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THE STATE OF SOUTH CAROLINA  
In The Court Of Appeals

APPEAL FROM COUNTY OF WILLIAMSBURG  
W. Haigh Porter, Special Referee

RECEIVED  
NOV 07 2017  
SC Court of Appeals

THE ESTATE OF JOSEPH S. SMITH,  
a/k/a J.S. Smith, Jr. By Its Personal  
Representatives, Geneva S. Hall,  
And Joseph Keith Ray,

*Respondent,*

v.

Case No. 2010-CP-45-393  
Appellate Case No. 2016-002443

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NOV 07 2017  
SC Court of Appeals

PATRICK S. SMITH, SANDRA B. SMITH,  
THOMAS LEWIS SMITH, ELIZABETH S.  
KAPPELER, GLORIA DARLENE HALL SMITH,  
COURTNEY ELIZABETH SMITH, TIFFANY  
ELAINE SMITH, JOSEPH SAMPSON SMITH, IV,  
CHARLES RICHARD RAY, JR., JOHN DOE,  
JAN DOE, ET AL,

*Appellant.*

RESPONDENT'S MOTION FOR COSTS AND ATTORNEY FEES  
PURSUANT TO RULE 222 OF THE APPELLATE COURT RULES

William M. O'Bryan, Jr.  
O'Bryan & O'Bryan,  
1 Courthouse Square  
P.O. Box 1105  
Kingstree, S.C. 26566  
(843) 355-7471  
*Counsel for Respondent*

Gregory B. Askins  
Askins, Chandler & Askins  
P.O. Box 10  
Hemingway, S.C. 29554  
*Counsel for Respondent*

Steven S. McKenzie  
Coffey & McKenzie, PA  
2 N. Brooks Street  
Manning, S.C. 29102  
(803) 435-8847  
*Counsel for Appellant*

Comes now Respondent, Joseph Keith Ray, by counsel, in petition for costs and attorney's fees pursuant to Rule 222 of the South Carolina Appellate Court Rules, and respectfully states:

1. That on December 1, 2016 Appellant's counsel timely filed a Notice of Appeal, mistakenly representing to this Court the parties he represented on this Appeal.

2. That Rule 208(a)(1) of the South Carolina Rules of Appellate procedure required Appellant to file an Initial Brief within 30 days of receiving the transcript.

3. That Appellant never contacted Respondent requesting an extension of time to file the Initial Brief.

4. That Respondent contacted the court several times about the status of the Initial Brief.

5. That due to the fact that Appellant never contacted Respondent, in March 2017, Respondent felt compelled to prepare and file a Motion to Dismiss, supporting brief, and affidavit from the Court reporter stating that she had faxed a copy of the transcript to counsel for Appellant between December 2 and 5, 2016.

6. That on March 27, 2017, counsel for Appellant sent the Court a letter stating that he had not received a copy of the transcript.

7. That on May 3, 2017, counsel for Appellant sent the Court a Petition for Extension, requesting permission to file the Initial Brief by June 5, 2017. Counsel for Appellant never contacted Respondent seeking a consent order.

8. ***That by Order dated May 11, 2017***, this Court granted Appellant thirty days to file its Initial Brief. The Order stated ***“[n]o further extensions will be granted absent a showing of extraordinary circumstances.”***

9. That on June 1, 2017, Appellant filed its Initial Brief, citing only one case in one of its three sections. The Certificate of Service was dated December 1, 2016.

10. That Respondents counsel contacted the court about the faulty Certificate of Service, other irregularities with the Appellant's Initial Brief, and whether Respondent would have additional time to respond because of the irregularities. On June 7, 2017, after speaking with Respondent's counsel, the Clerk sent Appellant's Counsel a letter noting that the Initial Brief was not in compliance with Court rules.

11. That Respondent filed its Initial Brief on or before June 30, 2017.

12. That Rule 210(a) of the South Carolina Appellate Court Rules require the Record on Appeal to be filed within 30 days of the service of Respondent's Initial Brief.

13. That in August, Respondent contacted the Court because it had not received a copy of the Record on Appeal.

14. That by letter dated August 9, 2017, the Clerk advised Appellant ***“[w]ithin ten days of the date of this letter, you must serve the record on appeal and file the proof of service for the record on appeal, along with a motion requesting permission to serve the record on appeal outside of the filing deadlines set by***

**Rule 310 of the SCACR. Your record on appeal will not be considered and your appeal dismissed if you fail to serve the record on appeal, file the proof of service and fail to serve and file a motion within ten days of the date of this letter.”**

15. That Appellant did not comply with the order of the Clerk. Instead, on August 19, 2017, Appellant filed a “Petition for Extension to File Record on Appeal.”

16. That Appellant did not attempt to seek to discuss an extension with Respondent, or try to obtain a consent order for extension.

17. That due to the fact that the “Petition for Extension to File Record on Appeal” was filed **after the date the Record on Appeal was due AND after the Clerk’s ten (10) day extension**, as well as due to the fact that Appellant never contacted Respondent about an extension, Respondent was compelled to prepare and file a Return in opposition to the Petition as well as a supporting brief, as required by Rule 240 of the Appellate Court Rules.

18. In early October 2017 , the Court granted Appellant an extension to file its Record on Appeal.

19. That after the Record on Appeal was due, Respondent contacted the Court to inquire as to the status of the Record on Appeal. The Clerk informed counsel that Petitioner was requesting to withdraw the appeal.

20. That by Order dated October 18, 2017, this Court granted the motion to withdraw and dismissed the appeal

21. Respondent has incurred significant expense and invested significant time in preparing its Initial Brief, calling the Court, drafting Motions and Supporting Briefs in an attempt to ensure that Appellant complies with deadlines of this Court.

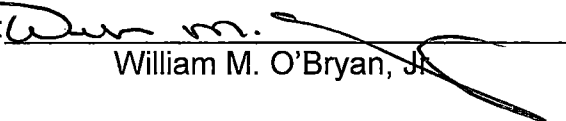
22. Further, Appellant's actions, in failing to contact Respondent for extensions and in seeking extensions after the expiration of the time allowed by the Rules of Court are extraordinary circumstances justifying the awarding of additional costs and attorney fees in addition to the standard \$1,000 fee allowed under note 1 to Rule 222.

Wherefore Respondent respectfully requests this Court, pursuant to Rule 222 of the Appellate Court Rules, grant Respondent \$1452 in costs in costs and \$1,000 in attorney's fees, plus such other and further costs as detailed in the attached itemized statement of costs and as the Court deems just.

Respectfully submitted

Joseph Keith Ray,

Nov 6 . 2017

By:   
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*Counsel for Respondent*

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(803) 435-8847  
*Counsel for Appellant*

### Statement of Facts

On December 1, 2016 Appellant's counsel timely filed a Notice of Appeal, mistakenly representing to this Court the parties he represented on this Appeal. No Initial Brief was filed by the end of February.

Appellant never contacted Respondent to discuss an extension or seek a consent order. In March, after the Respondent contacted the court several times about the status of Appellant's Initial Brief, Respondent filed a Motion to Dismiss with an affidavit from the Court reporter stating that she had faxed a copy of the transcript to counsel for Appellant between December 2 and 5, 2017, and billed counsel on December 5.

On March 27, 2017, four months after the filing of the Notice of Appeal, counsel for Appellant sent the Court a letter stating that he had not received a copy of the transcript. On May 3, 2017, five months after the filing of the Notice of Appeal, counsel for Appellant sent the Court a Petition for Extension, requesting permission to file the Initial Brief by June 5, 2017.

By Order dated May 11, 2017, this Court granted Appellant thirty days to file its Initial Brief. The Order stated ***"[n]o further extensions will be granted absent a showing of extraordinary circumstances."***

On June 1, 2017, Appellant filed its Initial Brief, citing only one case in one of its three sections. The Certificate of Service was dated December 1, 2016.

On June 7, 2017, after speaking with Respondent's counsel, the Clerk sent Appellant's Counsel a letter noting that the Initial Brief was not in compliance with Court rules. The Clerk returned attachments to Appellant's Initial Brief and noted that the certificate reflected the wrong date. The letter concluded "An amended proof of service will have to be provided."

Respondent filed its Initial Brief on or before June 30, 2017, in compliance with Court Rules. In August, Respondent contacted the Court because it had not received a copy of the Record on Appeal.

By letter dated August 9, 2017, the Clerk advised Appellant "[w]ithin ten days of the date of this letter, you must serve the record on appeal and file the proof of service for the record on appeal, along with a motion requesting permission to serve the record on appeal outside of the filing deadlines set by Rule 310 of the SCACR. Your record on appeal will not be considered and your appeal dismissed if you fail to serve the record on appeal, file the proof of service and fail to serve and file a motion within ten days of the date of this letter."

Appellant did not comply with the order of the Clerk. Instead, on August 19, 2017, Appellant filed a "Petition for Extension to File Record on Appeal."

Appellant did not discuss an extension with Respondent or seek a consent order granting the extension. Given the fact that the Petition was filed **after the Record on**

**Appeal was due**, Respondent felt compelled to prepare a Return to the Petition as well as a supporting Brief, as required by Rule 240.

In early October, the Court granted Appellant an extension to file the Record on Appeal. Shortly before or upon expiration of the extension, Appellant requested permission to withdraw the Appeal. By Order dated October 18, 2017, the Court granted the Motion to Withdraw and dismissed the appeal.

Respondent has incurred significant expense and time contacting the court, as well as drafting motions and briefs, to ensure that Appellant has filed its Initial Petition, has filed an accurate certificate of service, has filed a record on appeal, and has otherwise complied with the Rules. Respondent has incurred \$1,432 in costs and at least \$1,000 in attorney fees.

#### Discussion of Authorities

Rule 222(a) of the South Carolina Appellate Court Rules provides that costs may be recovered in an appeal, stating:

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. When a judgment is reversed, costs shall be taxed against the respondent unless the court orders otherwise. When an appeal is affirmed or reversed in part or is vacated, costs shall be allowed only as ordered by the appellate court. S.C.A.C.R. 222(a)

Rule 222(b) of the Appellate Court Rules defines costs to include attorneys fees.

It provides:

(b) Costs Allowed. The party entitled to recover costs under this rule may, to the extent the party actually incurred these costs, recover the following: (1) the filing fee paid under Rule 203(d); (2) the cost of the court reporter's transcript; (3) premiums paid for costs of supersedeas bonds or other bonds obtained to preserve rights pending appeal; (4) the cost of printing

the Record on Appeal under Rule 209; and (5) the cost of printing the party's final brief(s) under Rule 210. In addition, the party shall be entitled to recover an attorney's fee in an amount which shall be set by order of the Supreme Court. [1] The allowance of additional costs will generally not be allowed except in the most extraordinary of circumstances.  
S.C.A.C.R. 222(b)

Rule 222(b) limits the attorney fees to \$1,000. In a footnote, the Rule states: "By order dated July 24, 1997, the amount of attorney's fee was set at \$1,000."

S.C.A.C.R. 222(b) n.1. **Additional** attorney fees may be awarded in "the most extraordinary of circumstances." S.C.A.C.R. 222(b)

A motion for costs must be filed within fifteen (15) days of the "issuance of the remittitur." S.C.A.C.R. 222(d). The motion must comply with Rule 240, which requires an accompanying brief. S.C.A.C.R. 222(d) & 240. The motion "shall be accompanied by a sworn, itemized statement of costs incurred in the form prescribed in the Appendix."  
S.C.A.C.R. 222(d)

Rule 260 of the Appellate Court Rules defines a withdrawal of an appeal as a "dismissal." Rule 260(c) states: "**Withdrawal.** An appeal or other proceeding may be dismissed on motion of the appellant or petitioner upon such terms as may be fixed by the court." S.C.A.C.R. 222(c).

While the language of Rule 222 granting costs is mandatory, using the word "shall," this Court has held that the granting of costs is discretionary. Austin v. Stokes-Craven Holding Corp., 406 S.C. 187, 199, 750 S.E.2d 78, 84 (S.C. 2013). However, the awarding of the standard attorney fee of \$1,000 has been described by the Court as "automatic." Muller v. Myrtle Beach Golf and Yacht Club, 313 S.C. 412, 416, 438 S.E.2d 248, 250 (S.C. 1993). A party may simultaneously pursue attorney fees under Rule 222

and another Code section granting attorney fees. Austin, 405 S.C. at 200, 750 S.E.2d at 84-85 (allowing party to pursue appellate attorney fees in Court of Appeals under Rule 222 and in circuit court under S.C. Code §56-15-110).

In this case, this Court should award Respondent costs, which include attorney fees of \$1,000. Appellant moved to withdraw the appeal **after** petitioning the Court for an extension to file the record on appeal. He withdrew the appeal on the last day he could before the extension expired. Under Rule 260, the withdrawal of an appeal results in the court **dismissing** the appeal. Under Rule 222(a), when an appeal is dismissed, costs are taxed to the appellant. Under Rule 222(b), costs include attorney fees of \$1,000, in addition to the costs of the court reporter's transcript. While the award of costs is "discretionary" with the court, they are awarded normally; the award is almost "automatic." Awarding respondent costs is entirely appropriate in this case.

In addition to awarding Respondent "standard" costs, this court should find that there are extraordinary circumstances which justify the awarding of additional costs. Appellant has asked for numerous extensions throughout this appeal, but has never communicated with Respondent to seek a consent order. Appellant further failed to exercise even the most rudimentary diligence. As a result, Respondent has had to waste time and fees in following up with the Clerk of Court and in drafting motions and briefs that would have otherwise unnecessary.

For example, the trial transcript was prepared in December of 2016, but by March of 2017 Appellant still had not filed its Initial Brief. Only **after** Respondent had contacted the Clerk of Court about the status of the Initial Brief, only **after** Respondent had

contacted the court reporter and obtained an affidavit from her that she had mailed the transcript in December of 2016, only **after** Respondent had prepared a Motion to Dismiss, supporting brief, and paid the filing fee in March of 2017, only **after** all of these steps did Appellant send a letter to the Court saying that he never received the transcript. **A month** after sending a letter to Court, Appellant finally filed a motion for extension.

All of this effort and expense by Respondents could have been avoided with minimal diligence on the part of Appellant. It could have been avoided if Appellant had made **one phone call** to the court reporter to inform her that he had never received the transcript. The Court reporter's affidavit is undisputed; she sent the transcript in December, but apparently Appellant never received it. **One phone call** to check on the status of the transcript would have resulted in Appellant immediately getting a transcript and avoided needless phone calls by Respondent to the Clerk, not to mention the cost of preparing and filing a Motion to Dismiss.

All of this effort and expense by Respondents could have also been avoided with **one phone call** by Appellant to Respondent's counsel asking for an extension to file its Initial Brief. Respondents should have been given the opportunity to sign a consent order for an extension and thereby avoid the time and expense of preparing a Motion to Dismiss, supporting brief, and obtaining an affidavit from the court reporter.

For example, the Record on Appeal was not filed in a timely manner by Appellant. This resulted in Respondent contacting the Clerk to inquire into the status of the Record

on Appeal. This further resulted in the Clerk sending a letter to Appellant requiring the Record on Appeal to be filed within ten (10) days.

The Record on Appeal was not filed within ten (10) days as required by the Clerk's letter. Instead, **after the expiration** of the time specified in the Clerk's letter, Appellant sent in yet another "Petition for Extension."

Because Appellant's "Petition for Extension" was not in compliance with the Clerk's letter/directive and because the "Petition for Extension" was filed **not only after the Court's deadline specified in Rule 210 BUT ALSO the Clerk's ten (10) day extension**, Respondent's counsel believed, in order to zealously represent its client, that a Return on the Petition for Extension had to be filed.

In general, failure to file a motion to extend within the required time limit can result in dismissal. For example, in Associated Petroleum Carriers v. Mutual Properties, Inc., 235 S.C. 195, 110 S.E.2d 861 (S.C. 1959) the Court stated:

[i]f the opposing counsel do not consent to an extension of time, or, if for any good reason counsel for appellant cannot, or should not, ask opposing counsel for the extension, then appellant's counsel should proceed on motion.... to secure from the judge who heard the cause, or from one of the justices of this court, an order allowing the time to be extended. **Attorneys should be reminded, perhaps, that the motion for such extension must be made before the expiration of the time limited, and at least four days' notice of such motion must be given to the opposite party.** Id. at 199-200

The Court noted that appellant had not served its proposed exceptions within the time provided, and that appellant made no effort to obtain an extension of time from plaintiff's counsel, nor did it move for an extension of time to perfect the appeal. The Court dismissed the appeal. Id. at 200.

All of Respondent's effort and cost in preparing a Return and supporting brief could have been avoided if Appellant had made **one phone call** to Respondent before the expiration of the time specified in Rule 210 and asked Respondent to sign a consent order for an extension. All of Respondent's effort and cost in preparing a Return and supporting brief could have been avoided if Appellant had made **one phone call** to Respondent before the expiration of the Clerk's letter of August 9, 2017 requiring the filing of the Record on Appeal within ten (10) days.

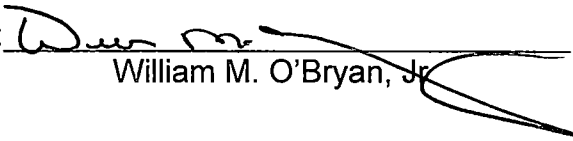
Appellant's entire appeal has been stained with missed deadlines and a failure to take even the simplest of steps to avoid cost and expense on the part of Respondents. All for an appeal where Appellant cites only one case in one section of a three section "Petition for Appeal." These are precisely the "extraordinary expenses" contemplated in Rule 222(b). This Court grant Respondent, in addition to the standard costs outlined in Rule 222(b), the filing fees for its Motion to Dismiss and the Return to the Petition for Extension, as well as additional attorney fees connected with preparing the Motion to Dismiss, the Return, and supporting briefs and affidavits.

#### Conclusion

For the reasons stated above, Respondent respectfully requests that this Court grant Respondent the standard costs and attorney fees provided for in Rule 222. Additionally, Respondent respectfully requests that this Court find that there are extraordinary circumstances justifying the awarding of the additional costs discussed above and detailed in the attached itemized statement of costs.

Joseph Keith Ray

Nov 6, 2017

By:   
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*Counsel for Respondent*

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Steven S. McKenzie  
Coffey & McKenzie, PA  
2 N. Brooks Street  
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(803) 435-8847  
*Counsel for Appellant*

I hereby certify that:

(1) I have filed an original and six (6) copies of the forgoing Respondent's Memorandum Of Law In Support Of Its Motion For Costs And Attorney Fees Pursuant To Rule 222 Of The Appellate Court Rules with the Clerk of the South Carolina Court of Appeals by depositing them in the United States Mail, postage prepaid, on November 6, 2017; and

(2) I have served the forgoing Respondent's Memorandum Of Law In Support Of Its Motion For Costs And Attorney Fees Pursuant To Rule 222 Of The Appellate Court Rules on all parties by depositing a copy of it in the United States Mail, postage prepaid, on November 6, 2017, addressed each of to the following:

Steven S. McKenzie  
Coffey & McKenzie, PA  
2 North Brooks Street  
Manning, S.C. 29102

Mr. Thomas Smith  
Individually and as Personal Representative  
Estate of J.S. Smith, Jr.  
1612 Wilson Street  
Camden, S.C. 29020

Elbert K. Turbeville, Esq  
Nettles, Turbeville & Reddeck  
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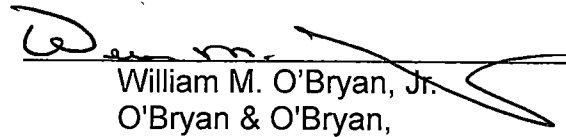
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Nov 6, 2017

  
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*Counsel for Respondent*

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*Appellant.*

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I hereby certify that:

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(2) I have served the forgoing Respondent's Motion For Costs And Attorney Fees Pursuant To Rule 222 Of The Appellate Court Rules on all parties by depositing a copy of it in the United States Mail, postage prepaid, on Nov 6, 2017, addressed each of to the following:

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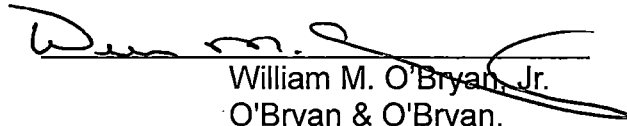
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WILLIAM.M. O'BRYAN, JR.

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J. D. O'BRYAN (1890-1985)  
W. M. O'BRYAN (1925-1985)  
J. D. O'BRYAN, JR. (1922-2001)

November 6, 2017

The Hon. Jenny Abbott Kitchings  
Clerk, the South Carolina Court of Appeals  
PO Box 11629  
Columbia, SC 29211

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Re: The Estate of Joseph Smith, a/k/a J.S. Smith, Jr., *et al* v. Patrick S. Smith, *et al*  
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Dear Ms. Kitchings:

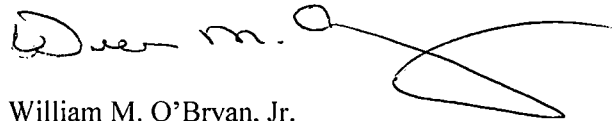
Enclosed please find original and six copies each of Respondent's Motion for Costs and Attorneys Fees, Respondent's Memorandum of Law in Support of Its Motion, together with Itemized Statement of Costs and Proof(s) of Service to be included in the Record on Appeal in the referenced case, together with my firm's check for payment of the motion/petition filing fee of \$25.00.

By copy of this letter, I am serving opposing counsel and all other parties.

Thanking you for your assistance in this matter, I am,

Yours very truly,

O'BRYAN & O'BRYAN

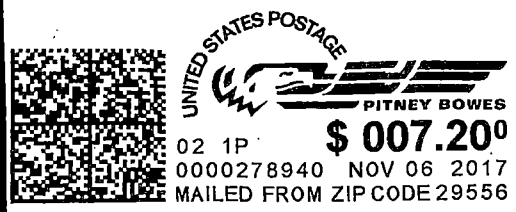


William M. O'Bryan, Jr.

WMO'Bjr/pda  
enclosures as stated

cc: Steven S. McKenzie, Esq.  
Elbert K. Turbeville, Esq.  
Joseph S. Smith, IV  
Gloria Darlene Hall Smith  
Tiffany Smith  
W. Haigh Porter, Esq.  
Thomas Smith (Individually and as Personal Representative)  
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