

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2016-002459

RECEIVED

JUL 31 2017

SC Court of Appeals

South Carolina Human Affairs Commission,

Appellant,

v.

Zeyi Chen & Zhirong Yang,

Respondents.

RETURN TO RESPONDENTS' MOTION FOR ASSESSMENT OF COSTS

The South Carolina Human Affairs Commission ("SCHAC" or "Appellant") submits this return to the Respondents Motion For Assessment Of Costs pursuant to Rule 240, SCACR.

I. STATEMENT OF THE CASE

Appellant sought enforcement of a Settlement Agreement memorialized by all parties at mediation. The Motion to Enforce was denied by Order entered on November 15, 2016. Appellant appealed that Order on December 16, 2016, and the Appeal has been dismissed as of June 30, 2017. Thereafter, Respondents moved to recover costs and fees on Appeal.

II. ARGUMENT

Pursuant to Rule 222(a), SCACR, Respondents moved to recover costs and fees on appeal. Under Rule 222(a), SCACR, “Unless otherwise ordered by the appellate court or agreed by the parties, costs shall be taxed against the appellant when the appeal is dismissed or judgment on appeal is affirmed.” “It is within this Court’s discretion whether to award fees and costs under Rule 222.” *Austin v. Stokes-Craven Holding Corp.*, 406 S.C. 187, 199, 750 S.E.2d 78, 84 (2013). Appellant respectfully asks this Court to deny Respondents’ motion as it relates to attorney’s fees.¹

A. **Attorney's fees not warranted in instant matter.**

An award of costs of an appeal is intended to reward the prevailing party in the appeal. *Sub-Zero Freezer Co. v. R.J Clarkson Co.*, 308 S.C. 188, 192, 417 S.E.2d 569, 571-572 (1992); *Cunningham v. Cauthen*, 47 S.C. 150, 163, 25 S.E. 87, 91 (1896). The definition of a prevailing party “clearly envisions a victory to some degree *on the merits*.” *EFCO Corp. v. Renaissance on Charleston Harbor, LLC*, 370 S.C. 612, 618, 635 S.E.2d 922, 925 (Ct. App. 2006) (emphasis added). This Court has further defined a prevailing party as “one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention and is the one in whose favor the decision or verdict is rendered and judgment entered.” *Id.* citing to *Heath v. County of Aiken*, 302 S.C. 178, 182-83, 394 S.E.2d 709, 711 (1990).

Court rules note when a dismissal is deemed adjudication on the merits; for example, Rule 41 (a) and (b), SCRCR. In the instant matter, there has been no decision rendered on the merits of the appeal; this Court deemed it to be interlocutory, leaving open the possibility of a

¹ Appellant does not dispute awarding Respondent with the requested costs for filing fees.

future decision. As such, costs are more properly assessed at such time as a final decision on the merits is rendered.

B. Rule 222, SCACR, does not override the statutory requirements of S.C. Code. Ann. §15-77-300.

In South Carolina, “[i]t is well established that “[a]ttorney's fees are not recoverable unless authorized by contract or statute.” *Jackson v. Speed*, 326 S.C. 289, 307, 486 S.E.2d 750, 759 (1997); see *Blumberg v. Nealco, Inc.*, 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993) (“The general rule is that attorney's fees are not recoverable unless authorized by contract or statute.”); *Duke Power Co. v. South Carolina Pub. Serv. Comm'n*, 284 S.C. 81, 100, 326 S.E.2d 395, 406 (1985) (“Ordinarily, an attorney must look to his client for compensation for services performed by his employment” unless authorized by contract or statute.); *Prevatte v. Asbury Arms*, 302 S.C. 413, 415, 396 S.E.2d 642, 643 (Ct. App. 1990) (“Under the common law of South Carolina, a prevailing party has no right to recover attorney's fees. In the absence of a common law right, the plaintiff must plead either a contract or a statute to receive enhanced damages or attorney's fees.”) (citation omitted).²

The state legislature has unambiguously addressed the matter of attorney's fees in civil suits involving a state entity in § 15-77-300 (A):

“In any civil action brought by the State, any political subdivision of the State or any party who is contesting state action, unless the prevailing party is the State or any political subdivision of the State, the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:

- (1) the court finds that the agency acted without substantial justification in pressing its claim against the party; and
- (2) the court finds that there are no special circumstances that would make the award of attorney's fees unjust.”

² While there are some equitable bases for attorney's fees outside of contract or statute, those are not implicated here.

S.C. Code Ann. § 15-77-300 (A) (2010).

The statute goes on to list a required analysis for an assessment of fees against a state agency. S.C. Code Ann. § 15-77-300 (B) (2010). While Rule 222 generally permits the award of attorney's fees in the Court of Appeals, it does not override the requirements of § 15-77-300. Rules of statutory construction require a court to look to the plain meaning of a text when the meaning is clear. "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." *Knotts v. S.C. Department of Natural Resources*, 348 S.C. 1, 10, 558 S.E.2d 511, 516 (quoting Norman J. Singer, *Sutherland Statutory Construction*, §46.03 at 94 (5th Ed. 1992)); *Bayle v. South Carolina Dep't of Transp.*, 344 S.C. 115, 122, 542 S.E.2d 736, 740 (Ct. App. 2001). "The legislature's intent should be ascertained primarily from the plain language of the statute." *State v. Landis*, 362 S.C. 97, 102, 606 S.E.2d 503, 505 (Ct. App. 2004). "The first question of statutory interpretation is whether the statute's meaning is clear on its face." *Wade v. Berkeley County*, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002) (citing *Kennedy v. South Carolina Ret. Sys.*, 345 S.C. 339, 549 S.E.2d 243 (2001)). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the Court has no right to impose another meaning." *Vaughn v. Bernhardt*, 345 S.C. 196, 198, 547 S.E.2d 869, 870 (2001) (citing *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000)). "[T]he words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." *Municipal Ass'n of South Carolina v. AT&T Communications of S. States, Inc.*, 361 S.C. 576, 580, 606 S.E.2d 468, 470 (2004) (citing *Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992)). "The terms must be construed in context and their meaning determined by looking at the other terms used in the statute." *State v. Morgan*, 352 S.C. 359, 366, 574 S.E.2d 203, 206 (Ct. App. 2002) (citing *Southern Mut. Church Ins. Co. v. South*

Carolina Windstorm & Hail Underwriting Ass'n, 306 S.C. 339, 412 S.E.2d 377 (1991)). “When the terms of a statute are clear, the court must apply those terms according to their literal meaning.” *Georgia-Carolina Bail Bonds v. County of Aiken*, 354 S.C. 18, 24, 579 S.E.2d 334, 337 (citing *Cooper v. Moore*, 351 S.C. 207, 212, 569 S.E.2d 330, 332 (2002)).

The language of S.C. Code Ann. § 15-77-300 is unambiguous in stating it applies to “any civil action brought by the state.” This encompassing language used by the legislature evinces the intent to have § 15-77-300 serve as the method by which attorney's fees are determined in civil cases involving the state. To the extent that SCACR Rule 222 and § 15-77-300 conflict, Rule 222 should give way to the statute.

The Supreme Court addressed a similar issue in examining the intersection of § 15-77-300 and Family Court rules. The Court noted that “[w]e do not perceive that the legislature intended for the important policy considerations implicit in § 15-77-300 to be overridden by the general grant of authority provided in section 20-7-420(38).”³ *Spartanburg Cty D.S.S. v. Little*, 309 S.C. 122, 125-126, 420 S.E.2d 499, 503 (1992). Appellant notes that part of the policy considerations noted in that decision are relevant to § 15-77-300 (C): “[t]he provisions of this section do not apply to civil actions relating to ... child abuse and neglect actions.” The reasoning still stands when § 15-77-300 is read in full that the legislature intended for the statute to govern *all* state-initiated civil actions, with the specifically noted exceptions.

C. SCHAC was substantially justified in pursuing its appeal.

If SCACR Rule 222 is held to apply to state agencies, the analysis of S.C. Code Ann. § 15-77-300 is required in order to comport with the plain meaning of that statute. The prevailing party to a civil action may recover attorney’s fees against a state agency only if “the agency acted without substantial justification in pressing its claim against the party” and there are no

³ This code section has been updated and is now found at S.C. Code Ann. § 63-3-530 (38).

“special circumstances that would make the award of attorney’s fees unjust.” S.C. Code Ann. § 15-77-300 (2010). Our Supreme Court held “substantial justification” does not mean “‘justified to a high degree,’ but rather ‘justified in substance or in the main’-- that is, justified to a degree that could satisfy a reasonable person.” *Heath v. County of Aiken*, 302 S.C. 178, 183, 394 S.E.2d 709, 712 (1990) (quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)). In deciding whether a state agency acted with substantial justification, the courts look to the agency’s position in litigating the case to determine “whether it is one which has a reasonable basis in law and fact.” *Video Gaming Consultants v. SC Department of Revenue*, 358 S.C. 647, 650, 395 S.E.2d 890, 892 (2004). An agency’s loss on the merits does not create a presumption that its position was not substantially justified. *Id.* citing *Kiareldeen v. Ashcroft*, 273 F.3d 542, 554 (3rd Cir. 2001); see also *Pierce*, 487 U.S. at 569 (noting the government could take a position that is substantially justified, yet lose).

Section 15-77-300 declares that an “agency is presumed to be substantially justified in pressing its claim against the party if the agency follows a statutory or constitutional mandate that has not been invalidated by a court of competent jurisdiction.” In the instant matter, appellant state agency has as its statutorily-mandated mission (see. S. C. Code Ann. § 1-13-20 and § 31-21-20) the elimination and prevention of illegal discrimination in employment, housing, and public accommodations. The Appellant Agency filed civil suit filed in circuit court pursuant to a statutory obligation found in § 31-21-130(C)(2). At mandated mediation, an agreement was reached and signed. When Respondents rescinded the agreement, as noted above, Appellant sought to enforce the agreement; when that enforcement action failed, this appeal followed in an effort to comply with the Agency’s affirmative duty to enforce the Fair Housing Law. “An administrative agency has only such powers as have been conferred upon it by law and

must act within the granted authority for an authorized purpose. It may not validly act in excess of its powers, nor has it any discretion as to the recognition of or obedience to a statute.” *South Carolina Tax Comm'n v. South Carolina Tax Bd. of Review*, 278 S.C. 556, 560, 299 S.E.2d 489, 491 (1983). At each step of this process, SCHAC has operated pursuant to a statutory mandate to enforce the SC Fair Housing Law. While this Court has deemed the instant appeal to be interlocutory in nature, Appellant was unable to find any case law addressing a motion to enforce that did not require additional court approval. Appellants contend that this action had a reasonable basis in law such that it could “satisfy a reasonable person.” *Heath*, 302 S.C. at 183. As noted *supra*, this dismissal was not a decision on the merits; but, even if it were, the agency was substantially justified in pressing its claim and an award of attorney's fees is inappropriate pursuant to S.C. Code Ann. § 15-77-300.

Further, even if this Court finds that Appellant was not substantially justified in pressing its claim, there are special circumstances that would make the award of attorney's fees unjust. Particularly, this dismissal has not addressed the merits of the matter appealed. Should it become necessary to pursue this matter to an appeal after a final decision on the merits below, the circuit court can address costs associated with this appeal. Further, Appellant is a state agency seeking to fulfill its mission to eliminate illegal discrimination in housing; any shifting of costs to the agency results in a corresponding loss of funds for pursuing that mission.

D. If attorney's fees are ordered, they should be accounted for based on work involved.

South Carolina Code Annotated § 15-77-300 outlines the factors to be applied in determining an award of fees to include (1) the nature, extent, and difficulty of the case; (2) the time devoted; (3) the professional standing of counsel; (4) the beneficial results obtained; and (5) the customary legal fees for similar services. Respondents' motion to dismiss, their sole

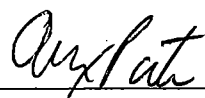
substantive filing in this matter, amounts to three (3) pages and cites only five (5) cases. With regards to factors the first two factors in determining an award of fees, Appellant does not believe the difficulty or time warrant an award of the full costs authorized under Rule 222, SCACR. In regards to the fourth factor, this dismissal serves merely to delay adjudication on the merits and does not warrant the maximum award. Appellant is certain that opposing counsel's fees are within the accepted range for similar services and does not question his professional standing.

III. CONCLUSION

WHEREFORE, Appellant respectfully requests this Court deny in full or in part Respondents' Motion For Assessment of Costs.

July 31, 2017

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
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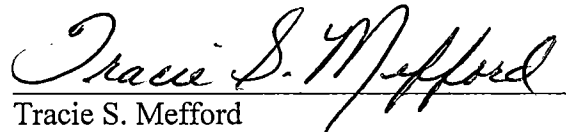
Zeyi Chen & Zhirong Yang,

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of July, 2017, in Columbia, South Carolina, I served a copy of the foregoing **Return to Respondents' Motion For Assessment Of Costs** upon Counsel for Respondents by depositing the same in the United States Mail, postage prepaid, and addressed as follows:

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July 31, 2017

HAND DELIVERED

Honorable Jenny Abbott Kitchings
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JUL 31 2017

SC Court of Appeals

Re: South Carolina Human Affairs Commission v. Zeyi Chen & Zhirong Yang
Civil Action No.: 14-CP-10-7037
Appellate Case No. 2016-002459

Dear Ms. Kitchings:

Enclosed for filing are the original and six (6) copies of Appellant's Return to Respondents' Motion For Assessment Of Costs in connection with the above referenced matter. By copy of this letter I am this date serving a copy of this document upon Counsel for the Respondents.

Thank you for your assistance in this matter.

Sincerely,

R. Alexander Pate, II

/tsm

enclosures

c.c. Ian O'Shea, Esquire