STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
FAMILY COURT
The Honorable Jocelyn B. Cate, Family Court Judge

Appellate Case No. 2016-000479
Opinion #2018-UP-268 (S.C. Ct. Of App. Filed June 20, 2018)
(Shearouse Ad. Sh. No. 25)

Holly Lawrence, ... Petitioner,

v.

Jennifer Brown, ... Respondent.

PETITION FOR A WRIT OF CERTIORARI

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RULE 242(d) CERTIFICATION

Counsel for Petitioner certifies that a Petition for Rehearing was made on July 5, 2018, and finally ruled upon by the Court of Appeals on August 16, 2018.

QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in affirming the Family Court's finding that it lacked jurisdiction to determine whether Biological Mother was entitled to appellate attorney's fees?

STATEMENT OF THE CASE

The parties and counsel were previously before this Court in 2014, when this Court adjudicated the merits of this contested adoption in favor of the Biological Mother. *Brown v. Baby Girl Harper*, 410 S.C. 446, 766 S.E.2d 375 (2014). The instant appeal is from the family court's refusal to consider an award of attorney's fees to Biological Mother, incurred by her during the family court trial and her subsequent appeal. While the Court of Appeals reversed the family court's determination that it lacked jurisdiction to determine if Biological Mother was entitled to *trial level* attorney's fees and its finding that Biological Mother abandoned her cause of action for attorney's fees, the Court of Appeals affirmed the family court's finding that it lacked jurisdiction to determine whether biological mother was entitled to *appellate* attorney's fees. It is Biological Mother's request for appellate attorney's fees that prompts this petition.

On October 27, 2013, Biological Mother gave birth to Baby Girl. On October 30,

2013, Biological Mother executed *Consent to Adopt* documents. Adoptive Mother then filed an action to finalize the adoption of Baby Girl. That case bears civil action no. 2013-DR-10-4057 (Appendix pp. 47-55).

On November 26, 2013, the Biological Mother filed her own Summons and Complaint (civil action No. 2013-DR-10-4386) (Appendix pp. 54-58) as well as an emergency motion for relief (case number 2013-DR-10-4057), seeking return of the child (Appendix pp. 59-69). Biological Mother alleged, among other things, that the *Consent to Adopt* which she signed was not validly executed pursuant to South Carolina's Adoption Act, that Adoptive Mother had violated the Interstate Compact on the Placement of Children (ICPC), and that she should be awarded attorneys' fees.

On December 30, 2013, the family court (Judge Daniel E. Martin, Jr.) issued a temporary order consolidating the two matters, scheduling an expedited hearing on the Biological Mother's motion for relief and providing for discovery (Appendix pp. 22-23).

On March 17, 2014, Adoptive Mother filed an amended complaint, asserting a number of claims in support of her adoption of the child. Adoptive Mother alleged that in addition to the *Consent to Adopt* document having been properly executed, the Biological Mother's rights should be terminated pursuant to South Carolina Code Section 63-7-2570 (1) repetition and severity of abuse, and 63-7-2570 (7) abandonment. Adoptive Mother also alleged that the Adoptive Mother should have custody of the minor child pursuant to *Middleton v. Johnson*, 269 S.C. 385, 633 S.E.2d 162 (Ct. App. 2006), alleging that the Adoptive Mother was the psychological parent of the minor child (Appendix pp. 105-112).

On March 31, 2014, Adoptive Mother moved that the hearing on Biological Mother's motion for relief be bifurcated, asking that the court determine only whether the

Consent was executed properly (Appendix pp. 121-129). On April 4, 2014, Biological Mother agreed to this bifurcation (Appendix 130).

Following discovery, the family court held a hearing on April 7-9, 2014 addressing this one issue (execution of the consent). Neither Biological Mother's ICPC cause of action nor Adoptive Mother's causes of action (abuse, neglect, abandonment, psychological parenthood) were before the court at this 2 ½ day evidentiary hearing.

On April 24, 2014, the family court issued an order finding the Consent was not valid and requiring immediate return of the child to Biological Mother. The family court also denied the Adoptive Mother's request for attorneys' fees (Appendix pp. 28-38). That same date, Adoptive Mother filed a motion for reconsideration of the order pursuant to Rule 59, SCRCP. Adoptive Mother served a notice of appeal to the South Carolina Court of Appeals on April 24, 2014 – the same date as the order.

The following day, April 25, 2014, Adoptive Mother filed the notice of appeal and also sought a supersedeas. Biological Mother filed a return to the petition for supersedeas and a motion to dismiss the appeal. Biological Mother moved to dismiss the initial appeal pursuant to *Terry v. Terry,* 400 S.C. 453, 734 S.E.2d 646 (2012), as the family court's ruling did not decide with finality whether the Adoptive Mother or Biological Mother would prevail, as both parties had these yet-to-be-heard causes of action. The Court of Appeals issued a temporary supersedeas that same date – April 25th.

On May 1, 2014, the Court of Appals dismissed the appeal without prejudice pending a decision on the Rule 59 motion. On May 5, 2014, the family court entered an order denying reconsideration.

On May 5, 2014, the Adoptive Mother filed a *Voluntary Dismissal of Amended*

Complaint. (Appendix pp. 131-132). In so doing, Adoptive Mother dismissed her allegations that the Biological Mother had abused, neglected and abandoned the child, and also dismissed her "psychological parent" cause of action under the *Middleton* decision.

Adoptive Mother filed and served a second notice of appeal and a second request for supersedeas. The Court of Appeals entered a temporary supersedeas on May 6, 2014.

On May 16, 2014, Biological Mother filed a return to the petition as well as a motion to dismiss the appeal. On May 23, 2014, Adoptive Mother filed a reply to the supersedeas return, and on May 27, 2014, Adoptive Mother filed a return to the motion to dismiss.

On June 6, 2014, the Court of Appeals entered an order denying the motion to dismiss the appeal. That same order continued the supersedeas and expedited briefing.

On August 4, 2014, the Court of Appeals issued a decision holding the consent document to be invalid (Appendix pp. 18-21).

On August 15, 2014, Adoptive Mother filed a *Petition for Writ of Supersedeas and Expedited Review*, and a *Petition for Writ of Certiorari* to this Court.

On August 19, 2014, Biological Mother filed *Biological Mother's Return to Adoptive Mother's Petition for Writ of Supersedeas and Expedited Review* and *Biological Mother's Return to Adoptive Mother's Petition for Writ of Certiorari.*

On August 20, 2014, this Court issued an order granting the Adoptive Mother's petition for writ of certiorari, dispensing with further briefing of the issues raised in the petition, and granting the petition for supersedeas.

Oral argument was heard on September 23, 2014. One week later, on September 29, 2014, the Supreme Court affirmed the Court of Appeals' decision affirming the family

court order, and held that the birth mother's consent to the adoption was invalid (Appendix pp. 4-13). This Court further held that because the Adoptive Mother was not the prevailing party on appeal, an award of attorneys' fees would be inappropriate. *Brown v. Baby Girl Harper*, 410 S.C. 446, 766 S.E.2d 375 (2014) footnote 8.

The remittitur from the Supreme Court was issued on October 7, 2014 (Appendix p. 14). On October 29, 2014, the Supreme Court ruled that, pursuant to Rule 222 of the South Carolina Appellate Court Rules, that the Motion for Costs filed by Biological Mother was granted in the amount of $1,583.39 against Adoptive Mother, and the family court was directed to add this award of costs to the remittitur (Appendix p. 15).

On October 21, 2014, Biological Mother requested a pre-trial hearing regarding Biological Mother's request for attorneys' fees. On November 18, 2014, a hearing was conducted before the Honorable Jocelyn B. Cate. On January 29, 2015, an order was filed denying the Biological Mother's request for further hearing as to her request for attorneys' fees and costs (Appendix pp. 42-43). The court concluded that by not submitting an attorneys' fee affidavit following the April 7-9, 2014 hearing on Biological Mother's expedited motion for relief, Biological Mother had abandoned her right to make such a request.

On February 19, 2015, a Rule 59(e) motion to alter/amend the judgment was filed by Biological Mother (Appendix pp. 164-165). On February 11, 2016, Judge Cate issued an order denying Biological Mother's Rule 59(e) motion[1] (Appendix pp. 44-46).

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[1] The one-year delay in issuing this order is explained by the family court in Footnote 1 of the February 11, 2016, order (Appendix p. 45). Biological Mother's efforts to have this issue addressed by the family court are outlined in correspondence to the family court, dated December 10, 2015 (Appendix pp. 249-256).

Biological Mother filed a Notice of Appeal on February 25, 2016 from Judge Cate's orders issued on January 29, 2015 and February 11, 2016.

In the Court of Appeals' unpublished opinion, filed June 20, 2018, the Court reversed the Family Court's determination that it lacked jurisdiction to determine if Biological Mother was entitled to trial level attorney's fees and its finding that Biological Mother abandoned her cause of action for attorney's fees. Further, the Court of Appeals affirmed the Family Court's finding that it lacked jurisdiction to determine whether Biological Mother was entitled to appellate attorney's fees.

Biological Mother filed a Petition for Rehearing with the Court of Appeals on July 5, 2018. The Court of Appeals denied the motion for rehearing on August 16, 2018.

ARGUMENTS

I. Overview

Pursuant to Rule 242, SCACR, Petitioner Holly Lawrence (Biological Mother) files the following Petition for Writ of Certiorari for this Court to review *Holly Lawrence v. Jennifer Brown*, Op. No. 2018-UP-268 (S.C. Ct. App. filed June 20, 2018) (Appendix p. 315). Consistent with Biological Mother's position, the Court of Appeals reversed the Family Court's determination that it lacked jurisdiction to determine if Biological Mother was entitled to *trial level* attorney's fees and its finding that Biological Mother had abandoned her cause of action for attorney's fees. Neither Biological Mother nor Adoptive Mother seeks review from this Court of this aspect of the Court of Appeal's decision. Instead, Biological Mother seeks review of the Court of Appeal's decision to affirm the Family Court's finding that it lacked jurisdiction to determine whether biological

mother was entitled to *appellate* attorney's fees. In affirming this portion of the Family Court's order, the Court of Appeals' decision is controlled by errors of law, contains material mistakes of fact, and is inconsistent with this Court's decisions.

In affirming the family court's finding that it lacked jurisdiction to determine whether Biological Mother was entitled to *appellate* attorney fees, the Court of Appeals misapprehends the scope of South Carolina Code Ann. § 63-3-530(A)(38). Nothing in the statute, the law governing post-remittitur jurisdiction, or in Rule 222, SCACR, limits a family court's power under the statute to award attorney's fees incurred in successfully defending a family court order on appeal.

II. Section 63-3-530(A)(38) empowers family courts to award appellate fees.

South Carolina family courts are creatures of statute. S.C. Code Ann. § 63-3-10. The General Assembly that created the Family Court also established what they may do. South Carolina Code Section 63-3-530 enumerates these powers, including "[t]he family court has exclusive jurisdiction" to award attorney fees: "Suit money, including attorney's fees, may be assessed for or against a party to an action brought in or subject to the jurisdiction of the family court." S.C. Code Ann. § 63-3-530(A)(38).

This statutory power includes the ability to award appellate-level fees. Applying the 1952 Code, the Court in *Smith v. Smith*, 262 S.C. 291, 297, 204 S.E.2d 53, 55-56 (1974), cited "the entire record in the case," including counsel's efforts on appeal, when it reversed the family court's limited fee award and remanded for the family court to fix a greater, more appropriate fee. Similarly, Chief Justice Littlejohn, authoring an opinion for the Court of Appeals in *Gore v. Gore*, 288 S.C. 438, 441, 343 S.E.2d 51, 52 (Ct.App. 1986), reversed the family court's failure to award fees and remanded for the court to consider all the fees

incurred, specifically including those incurred on appeal. Embodied in the logic and result of *Smith* and *Gore* is that the *family courts* may award *appellate-level* fees.

More recently, in *Michael Scott B. v. Melissa M.*, 378 S.C. 452, 456, 663 S.E.2d 58, 60 (2008) this Court described "the family court[s'] general jurisdiction to award attorney's fees" absent a more specific, contrary statute. Applying this reading, the Supreme Court reversed the Court of Appeals for excluding private TPR actions from the statute's scope. *Id.* at 456, 663 S.E.2d at 60. The Court of Appeals makes the same error of limiting the scope of the statutory grant of power to the family court. By its terms, a family court has the power to assess attorney's fees incurred on appeal as long as the fees were incurred "for or against a party to an action brought in or subject to the jurisdiction of the family court." *Id.* This case satisfies these terms.

Biological Mother also incurred attorney's fees on appeal only because she was forced to defend the family court's order. Whether family courts should award fees turns on whether counsel obtained a beneficial result. *E.D.M. v. T.A.M.*, 307 S.C. 471, 476-477, 415 S.E.2d 812, 816 (1992). One cannot evaluate beneficial results until any appeal is completed. *Id.* at 477, 415 S.E.2d at 816 (reversing a fee award where counsel lost the appeal on its merits). Being forced to defend a family court order on appeal likewise affects how much fee a family court should award because the appeal multiplies the complexity of the case and the time one must necessarily devote to it. *Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991).

By culling out the time counsel was forced to spend defending the family court order on appeal, the Court of Appeals not only improperly limits the statutory grant of authority, but also truncates the factors that the Supreme Court instructed family courts

to consider when exercising this statutory power to award fees.

III. The family court's post-remittitur jurisdiction includes the ability to award statutory fees that are consistent with the appellate victory.

After a remittitur issues, a lower court has jurisdiction to "take *any* action consistent with the appellate court's ruling." *Austin v. Stokes-Craven Holding Corp.*, 406 S.C. 187, 198, 750 S.E.2d 78, 83-84 (2013)(emphasis supplied). "Any action" includes the ability to hear motions for statutory attorney's fees, including motions for fees incurred during the prior appeal. *Id.* at 198, 750 S.E.2d at 84; *Muller v. Myrtle Beach Golf and Yacht Club,* 313 S.C. 412, 415-416, 438 S.E.2d 248, 250 (1993).

The Court of Appeals acknowledges and applies this broad post-remittitur jurisdiction to the family court's power to award trial-level fees. But, the Court of Appeals then cites *Green v. Green,* 320 S.C. 347, 465 S.E.2d 130 (Ct.App. 1995), to distinguish appellate-level fees. In doing so, the Court of Appeals mistakes *one* way to satisfy post-remittitur jurisdiction (where the remittitur specifically addresses the attorney fee issue) as the *only* way. It confuses what is sufficient with what is necessary. That is, in *Green,* the attorney's fees were an issue on appeal, and the remand included a charge to evaluate attorney's fees in light of the ultimate decision. *Green* included a description of the procedural posture of that particular case, but did not hold that it was necessary for the unique scenario to be replicated in the future in order for appellate attorney's fees to be awarded by the family court. The statutory grant of power of South Carolina Code Section 63-3-530(A)(38) cannot be limited by one case's dicta.

In the first appeal in *Green,* the Court reversed and remanded for the family court to consider whether to award trial-level fees. The successful appellant then failed to move

for the Rule 222, SCACR, appellate fee. *Id.* at 349, 353, 465 S.E.2d at 131, 134. On remand, the family court nevertheless considered the time spent on appeal. The Court of Appeals affirmed, stating in part that the family court had the discretion to award fees incurred on an appeal where attorney's fees were an issue on appeal and the remand included direction that the attorney's fees issue be addressed. *Id.* at 353, 465 S.E.2d at 134. This statement is dicta, as the family court ruled that the fee awarded was reasonable *even excluding the time associated with the appeal. Id.* at 353, 465 S.E.2d at 134. (Emphasis added) In short, jurisdiction to award appellate fees by the family court was not ruled upon. Hence, in relying on *Green*, the Court of Appeals is relying on dicta from that decision as a basis to deprive Biological Mother of statutorily-granted attorney's fees.

IV. Rule 222, SCACR, does not limit § 63-3-530(A)(38).

The view that Rule 222, SCACR, limits the family court's statutory power is in error. Rule 222, SCACR, is part of the appellate rules that govern appellate practice and procedure. Rule 101(a), SCACR. Rules on practice and procedure do not affect a lower court's subject matter jurisdiction. It is Section 63-3-530(A)(38), that governs the family court's subject matter jurisdiction. To the extent the two are inconsistent, the statute governs because the rules were promulgated "[s]ubject to the statutory law." S.C. Const, Art. V, § 4. In short, the General Assembly, not the judiciary, sets the power of the family courts it created.

Neither the family court nor Adoptive Mother ever cited *Thornton v. Thornton*, 328 S.C. 96, 492 S.E.2d 86 (1997). And because the Court of Appeals issued its opinion without oral argument, the Petition for Rehearing was the first time Biological Mother had

a chance to address this case, which is relied upon by the Court of Appeals in holding that the family court may not award fees incurred in the appeal of a family court case.

Thornton had a "long and tortuous history" in which the opinion gives only an "abbreviated" account. *Thornton*, 328 S.C.at 101, 492 S.E.2d at 89. In particular, nothing in the Court's abridged account or in its analysis of appellate fees indicates that attorney's fees were ever part of a remand order. *Id.* at 113-114, 492 S.E.2d at 95. So, the case does not support or suggest the Court of Appeals' reading that a prior remand must involve attorney's fees before a family court may award appellate fees.

Thornton does not explain what the party seeking appellate fees relied on after remand to the family court, Rule 222 or 63-3-530(A)(2) (a companion statute to 63-3-530(A)(38)). The Supreme Court began by noting that South Carolina Code Ann. § 20-7-420(2) [now § 63-3-530(A)(2)] authorized the family court on remand to award trial-level fees. *Id.* at 113, 492 S.E.2d at 95. This Court then separately analyzed appellate-level fees under Rule 222, SCACR—without addressing whether § 20-7-420(2) likewise authorized an appellate-fee award. *Id.* at 113-114, 492 S.E.2d at 95. It seems that after remand the party seeking appellate fees only asked the family court to apply Rule 222. If so, this Court's decision in *Thornton* is not contrary to the Biological Mother's position; *Thornton* does not limit the scope of the family court to award appellate attorney's fees *pursuant to statute,* but rather, addresses Rule 222 fees, which Biological Mother is not seeking.

Thornton is, in this significant way, distinguishable. In this case, Biological Mother's counsel specifically invoked the family court's *statutory* jurisdiction, not Rule 222, when she sought appellate fees on remand. Counsel pointed out that her "statutory right" to have the court assess fees was "another basis" to award appellate fees "[a]nd,

we're saying that there is that statutory right to pursue appellate fees over and above" the Rule 222 fees (Appendix pp. 204. line 11–205, line 7; p. 219, lines 12-14). On appeal, counsel again relied on § 63-3-530(A)(38) for jurisdiction (Appendix p. 268; 312).

The Court of Appeals' reading of *Thornton* is unsupported by that case's analysis and holding and breaks unbroken precedent rendered before and after *Thornton* was rendered. This Court has five times squarely addressed the interplay between fee-shifting statutes and the appellate fee-shifting rule, each time holding that the statute vests lower courts with jurisdiction to fully award appellate-level fees, whether or not Rule 222 also applies. Nothing in the text of S.C. Code Ann. § 63-3-530(A)(38) distinguishes it from these other fee-shifting statutes.

The first decision involves the interplay between the old Supreme Court Rule 38 on fees and S.C. Code Ann. § 15-77-300, which provides that a court "may allow" a prevailing party to recover fees when the state takes unjustified positions. In *McDowell*, the first appeal involved the merits and did not mention attorney's fees. *McDowell v. South Carolina Dep't of Social Serv.*, 296 S.C. 89, 370 S.E.2d 878 (Ct.App. 1987). Following that appeal, McDowell did not move for Rule 38 fees.

McDowell then waited weeks after the remittitur issued before petitioning the lower court for trial-level, statutory attorney fees. The lower court denied the petition, but the Court of Appeals reversed and remanded for the lower court to determine the trial-level fees. *McDowell v. South Carolina Dep't of Social Serv.*, 300 S.C. 24, 28, 386 S.C. 280, 282 (Ct.App. 1989). After this second remand, McDowell sought for the lower court to award additional fees for the work done on appeal. On this remand, the lower court held

that her appellate fees were capped at the $750 fee then provided for in Supreme Court Rule 38, § 4.

This Court reversed, holding that Rule 38 (now Rule 222) "does not preempt an award of attorney's fees to which one is otherwise entitled." *McDowell v. South Carolina Dep't of Social Serv.*, 304 S.C. 539, 543, 405 S.E.2d 830, 833 (1991). So, this Court held that the appellate rule did not limit the family court's statutory power to award McDowell all her appellate attorney's fees.

The next case was also rendered prior to *Thornton* and involves the interplay between Rule 222, SCACR, and S.C. Code Ann. § 29-5-10, the mechanic's lien statute. It too provides that attorney's fees "may be recovered" by the prevailing party.

In *Muller,* the first appeal addressed the merits without mentioning attorney's fees. *Muller v. Myrtle Beach Golf and Yacht Club,* 303 S.C. 137, 399 S.E.2d 430 (Ct.App. 1990). After the remittitur issued, the Supreme Court denied the prevailing party's Rule 222, SCACR, petition as untimely. *Muller v. Myrtle Beach Golf and Yacht Club,* 313 S.C. 412, 414, 438 S.E.2d 248, 249 (1993). The party then petitioned the lower court on remand to award appellate fees under § 29-5-10. The trial court denied fees, specifically ruling that it lacked jurisdiction to do so because the Supreme Court did not direct it to take up the fee issue. The Supreme Court reversed, holding that the mechanic's lien statute vested the lower court with jurisdiction to award fees incurred on appeal even though he could not recover fees under Rule 222, SCACR. *Id.* at 416, 438 S.E.2d at 250.

The *Taylor* litigation is the third case on point and was rendered after the *Thornton* decision was rendered. It involves the fee-shifting provision in the Unfair Trade Practices Act. On the first appeal, the Supreme Court ruled for Taylor on the merits and remanded

for the trial court to consider the fees that had been incurred at the trial level. *Taylor v. Medencia*, 324 S.C. 200, 223, 479 S.E.2d 35, 47 (1996). The trial court then ruled on the trial-level fees, prompting a second appeal. 331 S.C. 575, 503 S.E.2d 458 (1998).

After the second appeal, Taylor moved under Rule 222, SCACR, for all the fees he incurred on the second appeal. The Supreme Court granted the standard Rule 222 fees of $1000 without prejudice to Taylor's right to invoke § 39-5-140(a) and seek additional appellate fees in the trial court. *Taylor v. Medencia*, 332 S.C. 324, 326, 504 S.E.2d 590, 591 (1998). The Court cited the *Muller* and *McDowell* decisions to reaffirm that the lower court on remand was the one to decide whether to award appellate attorney's fees pursuant to a statute.

The next decision involves S.C. Code Ann. § 15-61-110, which provides that the court "may fix attorney's fees in all partition actions . . .." On the first appeal in the *Parker* litigation, the Court of Appeals affirmed an award of trial-level attorney's fees and, after Supreme Court review of another issue, the case was remanded back to the master-in-equity. *Parker v. Shecut,* 359 S.C. 143, 148, 597 S.E.2d 793, 796 (2004). The order remanding the case said nothing about the appellate-level fees, and party seeking fees apparently did not move for a Rule 222 fee award. *Id.* at 148, 597 S.E.2d at 796.

On remand, the master awarded the fees incurred on appeal. *Id.* at 148, 597 S.E.2d at 796. The Supreme Court affirmed, holding that the lower court's post-remittitur jurisdiction included jurisdiction to award appellate-level attorney's fees pursuant to a statute. *Id.*, 359 S.C. at 152-153, 597 S.E.2d at 798-799.

Most recently, the *Austin* litigation involved the interplay between Rule 222, SCACR, and the fee-shifting provision in the Dealer's Act. In that case, the first appeal

involved in part how much attorney fees the party was entitled to under South Carolina Code Ann. § 56-15-110 for the pre-appeal trial work. *Austin,* 406 S.C. at 191-195, 750 S.E.2d at 80-82. After the Supreme Court remanded on trial-level fees, the party moved the Supreme Court for appellate-level fees under Rule 222, SCACR, and to modify the $1000 fee specified in the Rule so as to award all the appellate fees incurred. *Id.* at 195, 750 S.E.2d at 82. The Supreme Court denied any Rule 222 fees. *Id.* at 195, 750 S.E.2d at 82.

After the remittitur issued, that same party moved the lower court to award the fees incurred in the appeal. On the second appeal, the Supreme Court held that its denial of Rule 222 fees did not preclude the party on remand from seeking the appellate fees as statutory fees. The Supreme Court reasoned that a party may seek to recover appellate fees under both Rule 222 and under the statute because the two are not mutually exclusive. *Id.* at 199-200, 750 S.E.2d at 84-85. The Supreme Court ultimately remanded for the lower court to award the appellate and post-appellate fees. *Id.* at 201, 750 S.E.2d at 85.

Returning now to the Court of Appeals' Opinion, the Court found that such decisions were distinguishable because they were not decided in the family court. Yet the Court of Appeals does not explain why this distinction makes a difference. There is no apparent distinction between the scope of the jurisdiction conferred in § 63-3-530(A)(38) and that conferred in §§ 15-61-110, 15-77-300, 29-5-10, 39-5-140(a) or 56-15-110. All of these fee-shifting statutes vest the lower courts with jurisdiction to award appellate-level fees on remand, be the lower court a family court or a circuit court. And nothing in any of these statutes' text suggest that the General Assembly intended to treat family courts differently. What is more, and as has been previously mentioned on pages 7-8 of this

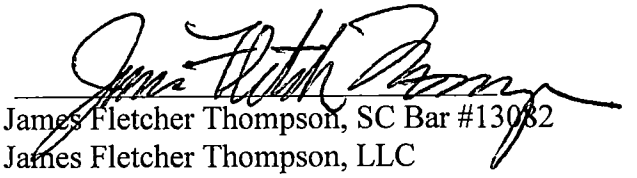
petition, the *Smith* and *Gore* decisions involved *family* courts awarding *appellate* attorney's fees. The Court of Appeals' Opinion is a break from this precedent.

Lastly, treating family courts differently will force family court litigants who desire more than the $1000 fee to move to modify the Rule 222 fee award and lard their Rule 222 petitions with attorney fee affidavits and other documentation. It would seem that this Court would have to begin making their own factual findings—in the first instance—on evaluating counsel's beneficial results; the party's ability to pay his or her attorney and the effect of the fee on their standard of living; the parties' respective financial condition; the complexity of the case; the time necessarily devoted to achieving a beneficial result; the professional standing of counsel; and the customary legal fees of similar services. *E.D.M.*; 307 S.C. at 476-477, 415 S.E.2d at 816; *Glasscock*, 304 S.C. at 161, 403 S.E.2d at 315. These factual issues are best evaluated initially at the trial level.

CONCLUSION

Section § 63-3-530(A(38) does not distinguish between a family court's power to award trial-level fees and appellate-level fees, and is materially indistinguishable from other fee-shifting statutes. All of these fee-shifting statutes grant lower courts the power to award appellate fees on remand if the award is *consistent with* the appellate ruling; the remittitur does not need to specifically mention this statutory jurisdiction in order for it to exist. Awarding Biological Mother's attorney's fees for the time and effort her counsel was forced to spend to successfully defend the family court order is fully consistent with her

appellate victory. Based upon the arguments above, Biological Mother respectfully requests that this Court grant her petition.



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CERTIFICATE OF SERVICE

I certify I have served the Appellant's *Petition for Writ of Certiorari*, on all counsel of record by email and by depositing a copy in the United States Mail, postage prepaid, on September 17, 2018, addressed as follows:

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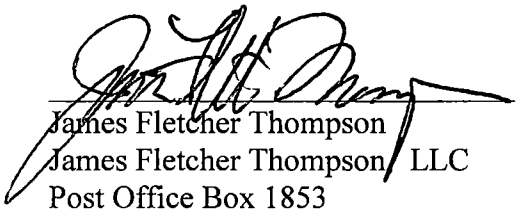

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