

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2014-001267  
Circuit Court Case No.2009-CP-10-3010

**RECEIVED**  
JUL 05 2016  
SC Court of Appeals

In the matter of the Estate of Alice Shaw Baker.

Betty Fisher and Lisa Fisher, .....Appellants

v.

Bessie Huckabee, Kay Passailague Slade,  
Sandra Byrd, and Henry McMaster, in his Capacity as Attorney General, Defendants,

Of whom Bessie Huckabee, Kay Passailague Slade, and Sandra Byrd,  
.....Respondents

**APPELLANTS' OPPOSITION TO MOTION FOR COSTS**

JOHN HUGHES COOPER, ESQUIRE  
1476 Ben Sawyer Blvd. Ste. 7  
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843-883-9099; fax 843-883-9335

and

LISA FISHER, ESQUIRE  
*Pro Hac Vice*  
c/o JOHN HUGHES COOPER, P.C.  
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Mount Pleasant, SC 29464  
843-883-9099; fax 843-883-9335

(Attorneys for Appellant)

**COMES NOW** Betty Fisher and Lisa Fisher, Appellants in the above appeal, and pursuant to Rule 240(e), SCACR, timely files their Return in opposition to the Motion for Costs prematurely filed by Respondent Peter Kouten on or about September 30, 2015 and renewed on June 23, 2016. The opinion in this matter dismissed the appeal on July 15, 2015.

**I. COSTS MAY NOT BE ASSESSED WHEN AN APPEAL IS  
DISMISSED WITHOUT PREJUDICE**

For costs to be proper on dismissal, Case law makes it clear that dismissal must be with prejudice. The unpublished decision in this matter does not state with prejudice, and the opinion itself makes it clear that it is not with prejudice. The court ruled:

"Because the orders are not immediately appealable, we dismiss this appeal. See *EnerSys Delaware, Inc. v. Hopkins*, 401 S.C. 615, 619, 738 S.E.2d 478, 480 (2013) (holding an order denying a motion to disqualify an attorney is not **immediately** appealable.)" (Emphasis added)

By using the term not "immediately appealable", it is clear that upon final judgment in the case, the issue of disqualification can be raised again. Therefore, case law which provides that costs are not allowed when a matter has been dismissed without prejudice include *Johnson v. Paraplane*, 321 S.C. 316, 468 S.E. 2d 620 (1996), *Peterkin v. Brigman* , 319 S.C. 367, 461 S.E. 2d 809 (1995).

On these grounds alone, Respondent's motion must be denied.

**II. EVEN IF RESPONDENT WAS ENTITLED TO COSTS, RESPONDENTS WAIVED HER RIGHT TO SAID COSTS, BECAUSE SHE SOUGHT COSTS PURSUANT TO 242, SCACR AND SOUGHT NOT RECOVERABLE COSTS AS OUTLINED HEREIN**

Costs may not be awarded unless the motion is timely filed, which pursuant to Rule 222, SCACR, rule 222(d) and (e), must be brought within 15 days of the issuance of the remittitur. (See also, *Black v. B.B. Kirkland Seed Co.*, 163 S.C. 222, 161 S.E.2d 489 (1931) [similar conclusion based on prior costs provision].)

Only Costs outlined in Rule 222, SCACR would be recoverable. As set forth in the sworn itemized statement of costs, Respondent Bessie Huckabee, as the purported personal representative for the Estate of Alice Shaw Baker ("Respondent"), did not seek attorney fees pursuant to Rule 222 (b), SCACR, instead Respondent sought fees under the fee provision of Rule 242(j)(2), SCACR. Pursuant to 242(j)(2), SCACR, costs are only allowed when a writ of certiorari is granted. In this case, the Supreme Court did not grant it.

The court in *Muller v. Myrtle Beach Golf & Yacht Club*, 313 S.C. 412, 438 S.E. 2d 248 (1993) further explained that Rule 222, SCACR provides for an automatic attorneys' fees award for the prevailing party on appeal, which is "taxed in the appellate court, but prevailing party waived his right to this award since he failed to file an itemized statement of cost prior to the issuance of the remittitur."

Counsel sought fees under the code for attorney fees allowed when a petition for writ of certiorari is granted in the Supreme Court, therefore, as outlined above in *Muller, supra*, respondent waived her right to attorney fees since she did not seek fees under the appropriate rule, i.e. 222(b), prior to the issuance of the remittitur.

Additionally, Respondent did not appear on the appeal, she chose to ignore the appeal, and only participated in these proceedings when Appellants filed their petition for rehearing. The automatic fee award is for responding to the appeal, Appellant contends that Respondent can not claim attorney fees when he did not participate in the underlying appeal. This is supported by the types of costs which can be awarded on appeal. There is no language which permits costs for printing briefs on rehearing. Respondent also sought costs for a reply brief which he did not file. Moreover, allowing Respondent statutory fees for attorney fees would be an unwarranted windfall for work that counsel can not take credit for.

Appellant requests that the court look at the Return from W. Westbrook Wills and the Return from Peter Kouten. The argument and law is essentially the same. Counsel Wills has waived his right to fees, despite the fact that he filed his return first. It would appear that Counsel Kouten merely copied the document. No attorney fees should be awarded for such conduct.

Additionally, Rule 222 also provides that costs are recovered only to the extent that the party actually incurred these costs. Respondent seeks costs for the copying of the petition for rehearing and costs of printing or copying reply brief. There is no provision for these costs, and these to are sought under Rule 242(j) which is not applicable and which this court must deny.

Therefore, Appellants asks the court to deny the request for copies of the petition for rehearing in the amount of \$6.00 and the costs of copying the reply brief under rule 242(j) in the amount of \$53.00, and the costs of printing or copying the appendix in the amount of \$3.50, for a total of \$62.50. Respondent is not entitled to any of these costs. Respondent did not file a reply brief. Respondent did not need to print an appendix in the Supreme Court, because it was served on him.

Finally, Appellant request that the court deny Attorney Kouten's request for attorney fees in the amount of \$1,000.00 as stated. Therefore, the entire Motion for costs should be denied.

**WHEREFORE**, Appellants pray for an Order denying Respondent's Motion for Costs in its entirety.

RESPECTFULLY SUBMITTED,

JOHN HUGHES COOPER, P.C.

By: 

JOHN HUGHES COOPER, ESQUIRE

Federal Court ID 298

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ATTORNEYS FOR PLAINTIFF

July 1, 2016

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Of whom Bessie Huckabee, Kay Passailague Slade, and Sandra Byrd,  
.....Respondents

\_\_\_\_\_  
PROOF OF SERVICE  
\_\_\_\_\_

I certify that I have served the **APPELLANT'S OPPOSITION TO MOTION FOR COSTS** on the following counsel and parties by depositing a copy of it in the United States Mail, postage prepaid, on July 1, 2016 addressed as follows:

Peter A. Kouten, Esquire  
Kouten Law Firm, LLC  
P.O. Box 340  
John's Island, SC 29457

( Attorney for Bessie Huckabee)

W. Westbrook Wills III, Esquire  
38 Broad Street Ste. 200  
Charleston, SC 29401

(Attorney for Bessie Huckabee, Kay Passailague Slade,  
Sandra Byrd)

July 1, 2016

RESPECTFULLY SUBMITTED,

JOHN HUGHES COOPER, P.C.

By: 

JOHN HUGHES COOPER, ESQUIRE

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John Hughes Cooper  
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July 1, 2016

John Townsend Cooper  
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JUL 05 2016

SC Court of Appeals

South Carolina Court of Appeals  
1220 Senate Street  
Columbia, SC 29201  
Attn: Diane

Re: Betty Fisher and Lisa Fisher, Appellants v. Bessie Huckabee, Kay Passailague Slade, Sandra Byrd, and Henry McMaster, in his capacity as Attorney General of South Carolina, Defendants, Of whom Bessie Huckabee, Kay Passailague Slade, and Sandra Byrd are Respondents, **Appellate Case No. 2014-001267**

Dear Diane:

Enclosed for filing please find an Original and 6 copies of Appellants' Opposition to Motion for Costs and a Proof of Service.

Also enclosed is a copy of our filing for date stamping and return to our office by mail.

Thank you for your assistance with this matter.

Best regards.

Very truly yours,

John Hughes Cooper

Enclosures: Original Opposition and Proof of Service  
6 copies of Opposition and Proof of Service  
Copy of Opposition for date stamping and return  
Return envelope

Cc: W. Westbrook Wills III, Esquire  
Peter A. Kouten, Esquire  
Mary Frances Jowers, Asst. Attorney General (by email)

WE COVER THE WATERFRONT

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FROM:

*John Hughes Esq.  
1476 Ben Sawyer Blvd, Suite 11  
Mt Pleasant, SC 29464*

TO:

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1220 Senate Street  
PF Columbia, SC 29201*

Label 228, July 2013

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