

RECEIVED
MAR 12 2018
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Master-In-Equity

Mikell R. Scarborough, Master-In-Equity for Charleston County

Appellate Case No. 2015-001146
Trial Court Case No. 2013-CP-10-1225

Kiawah Resort Associates, L.P., a Delaware
Limited Partnership, and Kiawah
Development Partners II LLC,

Appellants/Respondents,

v.

Kiawah Island Community Association, Inc.,
a South Carolina Not-for-Profit Corporation,

Respondent,

and

Kiawah Property Owners Group, Inc., and
Inlet Cove Club Homeowners Association, Inc.

Respondents/Appellants

**APPELLANTS/RESPONDENTS' RETURN TO
RESPONDENTS/APPELLANTS' MOTION FOR COSTS**

Ellis R. Lesemann
Michelle A. Matthews
Lesemann & Associates LLC
418 King Street, Suite 301
Charleston, South Carolina 29403
(843) 724-5155
Attorneys for Appellants/Respondents

A dismissed litigant who lacks legal standing to participate in an action must also lack the right to seek costs or attorney's fees upon conclusion of the action. For this fundamental reason, as well as the additional reasons set forth below, Appellants/Respondents Kiawah Resort Associates, L.P., and Kiawah Development Partners II LLC ("Appellants/Respondents"), respectfully request that this Court deny the Motion for Costs filed by Respondents/Appellants Kiawah Property Owners Group, Inc., and Inlet Cove Club Homeowners Association, Inc. ("Intervenors").

During the proceedings below, the Master ruled that the Intervenors lacked standing to participate in the case and dismissed them from the case. The lack of standing on the part of the Intervenors was addressed in the Master's Order on the Motion to Alter or Amend, which was issued on May 7, 2015 ("Final Order"). The Master's Final Order provided, in relevant part, as follows:

Plaintiffs as well as KICA have shown that neither intervening entity has asserted any discrete claims that are separately derived from their membership in KICA. Rather the KPOG and Inlet Cove members' (who are also members of KICA) sole basis for asserting any claim against the Property is rooted in their easement of use and enjoyment resulting from the Property being conveyed as Common Property and subject to the KICA Declaration. It is KICA who has the sole right and authority to prosecute or defend rights which arise under the KICA Declaration. [. . .] **The Court agrees and finds that the Intervenors do not have standing separate from their capacity as KICA members and should be dismissed from the case.**

See Master's Order on Motion to Alter or Amend (R. p. 53) (emphasis added).

The dismissed Intervenors appealed, but were *unsuccessful* in their appeal. Specifically, in this Court's Opinion dated September 27, 2017 ("Opinion"), the Court found that the Intervenors failed to preserve their challenge to the Master's Final Order for appellate review. *See* Opinion at p. 39. As a result, the Master's dismissal of the Intervenors on the basis of lack of standing was affirmed. Although the dismissed Intervenors appear to believe that such circumstances entitle them to an award of fees and costs, they are mistaken. A party who is

dismissed for lack of standing and who is unsuccessful on appeal of that ruling cannot be entitled to an award of fees and costs under Rule 222, SCACR, or be entitled to any relief whatsoever. Lack of standing means lack of entitlement to seek relief (of any kind). For these reasons, the Motion for Costs should be denied.

I. THE DISMISSED INTERVENORS LACK STANDING AND ARE PRECLUDED FROM RECOVERING AN AWARD OF FEES OR COSTS

The obligation to establish legal standing is not a one-time duty. Rather, the moving party must establish standing at every stage of the litigation, from the initial pleading through summary judgment, trial and appeal. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 2136 (1992). *Wyoming Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 47 (D.C. Cir. 1999) (courts of appeal are obliged to examine standing under all circumstances); *see also Diamond v. Charles*, 476 U.S. 54, 62, 106 S. Ct. 1697, 1703 (1986) (dismissing appeal due to lack of standing on the part of intervenor-defendant); *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 733, 128 S. Ct. 2759, 2768 (2008) (standing must exist on the date the complaint is filed and throughout the action). Standing is an “indispensable part” of the case and must be supported in the same way as any other matter on which the party bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the “successive stages of the litigation.” *Lujan*, 504 U.S. at 561. Furthermore, standing can be challenged at any time in the litigation, including on appeal, by the other parties or by the court *sua sponte*. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110, 122 S. Ct. 511, 514 (2001).

On the basis of these authorities, the dismissed Intervenor’s lack of standing precluded their continuing involvement in this case and resulted in their dismissal prior to this appeal. As the parties bearing the burden of proof regarding standing, the dismissed Intervenor failed to successfully establish standing both in the proceedings below and during this appeal. As such, the

dismissed Intervenor cannot establish their entitlement to recovery of costs and fees under Rule 222, SCACR, in an action where the ruling that they lack standing remains undisturbed. In fact, an award to the dismissed Intervenor would undermine the requirement of standing altogether.

II. THE DISMISSED INTERVENORS FAILED TO PRESERVE THE ISSUE OF STANDING ON APPEAL AND, THEREFORE, CANNOT SEEK RECOVERY OF COSTS OR FEES FOR A FAILED APPEAL

In the Opinion, this Court found that the issue raised by the dismissed Intervenor in their appeal of the Master's Final Order was not preserved for this Court's review on the basis that the dismissed Intervenor had immediately filed an appeal from the judgment without first filing a motion for reconsideration with the lower court. Specifically, the dismissed Intervenor appealed the Master's treatment of the legal standards for standing and intervention. However, the dismissed Intervenor's argument that the Master confused and misapplied the legal standards was never raised to the lower court. For this reason, the Court declined to address this argument and affirmed the Master's Final Order, including the Master's decision that the dismissed Intervenor did not have standing to participate in the action between Appellants/Respondents and Respondent KICA.¹

Where a party raises an issue, but the issue is never ruled on by the trial court, and the party fails to file a motion to alter or amend, the issue is not preserved. *See Summersell v. S.C. Dep't of Pub. Safety*, 337 S.C. 19, 522 S.E.2d 144 (1999). When an order is internally inconsistent, that inconsistency must be raised to the trial court by way of a post-trial motion before it is preserved

¹ Respondent KICA, as the other real party in interest to this dispute, did not seek an award of fees or costs against any other party upon conclusion of the appeal. Similarly, Appellant/Respondents did not seek an award of fees or costs against the dismissed Intervenor, even though the dismissed Intervenor was unsuccessful in their appeal of their dismissal and their appeal of the Master's determination that they lacked standing. It is also worth noting that one of the dismissed Intervenor, Kiawah Property Owners Group, no longer exists and is no longer capable of authorizing a Motion for Costs to even be filed. Only a proper party, and not the attorney of that party, has the right and standing to seek an award of fees or costs.

for appellate review. *See, e.g., Parker v. Shecut*, 340 S.C. 460, 480, 531 S.E.2d 546, 557 (Ct. App. 2000), *rev'd on other grounds*, 349 S.C. 226, 562 S.E.2d 620 (2002). A post-trial motion must be made where there are errors or inconsistencies in the trial court's final order. *See Grant v. S.C. Coastal Council*, 319 S.C. 348, 461 S.E.2d 388 (1995).

As discussed above, the dismissed Intervenor argued on appeal that the Final Order on (Appellants/Respondents') Motion to Alter or Amend was defective for lack of findings or inconsistent findings. However, the dismissed Intervenor failed to present this issue to the Master by failing to file their own motion to alter or amend within ten (10) days of the issuance of the Final Order upon which the dismissed Intervenor based their appeal. The Motion for Costs seeks an order from this Court awarding fees and costs, including the cost of printing or copying Respondent's Final Brief of Respondents/Appellants. Having failed to preserve the issue on appeal, the dismissed Intervenor lacked standing from the outset of their appeal and were unsuccessful on appeal. Accordingly, the dismissed Intervenor cannot invoke Rule 222, SCACR, to seek an award for costs incurred in futility and the Motion for Costs should be denied.

III. AS APPELLANTS OF A JUDGMENT THAT HAS BEEN AFFIRMED, THE DISMISSED INTERVENORS ARE NOT ENTITLED TO RECOVERY PURSUANT TO RULE 222, SCACR

The dismissed Intervenor are not entitled to recover their costs under Rule 222, SCACR. The Opinion affirmed the Master's Final Order, which included the Master's ruling that the dismissed Intervenor lacked standing to intervene. Rule 222(a), SCACR, provides that "costs shall be taxed against the appellant when the judgment on appeal is affirmed." *See* Rule 222(a), SCACR. The dismissed Intervenor were appellants of the affirmed judgment, and have no standing to seek any relief against Appellants/Respondents on the basis that the Master's decision on the claim for reformation was also affirmed. The lack of standing on the part of the dismissed

Intervenors is total, not partial. Following the issuance of the Master's Final Order, the dismissed Intervenors filed this appeal in which they challenged their dismissal for lack of standing and were unsuccessful in their appeal. The dismissed Intervenors' lack of success on appeal and ongoing lack of standing do not provide a conceivable basis for an award of fees under Rule 222(a), SCACR, unless this Court dispenses with the underlying and fundamental requirement of standing.

IV. IN THE ALTERNATIVE, THE AMOUNT OF COSTS AWARDED, IF ANY, SHOULD BE REDUCED

To the extent that it is conceivable to entertain an award of fees and costs to unsuccessful appellants who were dismissed from the proceedings below and who continue to lack standing, this Court should order that the award of costs be reduced. One of the itemized costs for which the dismissed Intervenors seek recovery relates to the cost incurred by the dismissed Intervenors as part of the underlying proceeding prior to the issuance of the Master's Final Order. As reflected in the Itemized Statement of Costs, the dismissed Intervenors seek an award for the cost of the court reporter's transcript in the amount of \$2,462.00. However, this cost was incurred by the dismissed Intervenors in January 2014 in connection with the preparation of proposed orders for the Master on the merits of the dispute prior to when Intervenors were dismissed for lack of standing. The dismissed Intervenors filed their Notice of Appeal in June 2015, over a year later.

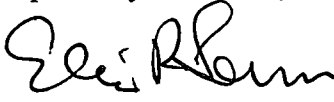
Recovery under Rule 222, SCACR, is limited to costs incurred in pursuing the appeal. *See Martin v. Paradise Cove Marina, Inc.*, 348 S.C. 379, 384, 559 S.E.2d 348, 351 (Ct. App. 2001) (holding that recovery under Rule 222, SCACR, "is clearly limited to costs incurred in pursuing the appeal, such as the filing fee, the cost of obtaining the transcript, the cost of printing the Record on Appeal and final briefs, and limited attorney fees."). The cost of the court reporter's transcript was not incurred by the dismissed Intervenors in pursuing their appeal, but rather in connection with the underlying trial on the merits.

Therefore, Appellants/Respondents respectfully request that any award of costs be reduced in the amount of \$2,462.00, to whatever extent that this Court believes that a dismissed party that lacks standing is entitled to an award of fees or costs after being unsuccessful on appeal.

CONCLUSION

For the reasons set forth above, Appellants/Respondents Kiawah Resort Associates, L.P. and Kiawah Development Partners II LLC, respectfully request that the Court deny Respondents/Appellants Kiawah Property Owners Group, Inc. and Inlet Cove Club Homeowners Association, Inc.'s Motion for Costs.

Respectfully submitted,

By: 

Ellis R. Lesemann
erl@lalawsc.com
Michelle A. Matthews
mam@lalawsc.com
LESEMANN & ASSOCIATES LLC
418 King Street, Suite 301
Charleston, SC 29403
Phone: (843) 724-5155

Attorneys for Appellants/Respondents

March 9, 2018
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

MAR 12 2018

APPEAL FROM CHARLESTON COUNTY
Master-In-Equity

SC Court of Appeals

Mikell R. Scarborough, Master-In-Equity for Charleston County

Appellate Case No. 2015-001146
Trial Court Case No. 2013-CP-10-1225

Kiawah Resort Associates, L.P., a Delaware
Limited Partnership, and Kiawah
Development Partners II LLC,

Appellants/Respondents,

v.

Kiawah Island Community Association, Inc.,
a South Carolina Not-for-Profit Corporation,

Respondent,

and

Kiawah Property Owners Group, Inc., and
Inlet Cove Club Homeowners Association, Inc.

Respondents/Appellants

CERTIFICATE OF SERVICE

I hereby certify that I have this date, mailed, postage prepaid, a true and correct copy of the
Appellants/Respondents' Return to Motion for Costs to the following counsel of record:


Allison C. Jett, Esquire
Weissman Nowack Curry & Wilco
One Alliance Center, 4th Floor
3500 Lenox Road
Atlanta, GA 30326
Attorneys for Respondent
Kiawah Island Community Association

Amy E. Armstrong, Esquire
Jessie White, Esquire
S.C. Environmental Law Project
Post Office Box 1380
Pawleys Island, SC 29585
**Attorneys for Respondents/Appellants
Kiawah Property Owners Group, Inc.,
and Inlet Cove Homeowners Association, Inc.**

RECEIVED

MAR 12 2018

SC Court of Appeals

By: 

Ellis R. Lesemann

March 9, 2018
Charleston, South Carolina

LESEMANN & ASSOCIATES LLC

CIVIL LITIGATION | BUSINESS DISPUTES

ELLIS R. LESEMANN
EMAIL: erl@lalawsc.com

418 KING STREET, SUITE 301
CHARLESTON, SOUTH CAROLINA 29403

DIRECT: (843) 724-5156
WEBSITE: www.lalawsc.com

TELEPHONE (843) 724-5155

March 9, 2018

RECEIVED

MAR 12 2018

SC Court of Appeals

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

Re: *Kiawah Resort Associates, L.P., et al. vs. Kiawah Island Community Association, Inc., et al.*; Appellate Case No.: 2015-001146

Dear Ms. Kitchings:

Enclosed for filing please find the original and seven (7) copies of Appellants/Respondents Kiawah Resort Associates, L.P. and Kiawah Development Partners II, LLC's (collectively referred to as "Appellants/Respondents") Return to Motion for Costs in connection with the above-referenced matter.

Please file the original and six (6) copies of Appellants/Respondents' Return to Motion for Costs and return one file-stamped copy to me in the self-addressed, stamped envelope provided.

Thank you for your assistance with this matter.

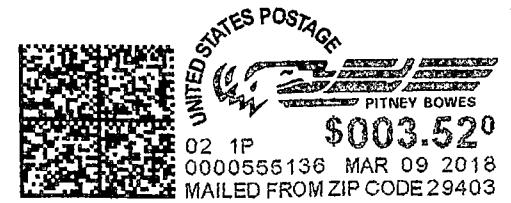
With best regards,



Ellis R. Lesemann

ERL/ajs
Enclosures

cc: Allison C. Jett, Esq.
Amy E. Armstrong, Esq.



LESEMANN & ASSOCIATES LLC
418 King Street, Suite 301
Charleston, SC 29403

RECEIVED
MAR 12 2018
SC Court of Appeals

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