THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
JUL 10 2015
S.C. SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Opinion No. 5011 (S.C. Ct. App., Heard May 23, 2012 – Filed July 25, 2012
Appellate Case No. 2013-000364

South Carolina Department of Health and Environmental Control — Petitioner,

vs.

Ann Dreher — Respondent.

RETURN TO MOTION TO ASSESS COSTS

Petitioner South Carolina Department of Health and Environmental Control ("Department"), pursuant to SCACR Rule 222(d) and SCACR Rule 240(c) respectfully files this Return to Respondent's Motion for Costs. Respondent seeks $7,571.54 in attorney's fees and costs to be taxed against the Petitioner. The Department respectfully requests that the Court order that fees and costs not be taxed against the Department.

SCACR Rule 222, the rule cited by Respondent, is the applicable rule for costs:

> 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.

(emphasis added). The emphasized language specifically authorizes the Court to order that costs not be taxed against a Petitioner. Whether to tax costs appears to be solely in the Court's discretion. The Department respectfully submits that it would be proper for the court to order that fees not be taxed against the Department in this appeal.

Though there are no factors specified in the Rule for guiding the Court's decision on whether to order that attorneys fees not be taxed as costs against the Petitioner, the Department looks to the standards in the fee shifting statute, S.C. Code Ann. § 15-77-300 (Supp. 2010), for guidance. In that statute, fees can only be shifted if, among other things, the court finds that the agency acted without substantial justification in pressing its claim against the party[1] and the court finds that there are no special circumstances which that would make the award of attorneys fees unjust. *Id.* The Department submits that the following two factors support issuance of an order denying costs: (1) The Department's budget and (2) The Department was acting to preserve a regulatory standard.

The Court can take judicial notice of the budget and its impact on the Department. Though the fees authorized under SCACR Rule 222 are set at $1,000 by order of June 24, 1997, the Department submits that the $1,000 requested by Respondent is better spent implementing the many statutes and programs the Department implements at the behest of the General Assembly.

Regarding the Department's motivation in this appeal, the Department appealed the Court of Appeals ruling because S.C. Code Ann. Reg. § 30-12N(2)(c) plainly

---

[1] The statute specifies that an agency "is presumed to be substantially justified in pressing its claim against the party if the agency follows a statutory or constitutional mandate that has not been invalidated by a court of competent jurisdiction."

prohibits bridges to coastal islands less than two acres in size. Since both parties, all witnesses, and the Administrative Law Judge all agreed that Tract D constitutes a "coastal island" as that term is defined in S.C. Code Ann. Reg. § 30-1(D)(11) and that Tract D is less than two acres in size,[2] the Department believed that appealing the Court of Appeals' Opinion was appropriate.

The Respondent also seeks additional attorney fees under SCACR Rule 242(j) in the amount of $1,000. SCACR Rule 242(j) states that "[t]he allowance of additional costs will generally not be allowed except in the most extraordinary circumstances." The issues of this appeal are not "extraordinary" in nature. Accordingly, additional attorney fees under SCACR Rule 242(j) are not justified in this case.

Though SCACR Rule 222 does not require a finding that the Department had justification for its appeal to order that costs not be taxed, the Department submits that given the purpose of the appeal to preserve the regulatory scheme for bridges to coastal islands, this factor weighs in favor of ordering that costs not be taxed against the Department.

CONCLUSION

Given the budget constraints imposed on the Department by the General Assembly, the basis for the Department's appeal, and that circumstances of this appeal are not "extraordinary" as specified in SCACR Rule 242(j), the Department respectfully requests that the Court order that fees not be taxed against the Department. In the

---

[2] "[T]here is no dispute that Tract D is a coastal island as defined in the regulations because Dreher *concedes* Tract D is a high ground area above the critical line delineation separated from the upland immediately adjacent to 806 East Cooper Avenue by navigable, saline waters." Dreher v. S.C. Dep't of Health & Envtl. Control, 399 S.C. 259, 264-65, 730 S.E.2d 922, 925 (Ct. App. 2012).

alternative, the Department respectfully requests that the Court reduce the requested fees as the Court deems just and proper.

Respectfully submitted,

Bradley Churdar, Bar # 12929
Chief Counsel
South Carolina Department of Health and Environmental Control
1362 McMillan Avenue, Suite 400
Charleston, SC 29405
(843) 953-0214
(843) 953-0201 – fax
churdabd@dhec.sc.gov

Attorney for Petitioner
South Carolina Department of Health and Environmental Control

July 6, 2015
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
JUL 10 2015
S.C. SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Opinion No. 5011 (S.C. Ct. App., Heard May 23, 2012 – Filed July 25, 2012

South Carolina Department of Health and Environmental Control — Petitioner,

vs.

Ann Dreher — Respondent.

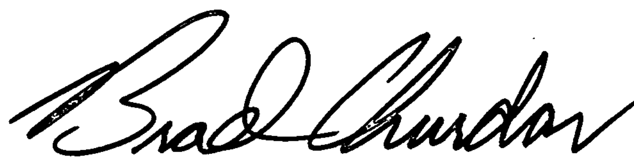
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date he has served the ***Return to Motion for Costs*** in this matter upon the following, by placing copies of same in the United States Mail, first class postage prepaid, addressed to:

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

Christopher McG. Holmes, Esquire
222 West Coleman Blvd.
Suite 124
Mt. Pleasant, SC 29464

Amy E. Armstrong, Esquire
SC Environmental Law Project
Post Office Box 1380
Pawleys Island, SC 29585



Bradley D. Churdar

July 6, 2015