THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2011-CP-38-1397

William Breland, ... Respondent,

v.

South Carolina Department of Transportation, ... Appellant.

REPLY

Pursuant to Rules 222(d) and 240(f), SCACR, Respondent files the following Reply to the Return this Court requested in response to Respondent's Motion for Costs. The Court should grant the Motion.

Respondent Mr. Breland filed an action on November 28, 2011, against several defendants, including the South Carolina Department of Transportation (SCDOT). Mr. Breland asserted he was injured while driving his van on U.S. Highway 321 in Orangeburg County when he struck a dead tree that had fallen into the roadway. Mr. Breland contended SCDOT failed to inspect its right-of-way along U.S. Highway 321, failed to warn the traveling public about the hazard, and failed to keep the roadway safe. On January 31, 2012, SCDOT filed an Answer denying it was responsible and stating 16 separate defenses.

The case was tried September 3, 2013, through September 6, 2013. The jury returned

a verdict for Mr. Breland for $225,000. SCDOT made post-trial motions for judgment notwithstanding the verdict (JNOV) or, alternatively, a new trial. On October 1, 2013, the trial court held a hearing on SCDOT's motions and on January 16, 2014, the court entered an order denying the motions.

On January 17, 2014, SCDOT filed and served its notice of appeal. Following briefing the Court heard oral arguments on January 7, 2016. On February 24, 2016, the Court issued its opinion affirming the judgment in an unpublished decision. *Breland v. South Carolina Dept. of Transp.*, 2016-UP-089 (S.C. Ct. App. filed Feb. 24, 2016).

On March 14, 2016, Appellant petitioned for rehearing and on June 10, 2016, this Court entered an order denying rehearing.

On July 7, 2016, Appellant petitioned the Supreme Court to issue a writ of certiorari to review this Court's decision. On August 15, 2016, Respondents prepared and filed a Return as required by Rule 242(f), SCACR. On August 25, 2016, Appellant filed a Reply to the Return.

On March 24, 2017, the Supreme Court denied Appellant's petition. On April 4, 2017, this Court transmitted the remittitur to the circuit court.

On April 18, 2017, Respondent filed his Motion for Costs pursuant to Rule 222(a), SCACR. Appellant did *not* file a Return within 10 days as permitted by Rules 222(d) and 240(e), SCACR. Instead of deeming Appellant's failure to timely file a return to be consent to the relief Respondent sought (Rule 240(e), final sentence), the Court wrote Appellant on May 22, 2017, requesting a Return. Respondent files this Reply.

As previously stated in the Motion, Rule 222(a) provides that unless the court orders otherwise or the parties agree otherwise, "costs *shall* be taxed against the appellant when the appeal is dismissed or the judgment is affirmed." (Emphasis added). This Court's opinion affirmed the circuit court's judgment in its entirety, rejecting every one of Appellant's arguments.

Appellant filed the Return this Court requested, and asked the Court to deny or reduce the requested costs and fees. Appellant's entire argument is as follows:

> Appellant's arguments in this case warranted further review by the Court of Appeals, as Appellant raised significant and novel issues of evidentiary law in South Carolina, as it relates to technological advances. Lengthy oral arguments further demonstrated the complexity of this matter and the continuing uncertainly surrounding the authentication and admissibility of electronic images. In short, this appeal, while unsuccessful, was not frivolous or imprudent.

(Return, p. 2).

Rule 222 does not condition an award of costs to a respondent upon whether an appellant's case involved frivolous or imprudent arguments. That standard is reserved for Rule 269, SCACR, where the Court may order the payment of sanctions if a party brings an appeal, petition, motion or return that is frivolous. Instead, Rule 222 sets forth a method for permitting the "winner" on appeal to ask the Court to require the "loser" to offset some of the costs the "winner" incurred in prosecuting or defending the appeal. The Rule presumes the award will be made by its use of the word "shall." Where the "winner" was the appellant, the award will naturally be higher given the burden on the appellant to acquire the transcript and prepare the record. Where the "winner" is the respondent, the amount of costs incurred will necessarily be less.

Appellant does not challenge the reasonableness of the costs Respondent Breland incurred, nor the reasonableness of the modest $1,000 attorney fee permitted under the Supreme Court's order of July 24, 1997. Instead, Appellant asserts that because Appellant believes Appellant raised "significant and novel issues of evidentiary law" which according to Appellant were not "frivolous or imprudent," the Court should relieve Appellant of the obligation imposed by Rule 222(a). But the Rule does not include such a standard as a prerequisite to an award.

And even if the Rule contained as a prerequisite a finding by the Court that the "loser" on appeal failed to raise "significant and novel" issues or that the issues raised were "frivolous or imprudent," this Court's disposition of the appeal in an unpublished order under Rule 220(b), SCACR, belies Appellant's contention that there was anything unusual or novel about the several issue Appellant raised that Respondent had to address in response.

Rule 222 reflects a policy choice the Supreme Court made when the Rules of Appellate Procedure were adopted in 1990. Absent extraordinary circumstances not present here, an appellant who takes a case on appeal but loses in summary fashion, and then prolongs the case by pursuing a petition for certiorari, should not be heard to complain when the respondent seeks the relief Rule 222(a) provides. And in this case, the Appellant did *not* complain until this Court asked Appellant to do so.

The appellate courts routinely grant the requests for an award of fees and costs where the amount is reasonable and the movant has prevailed entirely on appeal. *See Sub-Zero Freezer Co. v. R.J. Clarkson Co.*, 308 S.C. 188, 417 S.E.2d 569 (1992) (awarding attorney fees in excess of the limit under the Rule in existence at the time); *Cerny v. Salter*, 311 S.C.

430, 429 S.E.2d 809 (1993) (awarding respondent appellate costs even though appellant raised constitutional challenges to various statutes but lost); *Muller v. Myrtle Beach Golf and Yacht Club*, 313 S.C. 412, 438 S.E.2d 248 (1993) (describing the award under Rule 222 as "an automatic attorney's fee award"); *Taylor v. Medenica*, 332 S.C. 324, 504 S.E.2d 590 (1998) (awarding costs and fees to Respondent where appeal affirmed). This case is no different. Even after prevailing before a jury at trial, Respondent was required to respond to Appellant's brief in which Appellant raised four issues regarding discretionary evidentiary rulings. Respondent was required to pay counsel to review the record, prepare a brief, prepare for and participate in oral argument, and then defend both a petition for rehearing (by letter) and a petition for writ of certiorari (by return). And Respondent prevailed entirely on appeal.

For the reasons stated this Court should grant Respondent's motion for costs incurred on appeal as well as the request for attorney fees that are capped by rule at $1,000.00.

Respectfully Submitted,

May 31, 2017

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PROOF OF SERVICE

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

Richard B. Ness
Alison D. Hood
Norma Anne Turner Jett
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NESS & JETT, LLC
P.O. Box 909
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May 31, 2017

Erin Bridges

BNTD
BLUESTEIN · NICHOLS · THOMPSON · DELGADO LLC
ATTORNEYS AT LAW

May 31, 2017

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

RE: William Breland v. South Carolina Department of Transportation
Case Tracking No.: 2014-000168

Dear Ms. Kitchings:

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

Thank you for your attention to this matter. If you 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: J. Christopher Wilson, Esquire
Richard B. Ness, Esquire
Alison D. Hood, Esquire
Norma Anne Turner Jett, Esquire
Adam C. Ness, Esquire