

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2017-000197
Case. No. 2016-CP-10-4668

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MAY 12 2017

SC Court of Appeals

Kyle J. Kibler,

Plaintiff/Appellant,

v.

Basil C. Peyton and
Origin Point Brands, LLC

Defendants/Respondents,

**MEMORANDUM IN SUPPORT OF RESPONDENT ORIGIN POINT BRANDS, LLC'S
MOTION FOR COSTS ON APPEAL**

Pursuant to Rules 222 and 240 of the South Carolina Appellate Court Rules, Respondent Origin Point Brands, LLC ("OPB") respectfully submits this Memorandum in support of its Motion for Costs on Appeal. As set forth below, OPB should be awarded attorneys' fees in the amount of \$1,000 under Rule 222, SCACR because Appellant Kyle Kibler's ("Kibler") appeal was dismissed.¹

I. PROCEDURAL BACKGROUND

Kibler filed a Complaint in the Charleston County Court of Common Pleas on September 1, 2016 against OPB and Basil Peyton ("Peyton"). In response to the Complaint, OPB and Peyton

¹ An Itemized Statement of Costs is attached hereto as Exhibit A.

filed a motion to compel arbitration of Kibler's claims based on the arbitration provision in Kibler's employment agreement with OPB. Kibler responded in opposition to the motion, arguing that his claims were outside the scope of the arbitration provision in his employment agreement. The Court of Common Pleas heard oral argument on January 4, 2017 and issued its order on January 6, 2017, holding that "the action should be stayed and arbitration is compelled."

Kibler filed a Notice of Appeal on January 30, 2017, appealing the order compelling arbitration and staying the action. This Court then sent counsel for all parties a letter on February 7, 2017, stating that a "preliminary review of the order challenged on appeal indicates it might not be appealable." The Court thus directed counsel for all parties to file briefs addressing the issue of appealability.

OPB filed a brief on February 15, 2017 arguing that the Court of Common Pleas' Order is not appealable. As explained in OPB's brief, the South Carolina Supreme Court ruled in *Heffner v. Destiny, Inc.*, 321 S.C. 536, 538, 471 S.E.2d 135, 136 (S.C. 1995) and in *Toler's Cove Homeowners Assoc., Inc. v. Trident Construction Co.*, 355 S.C. 605, 611, 586 S.E.2d 581, 584-85 (S.C. 2003) that an order compelling arbitration and staying an action pending arbitration is not an appealable order. Kibler filed his brief on February 17, 2017 asserting that the Court of Common Pleas' Order was appealable.

On March 31, 2017, this Court dismissed Kibler's appeal. As set forth in this Court's Order, based on the South Carolina Supreme Court decisions in *Heffner* and *Toler's Cove*, the Court of Common Pleas' Order compelling arbitration is not immediately appealable. This Court issued the Remittitur on April 26, 2017.

II. ARGUMENT

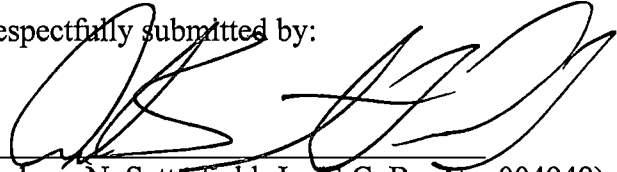
OPB should be awarded its attorneys' fees incurred in briefing the issues on appeal under Rule 222, SCACR. Rule 222(a) states: "Unless otherwise ordered by the appellate court or agreed by the parties, costs *shall be* taxed against the appellant when the appeal is dismissed . . ." Rule 222(a), SCACR (emphasis added). Rule 222(b) addresses which particular costs are allowed, stating in relevant part: "The party entitled to recover costs under this rule . . . *shall be* entitled to recover an attorney's fee in an amount which shall be set by order of the Supreme Court." Rule 222(b), SCACR (emphasis added); *see also Taylor v. Medenica*, 332 S.C. 324, 326, 504 S.E.2d 590, 591 (S.C. 1998) ("Rule 222(b) states that the prevailing party shall be entitled to recover, among other things, . . . an attorney's fee [that is currently set at \$1,000]. We therefore award respondents the \$1,000 attorneys' fee . . ."). "By order dated July 24, 1997, the amount of attorney's fee was set at \$1,000." Rule 222(b) n. 1, SCACR.

Kibler's appeal was dismissed by this Court on March 31, 2017. Indeed, the Court's Order expressly states that "this appeal is dismissed." Thus, OPB is entitled to recover an attorneys' fee in the amount \$1,000. While OPB incurred attorneys' fees in excess of \$1,000 in briefing the issue of appealability and otherwise adjudicating Kibler's appeal, OPB is only seeking \$1,000 based on Rule 222(b), SCACR. An award of attorneys' fees is particularly appropriate here because well-settled law dating back to 1995 provides that the Court of Common Pleas' Order is not an appealable order, and thus Kibler's appeal should never have been filed.

III. CONCLUSION

For the foregoing reasons, OPB respectfully requests that costs on appeal be taxed against Appellant Kyle Kibler.

Respectfully submitted by:



Andreas N. Satterfield, Jr. (S.C. Bar No. 004949)
Andy.Satterfield@jacksonlewis.com
Jonathan A. Roth (S.C. Bar No. 100494)
Jonathan.Roth@jacksonlewis.com
JACKSON LEWIS LLP
15 South Main Street Suite 700
Greenville, South Carolina 29601

Attorneys for Respondent Origin Point Brands, LLC

This 9th day of May, 2017.

Other Counsel of Record:

Christopher C. Mingledorff
Moore Ingram Johnson & Steele
885-B Island Park Drive
Charleston, SC

Counsel for Appellant Kyle J. Kibler

Mark H. Wall (S.C. Bar No. 5798)
Mark.Wall@WallTempleton.com
WALL TEMPLETON & HALDRUP, P.A.
145 King Street, Suite 300
Charleston, SC 29402
(843) 329-9500

Attorneys for Respondent Basil Peyton

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing MEMORANDUM IN SUPPORT OF RESPONDENT ORIGIN POINT BRANDS, LLC'S MOTION FOR COSTS ON APPEAL has been sent to all counsel of record by United States Mail and addressed as follows:

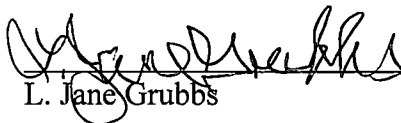
Christopher C. Mingledorff
Moore Ingram Johnson & Steele, LLP
885-B Island Park Drive
Charleston, SC 29492

Mark H. Wall (S.C. Bar No. 5798)
Mark.Wall@WallTempleton.com
WALL TEMPLETON & HALDRUP, P.A.
145 King Street, Suite 300
Charleston, SC 29402
(843) 329-9500

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S.C. Court of Appeals


L. Jane Grubbs

This is the 9th day of May, 2017.

Jackson Lewis

Attorneys at Law

Jackson Lewis P.C.
15 South Main Street
Suite 700
Greenville, South Carolina 29601
Tel 864 232-7000
Fax 864 235-1381
www.jacksonlewis.com

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MY DIRECT DIAL IS: (864) 672-8050
MY EMAIL ADDRESS IS: ANDY.SATTERFIELD@JACKSONLEWIS.COM

May 9, 2017

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SC Court of Appeals

Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

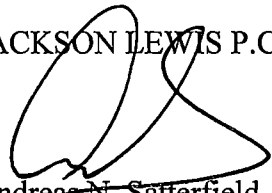
Re: Kyle J. Kibler v. Basil C. Peyton and Origin
Point Brands, LLC
Appellate C.A. No.: 2017-000197

Dear Ms. Kitchings:

Enclosed please find for filing the original and one copy of Respondents' Motion and Memorandum in Support of its Motion for Costs on Appeal in the above-referenced matter. Please file the original and return the clocked copy to us in the self-addressed stamped envelope.

Sincerely,

JACKSON LEWIS P.C.


Andreas N. Satterfield, Jr.

ANS/ljg

Enclosures

cc: Christopher C. Mingleorff, Esq. (w/enclosure)
Mark H. Wall, Esq. (w/enclosure)

jackson lewis
Attorneys at Law

Jackson Lewis P.C.
15 South Main Street
Suite 700
Greenville, South Carolina 29601

Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

REC

MAY

