

**THE STATE OF SOUTH CAROLINA  
In the Court of Appeals**

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

DeAndrea Gist Benjamin, Circuit Court Judge

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Case No.: 2013-CP-40-1897  
Appellate Case No.: 2016-000211

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**RECEIVED**  
SEP 07 2018  
SC Court of Appeals

Kim Murphy .....Appellant

v.

Richland-Lexington School District No. 5 by and through its Board of Trustees by  
and through Counsel to the Board of Trustees,.....Respondent.

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**RETURN TO MOTION FOR ATTORNEY FEES AND COSTS**

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Appellant, Kim Murphy, files this Return to Respondent's Motion for attorney fees and costs. Murphy respectfully argues that because her appeal was denied as moot she should not be taxed costs and fees.

**1. Introduction**

This appeal concerned Murphy's removal from the Respondent Richland-Lexington School District No. 5 Board of Trustees ("Board"). She was removed on the stated basis that she was a resident of Lexington and not Richland County and that therefore she was not qualified to occupy a Richland County seat on the Board. The Court dismissed this appeal as moot based on the Supreme Court's decision in *Gantt v. Selph*. See, *Gantt*, 423 S.C. 333, \_\_\_, 814 S.E.2d 523, 528 (2018). The Supreme Court in *Gantt* was confronted with Murphy's residency for the

purposes of Board's November 2016 election and determined that there was sufficient evidence in the record "supporting the circuit court's finding that Murphy does not reside in Richland County [and] is not qualified to be a candidate for a Richland County seat on the School Board." *Gantt v. Selph*, 423 S.C. 333, 343, 814 S.E.2d 523, 528 (2018), *reh'g denied* (June 27, 2018). That decision necessarily rendered this decision moot, and this Court did not render a decision on the merits of this case.

The Board filed a motion for costs pursuant to Rule 222, SCACR on August 24, 2018. The Board seeks \$2,607.62. That motion was received by Murphy on August 28, 2018. The Court mailed the Board's counsel a letter on August 29, 2018 stating that the motion was premature because the filing fee had been omitted and the Court had not issued a remittitur. The filing fee for the Board's motion has since been paid and the Court issued a Remittitur on September 4, 2018. Thus, the instant motion became ripe on September 4, 2018 and this return is timely.<sup>1</sup>

## **2. Standard of Review**

Rule 222, SCACR provides that a prevailing party "may" recover certain enumerated costs. Rule 222(b), SCACR. Thus, the decision of whether or not to tax costs under Rule 222 is in the sound discretion of the Appellate Court. *Austin v. Stokes-Craven Holding Corp.*, 406 S.C. 187, 199, 750 S.E.2d 78, 84 (2013) ("Notably, it is within this Court's discretion whether to award fees and costs under Rule 222.").

## **3. Discussion**

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<sup>1</sup> Alternatively, if this Return is not timely, Murphy moves hereby for an extension of time contemporaneously with this Return. Murphy's counsel has consulted with the Board's counsel and the Board's counsel consents to this motion.

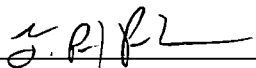
Murphy asks the Court to exercise its discretion not to award costs because the decision in this case was not on the merits; but rather, the decision was that this case was rendered moot by a Supreme Court decision that came after Murphy filed this appeal. There does not appear to be a governing decision addressing the effect of mootness on a Rule 222 motion. However, persuasive authority supports a decision not to tax costs and fees.

The Court in *City of Charleston v. Masi* declined to assess attorney fees under S.C. Code Ann. § 15-77-300 (concerning attorney fees in cases involving the State) because it determined that a mootness determination did not render the party seeking costs a prevailing party. *Masi*, 362 S.C. 505, 609 S.E.2d 301, 304 (2005). The Court specifically held: “The District is not a prevailing party because its degree of success is nonexistent given that the circuit court did not specifically find for either party and because this case is being dismissed as moot.” *Masi*, 609 S.E.2d at 304; *see also*, *Brookline Citizens to Protect the Parks Taxpayer Grp. v. Bd. of Selectmen of Brookline*, 27 Mass. App. Ct. 1191, 1191, 543 N.E.2d 430, 431 (1989) (Plaintiffs in a moot case were not entitled to attorney fees because they did not “prevail[] in any meaningful sense.”); *and*, *Greene v. Gregg*, 520 S.W.2d 924, 927 (Tex. Civ. App. 1975) (“Since this case became moot while on appeal, the cost of court incurred in both the trial and appellate court by each party should be taxed against the party that incurred such cost.”). This Court did not specifically find for either party and dismissed this case as moot; therefore, it would be unfair to tax costs and fees against Murphy in this case.

#### **4. Conclusion**

Murphy, based on the forgoing authority and the equities, respectfully asks that the Court decline to tax costs and fees against her.

**CROMER BABB PORTER & HICKS, LLC**

BY: 

J. Lewis Cromer (#1470)

J. Paul Porter (#100723)

Elizabeth M. Bowen (#103337)

1418 Laurel Street, Suite A (29201)

Post Office Box 11675

Columbia, South Carolina 29211

Phone 803-799-9530

*Attorneys for Appellant*

September 7, 2018  
Columbia, SC

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**PROOF OF SERVICE**

I certify that I have caused service of the **Return to Motion for Attorney Fees and Costs** via United States Postal Service delivery, on September 7, 2018, to the attorney of record, John Reagle of Halligan Mahoney & Williams, at P.O. Box 11367, Columbia, SC 29211.

**CROMER BABB PORTER & HICKS, LLC**

BY: J.P.P.  
J. Lewis Cromer (#1470)  
J. Paul Porter (#100723)  
Elizabeth M. Bowen (#103337)  
1418 Laurel Street, Suite A (29201)  
Post Office Box 11675  
Columbia, South Carolina 29211  
Phone 803-799-9530

*Attorneys for Appellant*

September 7, 2018  
Columbia, SC

# C | B | P | H

## CROMER BABB PORTER & HICKS, LLC *Attorneys and Counselors at Law*

J. Lewis Cromer \* Julius W. Babb, IV \* J. Paul Porter \* Ryan K. Hicks  
Shannon M. Polvi \* Samantha E. Albrecht \* Elizabeth M. Bowen

September 7, 2018

**Via Hand Delivery**

Honorable Jenny Abbott Kitchings  
Clerk of Court  
S.C. Court of Appeals  
1220 Senate Street  
Columbia, SC 29201

**RECEIVED**  
SEP 07 2018  
SC Court of Appeals

**Re: Kim Murphy v. Richland-Lexington School District No. 5**  
**Appellate Case No.: 2016-000211**

Dear Ms. Kitchings:

Enclosed please find the original and one copy of Appellant's Return to Respondent's Motion for Attorneys Fees and Costs along with a Proof of Service. Please file the original and return a filed copy to our runner. By copy of this letter, I am serving counsel of record with a copy of same.

Should you have any questions or concerns, please feel free to call us. Thank you in advance for your assistance in this matter.

With kind regards, I remain

Sincerely,



Kate M. Ray  
*Litigation Paralegal*

/kmr  
*Enclosures*

cc: John M. Reagle (w/encl.)