

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

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MAY 22 2017

SC Court of Appeals

Case No. 2016-CP-10-4668

Basil C. Peyton and Origin Point Brands, LLC,.....Respondents,

v.

Kyle J. Kibler.....Appellant.

MEMORANDUM IN OPPOSITION TO ORIGIN POINT BRANDS, LLC'S
MOTION FOR COSTS ON APPEAL

Pursuant to Rules 222 and 240 of the South Carolina Appellate Court Rules, Appellant Kyle J. Kibler ("Kibler") respectfully submits this Memorandum in Opposition of Origin Point Brands, LLC's ("OPB") Motion for Costs on Appeal.

I. BACKGROUND

This appeal arose out of the Trial Court's order compelling all of Kibler's claims against OPB to arbitration. The Trial Court erroneously based its order compelling all claims to arbitration upon a prior employment agreement between the parties which was only limited to the employee/employer relationship between Kibler and OPB. Even though the Trial Court sent all of the claims before it to arbitration, the Trial Court did not dismiss the underlying action and instead "stayed" the remainder of the action. The Trial Court's "stay" of the remaining portion of the action is a nullity because all of the claims were sent to arbitration and nothing remained before the Trial Court to be stayed. Therefore, Kibler filed an appeal with this Court to have the Trial Court's decision and order reviewed.

After receipt of Kibler's Notice of Appeal, this Court sent a letter to counsel for Kibler and requested a brief addressing the appealable nature of the order. Interestingly, even though this Court eventually dismissed Kibler's appeal, the Court did not at that time dismiss the appeal, but instead recognized there were reasonable arguments to be made by the parties governing the appealable nature of the Trial Court's order.

Within the timeframe set by this Court, Kibler and OPB filed their respective briefs regarding the appealable nature of the Trial Court's order. In short, Kibler highlighted a gap in South Carolina law which needed to be addressed regarding the appealable nature of arbitration matters, just like Kibler's matter. Despite Kibler's arguments, this Court determined the Trial Court's order was not appealable and dismissed Kibler's appeal.

II. ARGUMENT

This is not a case in which appellate costs should be awarded. Despite OPB's position to this Court that it is entitled to a \$1,000 attorneys' fee, this Court has discretion whether to award fees and costs pursuant to Rule 222. *Austin v. Stokes-Craven Holding Corp.*, 406 S.C. 187 (2013). The reason for this Court's discretion in awarding fees is apparent. Should a matter arise in which an appeal is filed in a frivolous or bad faith nature, then the Court should be able to sanction the appealing party by the awarding of costs or attorneys' fees. On the other hand, if a colorable and reasonable issue is brought before the Court, just like Kibler's matter, then the Court has discretion not to award costs or attorneys' fees.

A reading of OPB's argument on this issue would lead one to believe that appellate costs and attorneys' fees are awarded in every appeal. As this Court is acutely aware, this simply is not the case. In the instant matter, Kibler's appeal was reasonable and made very colorable arguments regarding a gap in South Carolina law governing arbitration and the compelling of matters to arbitration. Just because this Court did not take the opportunity in Kibler's matter to resolve the gap in South Carolina law does not justify an award of attorneys' fees.

III. CONCLUSION

For the foregoing reasons, Kibler respectfully requests that OPB's request for costs on appeal be denied.

Respectfully submitted by:



Christopher C. Mingledorff
South Carolina Bar No. 100390
MOORE INGRAM JOHNSON & STEELE
885-B Island Park Drive
Charleston, South Carolina
Attorneys for the Appellant

This 18th day of May, 2017.

Other Counsel of Record:

Andreas N. Satterfield, Esq.

Jonathan A. Roth, Esq.

15 South Main Street

Suite 700

Greenville, SC 29601

Attorney for Respondent Origin Point Brands, LLC

(864) 232-7000

Mark H. Wall, Esq.

145 King Street

Suite 300

Charleston, SC 29402

Attorney for Respondent Basil C. Peyton

(843) 329-9500

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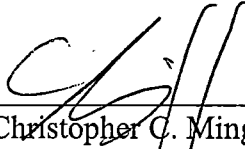
PROOF OF SERVICE

I, Christopher C. Mingledorff, certify that on May 18, 2017, I have served the Memorandum in Opposition to Origin Point Brands, LLC’s Motion for Costs on Appeal by depositing a copy of the same in the United States Mail, addressed to the attorneys of record, Andreas N. Satterfield and Jonathan A. Roth, Jackson Lewis, PC and Mark H. Wall, Wall Templeton and Haldrup, P.A. by certified mail, postage prepaid at the addresses listed below:

Origin Point Brands, LLC
c/o Andreas N. Satterfield, Esq.
Jonathan A. Roth, Esq.
15 South Main Street
Suite 700
Greenville, SC 29601

Basil C. Peyton
c/o Mark H. Wall, Esq.
145 King Street
Suite 300
Charleston, SC 29402

[signature block on next page]



Christopher C. Mingledorff
South Carolina Bar No. 100390
MOORE INGRAM JOHNSON & STEELE
885-B Island Park Drive
Charleston, South Carolina
Attorneys for the Appellant

MOORE INGRAM JOHNSON & STEELE

A LIMITED LIABILITY PARTNERSHIP
WWW.MIJS.COM

JOHN H. MOORE
STEPHEN C. STEELE
WILLIAM R. JOHNSON†‡
ROBERT D. INGRAM†
J. BRIAN O'NEIL
G. PHILLIP BEGGS
ELDON L. BASHAM
MATTHEW J. HOWARD
JERE C. SMITH
CLAYTON O. CARMACK
KEVIN B. CARLOCK†
J. KEVIN MOORE
RODNEY R. MCCOLLOCH
SUSAN S. STUART
BRIAN D. SMITH
HARRY R. TEAR III
W. TROY HART†‡
JEFFREY A. DAXE
KIM A. ROPER†
VICTOR P. VALMUS
ANGELA H. SMITH†
CHRISTOPHER C. MINGLEDORFF‡
ANGELA D. TARTLINE
PHILIP C. THOMPSON
SHANE MAYES

ALEXANDER B. MORRISON*
GREGORY H. FULLER*
DOUGLAS W. BUTLER, JR.
CAREY E. OLSON*
JOYCE W. HARPER
CHARLES E. PIERCE*
WILMA R. BUSH
TODD I. HEIRD*
CARLA C. WESTER‡
AMY L. JETT*
RYAN M. INGRAM
SHAWN G. SHELTON
D. AUSTIN GILLIS†
KRISTEN C. STEVENSON*
SARAH H. BEST*†
RYAN C. EDENS*
JULIE C. FULLER*
JODI B. LODEN*
TAMMI L. BROWN
J. MARSHALL WEHUNT
JONATHAN J. SMITH
WILLIAM B. WARIHAY*
DAVID J. OTTEN*
JONATHAN S. FUTRELL
NORBERT D. HUMMEL, IV

MARIETTA, GEORGIA
EMERSON OVERLOOK
326 ROSWELL ST • STE 100
MARIETTA, GEORGIA 30060
TELEPHONE (770) 429-1499

KNOXVILLE, TENNESSEE
408 N. CEDAR BLUFF RD • STE 500
KNOXVILLE, TENNESSEE 37923
TELEPHONE (865) 692-9039

JACKSONVILLE, FLORIDA
10201 CENTURION PKWY, N • STE 401
JACKSONVILLE, FLORIDA 32256
TELEPHONE (904) 428-1465

BRENTWOOD, TENNESSEE
5200 MARYLAND WAY • STE 301
BRENTWOOD, TENNESSEE 37027
TELEPHONE (615) 425-7347

LEXINGTON, KENTUCKY
2333 ALEXANDRIA DRIVE
LEXINGTON, KENTUCKY 40504
TELEPHONE (502) 410-6021

CHARLESTON, SOUTH CAROLINA
885 ISLAND PARK DR • STE B
CHARLESTON, SOUTH CAROLINA 29492
TELEPHONE (843) 302-0002

ORLANDO, FLORIDA
7380 W. SAND LAKE RD • STE 500
ORLANDO, FLORIDA 32819
TELEPHONE (407) 387-6233

DAVID P. CONLEY
LOURDES M. SANCERNI‡
J. DANIEL COLE
RYAN S. ROBINSON
JOSEPH D. SHELLEY
LESLIE S. NEUBAUER
JENNIFER B. SIMPSON
CHRISTIAN H. LAYCOCK
LIZA D. HARRELL**
JESSICA A. KING
JOHN A. EARLY
CHRISTOPHER W. SHERMAN*
FREDERICK F. FISHER***
KENNETH D. HALL
RAHUL SHETH
GRANT S. TALL
KIMBERLY E. THOMPSON*
BRENT R. LAMAN*
CHRISTOPHER R. BROOKS*
CHRISTOPHER D. TROUTMAN
ALLISON M. HELSINGER‡
MICHAEL R. BEANE‡
N. CRAIG HOLLOWAY*
MICHAEL E. PATTERSON***
MATTHEW L. JONES

NELOFAR AGHARAHIMI*
ANTHONY J. TROMMELLO
RYAN T. BOWDEN
PATRICK R. MCKENRICK*
JARED C. WILLIAMS***
CHRISTOPHER G. ROWE*
TIFFANY B. SHERRILL*
AMBER LAMPE PETERS*
DAVID W. SAMMONS‡

OF COUNSEL:
JOHN L. SKELTON, JR.†

† ALSO ADMITTED IN TN
* ALSO ADMITTED IN FL
**** ALSO ADMITTED IN CA
^ ALSO ADMITTED IN TX
• ALSO ADMITTED IN AL
‡ ALSO ADMITTED IN KY
+ ALSO ADMITTED IN SC
ALSO ADMITTED IN NC
** ALSO ADMITTED IN IN
• ALSO ADMITTED ONLY IN TN
0 ADMITTED ONLY IN FL
*** ADMITTED ONLY IN SC
o ADMITTED ONLY IN KY

May 18, 2017

Via Certified Mail/RRR: 7016 2140 0001 0947 9210

Honorable Jenny Abbott Kitchings
Clerk, 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 Case No. 2017-000197

Dear Ms. Kitchings:

With regard to the above, please find enclosed the original and six (6) copies of the *Memorandum in Opposition to Origin Point Brands, LLC's Motion For Costs on Appeal* to be included in the Record on Appeal, along with Proof of Service. I am this date serving counsel for Appellants with a copy of the Memorandum.

With kind regards, I am

Sincerely,
MOORE INGRAM JOHNSON & STEELE, LLP


Christopher C. Mingledorff

CCM/jlr

cc (w/encs.): Andreas N. Satterfield, Jr., Esq. (via U.S. mail)
Jonathan A. Roth, Esq. (via U.S. mail)
Mark H. Wall, Esq. (via U.S. mail)
Robert L. Maddox, III, Esq. (via email)
Michael M. Hirn, Esq. (via email)
Kyle Kibler (via email)

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US POSTAGE



MOORE INGRAM JOHNSON & STEELE LLP

A LIMITED LIABILITY PARTNERSHIP

885 Island Park Blvd
Suite B

CHARLESTON, SOUTH CAROLINA 29492

*Via Certified Mail/RRR: 7016 2140 0001 0947
9210*

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