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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM DARLINGTON COUNTY
COURT OF COMMON PLEAS

RECEIVED

J. MICHAEL BAXLEY, CIRCUIT COURT JUDGE JUN 21 2016

SC Court of Appeals

CASE NO. 2013-CP-16-431
APPELLATE CASE NO. 2014-000589

Wilkins Lee Byrd, Kay R. Larson, John Norwood Klettner, Laura K. Bynum, Ann B. Crump, Robert Larsen, Joan Rutledge Gary, John Robert Stanton, Charles E. Stanton, Byrd L. Thomson, and John Doe and Richard Roe as Representatives of all persons unknown claiming any right, title, estate, interest in or lien upon the real estate described in the appeal herein, including but not limited to any unknown owners, unknown heirs, unknown devisees of S. W. Byrd, Mary Moore Byrd, Etta B. Klettner, S. J. Klettner, Sr., Susan Wilkins Byrd, Mary M. Byrd, Joseph D. Rutledge, John R. Larsen, Charles E. Byrd, Jewel Butler Byrd, Wilkins Norwood Byrd, Ruth Byrd, Marian Moore Byrd, Mary K. Stanton, S. J. Klettner, Jr., Mary R. Larsen, John Rutledge Gary, Jewel Elizabeth Byrd, or any person, any unknown infants of persons under disability or persons in the military service designated in a class as Richard Roe, as to the property described in the petition herein and designated as Tax Map No. 076-00-02-004, Appellants,

v.

E. Butler McDonald, Respondent.

APPELLANTS' MOTION FOR COSTS

The Appellants, by and through their undersigned attorney, hereby move this court for an Order granting Costs on Appeal pursuant to Rule 222. This motion is based on the Itemized Statement of Costs and the following memorandum.

STATEMENT OF THE CASE

The Appellants appealed from the Darlington County Probate Court ordering the public sale of property in a partition action brought by Respondent. The appealed from Order of the Probate Court, affirmed by the Circuit Court, included grounds of appeal as follows: (1) erred in treating the percentages of ownership as personal property rather than as realty, (2) lacked subject matter jurisdiction to hear the partition action, (3) erred in applying section 15-61-25(A) of the South Carolina Code (2006) rather than section 62-3-911 of the South Carolina Code (Supp. 2012), (4) erred in finding Appellants failed to comply with the probate court's order, (5) erred in holding partition by allotment was not practical and in ordering a public sale, and (6) erred in awarding reasonable attorney's fees and costs to McDonald pursuant to section 15-61-110 of the South Carolina Code (2005).

The only grounds of appeal affirmed by the court was number (1) above, dealing with percentages of ownership of the tenants-in-common. The Court's decision to affirm the determination of percentages of ownership only slightly changed the ownership of the various tenants-in-common. In addition, the Court

of Appeals with Appellants “that South Carolina law governed the descent of Betty Byrd’s interest in the S. W. Byrd Farm.” By the Court of Appeals holding the probate court did not have jurisdiction in the partition action and vacating the remaining issues on appeal, the Appellants prevailed on five of the six grounds of appeal.

AUTHORITY ON RULE 222 AND COSTS

Under Rule 222, “when an appeal is affirmed or reversed in part or is vacated, costs shall be allowed only as ordered by the appellate court.” There appears to be no case directly on point under Rule 222, but there are numerous old cases which clearly support appellants’ position. Costs are awarded when a lower court decision is “modified”, “substantially modified”, or where a decision is reversed for lack of jurisdiction.

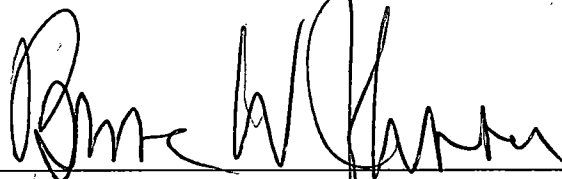
Defendant held prevailing party and entitled to taxation of its costs of appeal, where judgment was affirmed as to \$2,000 actual damages and reversed as to \$400 punitive damages. *Gathings v. Great Atlantic & Pac. Tea Co.*, 170 S.C. 219, 170 S.E. 153 (1933). Where Supreme Court modifies judgment, appellant is regarded as prevailing party, entitled to taxation of his costs. *Home Building & Loan Ass’n of Spartanburg v. Cohen*, 179 S.C. 159, 183 S.E. 775(1936). Modification of a judgment on appeal entitles the appellant to his costs incurred in the Supreme Court. *Lemmon v. Wilson*, 205 S.C. 297, 31 S.E.2d 745 (1944).

Defendant obtaining substantial modification of a decree by allowance of set-off held entitled to costs on appeal. *United Timber Corp. v. Mullins Lumber Co.*, 142 S.C. 477, 141 S.E.2d 15, (1927). Costs will be taxed against defendant in error, where judgment was substantially modified. *Sullivan v. Latimer*, 43 S.C. 262, 21 S.E. 3 (1895). Costs may be imposed on plaintiff in error where a judgment is reversed for lack of jurisdiction of the circuit court, if the cause was removed into that court at his instance. *Blacklock v. Small*, 8 S.Ct. 1096, 127 U.S. 96, 32 L.Ed. 70 (1888).

SUMMARY

The appellants are the prevailing parties. The decision of this Court amounts to a “substantial modification”, entitling appellants to costs.

Respectfully Submitted,



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June 20, 2016

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SC Court of Appeals

V. Claire Allen, Deputy Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: E. Butler McDonald v. Wilkins Lee Byrd, et al
Appellant Case No. 2014-000589
Our File No. 12-061

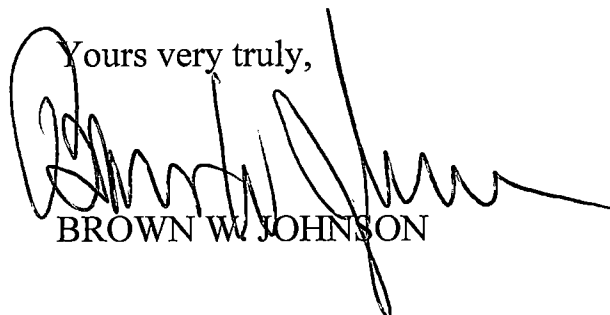
Dear Ms. Allen:

I am enclosing the original and six copies of the following:

1. Appellants' Motion for Costs;
2. Itemized Statement of Costs (Form 17);
3. Certificate of Service;
4. Check in the amount of \$25.00 to cover the filing fee.

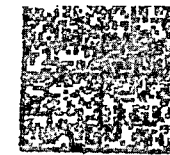
By copy of this letter, I am forwarding a copy of the same to Ms. Ervin, attorney for the respondent.

Yours very truly,



BROWN W. JOHNSON

BWJ:ktb
Enclosures



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