granting a request to intervene is directly appealable....” The Court ordered no costs be taxed. Again, the Supreme Court was deciding for the first time that an order granting intervention was not immediately appealable. Furthermore, the Court did so *sua sponte*. Here, Respondents had to move – repeatedly – for dismissal, and the law on these issues had previously been set forth clearly by the Supreme Court.

C. *McLendon v. SC Dept. of Hwys and Pub. Transp.*, 313 S.C. 525, 443 S.E.2d 539 (1994)

Appellant cites this case for the parenthetical proposition “appeal dismissed upon respondent’s motion that order not immediately appealable – no costs awarded.” In *McLendon*, the Supreme Court ruled for the first time that the denial of a motion to dismiss under Rule 12(b)(6), SCRPC, was not immediately appealable, even if the argument underlying the motion erroneously asserted the running of the statute of limitations affected the court’s subject matter jurisdiction. Costs were not to be awarded to either party. Again, this was the first time the Supreme Court was announcing this rule. Here, the rules on appealability were settled and Respondents had to repeatedly brief why those rules were not stale or the cases were not wrongly decided.

D. *Ballenger v. Bowen*, 313 S.C. 476, 443 S.E.2d 379 (1994)

Appellant cites this case for the parenthetical proposition “appeal dismissed upon respondent’s motion that order not immediately appealable – no costs awarded.” In *Ballenger*, the Court did deny costs to either party; however, the Court used the opportunity to overrule two cases that created confusion over appealability and indicated the order in that case – the denial of a motion for summary judgment – was immediately appealable. 313 S.C. at 478, 443 S.E.2d at 380 (“[t]o the extent that *Ex parte South Carolina Farm Bureau Mutual Ins. Co.*, [314 S.C. 487, 431 S.E.2d 252 (1993)], and *Carter v. Florentine Corp.*, 310 S.C. 228, 423 S.E.2d 112 (1992), are inconsistent with this conclusion, they are overruled.” In this case, however, there was no confusion in the law about appealability, and no need for the Supreme Court to overrule prior precedent.

E. *Chambers v. Smith's Drywall*, 324 S.C. 122, 478 S.E.2d 253 (1996)

Appellant cites this case for the parenthetical proposition “upon motion to strike amended record on appeal: court reviewed initial briefs, found appeal to be without merit, and affirmed the appealed order – no costs awarded.” In fact, the motion for costs was for having to prepare the motion to strike, but the Court had denied the motion to strike as moot. Thus, the Court had affirmed on the ground that the appeal was without merit, and the motion it was denying was for costs for the motion to strike, not a motion to dismiss. *Chambers* is completely different from this case, where Respondent has had to repeatedly brief appealability over the last three years and fend off two attempts to have the Supreme Court assume jurisdiction over the case.

F. *Johnson v. Paraplance Corp.*, 321 S.C. 316, 468 S.E.2d 620 (1996)

Appellant cites this case for the parenthetical proposition “court granted certiorari, vacated court of appeals opinion, and sua sponte dismissed appeals because appealed order not immediately appealable – no costs awarded.” In *Johnson*, however, this Court had noted the order denying summary judgment was normally not appealable, but address the order under the principle that once an appealable issue was in the case, the Court could address those orders that are not appealable. On cert, the Supreme Court granted the petition, dispensed with further briefing, vacated the opinion, and dismissed. This was not on anyone’s motion. The Court was applying very recent precedent in holding the order was not appealable, and because of the summary manner in which it handled the case (grant of cert, dispensing with briefing, vacatur) the Court ruled no costs would be assessed.

In this case, Respondents moved to dismiss and have spent the last three years fighting Appellant’s mistaken assertion before this Court and the Supreme Court that the order was

appealable, or if not, it should be. Unlike the parties in *Johnson*, Respondent has filed numerous memoranda and briefs in this matter (this is the sixth time).

None of the cases that Appellant cites preclude an award of fees and costs in this case, nor do any of them counsel against making such an award here. Respondent has now had to brief an issue *once again* before this Court based upon the Appellant's citation of cases that do not stand precisely for the propositions for which they are proffered.

The rules governing appealability of the orders in this case were settled, but Appellant persisted for the last three years against repeatedly being told "no" by both appellate courts. Appellant may have been advocating a change in the law, but doing so carries the same risk any time an appellant does this, that is, that the appellant is wrong. When that happens it is the practice of the appellate courts to order the payment of fees and costs. Rule 222, SCACR, contemplates as much.

In light of the repeated briefing that Respondents have had to undertake, Respondents assert that this case involves "the most extraordinary of circumstances" to justify an award of fees in excess of \$1,000.00. *See* Rule 222(b), SCACR (the "allowance of additional costs will generally not be allowed except in the most extraordinary of circumstances"). In this case, Respondents have now filed their *sixth* brief or memorandum in opposition to the positions Appellant has taken over the last three years, many of them specious, unfounded, or not supported by authority Appellant cited.

Accordingly, this Court should not only grant Respondent's motion for costs, but should award additional fees in an amount this Court deems appropriate given the additional time and

briefing Respondents have had to do in this case due to the numerous times Respondent has had to brief appealability against the backdrop of settled precedent here.

Respectfully submitted, ^a



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July 28, 2014

Attorneys for Respondent

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served
counsel of record with a copy of the *Reply to Return to Motion for Costs* by mailing
a copy of the same by United States Mail with first class postage prepaid to the
following addresses:

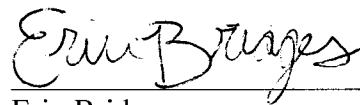
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Kenneth Henry Dojaquez
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O. Eugene Powell, Jr.

July 28, 2014

VIA HAND DELIVERY

Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Gary Smart v. Grady
Case Number: 2009-CP-25-285

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven (7) copies of Respondents' *Reply to Return to Motion for Costs* in reference to the above matter. I have also enclosed a proof of service upon counsel of record. Please return the additional filed copy to me via our courier.

Thank you for your attention to this matter. If you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely,

Erin Bridges
Paralegal to John S. Nichols
BLUESTEIN, NICHOLS, THOMPSON
& DELGADO, LLC

/emb
Enclosures

cc: Mark B. Tinsley, Esquire
Robert L. Widener, Esquire
Patrick M. Higgins, Esquire
Jason Franklin Ward, Esquire
John H. Tiller, Esquire
Erin D. Dean, Esquire