

THE STATE OF SOUTH CAROLNA

In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

Carmen T. Mullin, Circuit Court Judge

Case No. 2016-001278

Opinion, No.: 5632

RECEIVED

APR 08 2019

SC Court of Appeals

Mildred Ann Kinghorn as
Trustee for the Mildred Ann
Kinghorn Trust, dated 28
April 2004

Respondent,

George Sakakini,

Appellant.

RETURN TO RESPONDENT'S MOTION FOR COSTS ON APPEAL

M. Richardson Hyman, Jr.
Post Office Box 127
Charleston, South Carolina 29402

(843) 416 1047
Attorney for Appellant

BACKGROUND

The Respondent has filed a Motion for Costs, dated 27 March 2019. Appended to the Motion served upon Appellant, the Respondent filed a “Memorandum of Law Supporting the Motion for Costs on Appeal. (Both incorporated by reference) Also filed was an “Itemized Statement of Costs.” The latter is attached hereto as Exhibit 1. The only costs itemized or apparently sought are attorneys’ fees in the amount of \$2,500.00.

DISCUSSION

South Carolina Appellate Court Rule 222(b) states in full:

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. The allowance of additional costs will generally not be allowed except in the most extraordinary of circumstances.

While perhaps Respondent could have recovered costs under South Carolina Appellate Court Rule 222(b) had she complied with the express provisions of South Carolina Appellate Court Rule 222, she did not. The relevant provision states in whole:

A party desiring costs to be taxed shall, within fifteen (15) days of the issuance of the remittitur, serve and file a motion requesting that costs be assessed under this Rule. The motion shall comply with Rule 240. If costs are being sought under (b) above, the motion shall be accompanied by a sworn, itemized statement of costs incurred in the form prescribed in the Appendix to these rules. Any return or reply to the motion shall be served and filed in the manner provided by Rule 240. The return may oppose the request for costs or seek a reduction of the amount of costs to be awarded. The remittitur shall not be stayed by the filing of a motion for costs. SCACR 222(d).

Pursuant to the Court Rule, if costs are being sought under subsection (b) above, the motion shall be “**accompanied by a sworn, itemized statement of costs incurred** in the form prescribed in the Appendix to these rules.” In this case, the only costs sought are attorneys’ fees, which are in

fact costs otherwise taxable under Rule 222(b). However, to recover costs taxable under Rule 222(b), Rule 222(d) states that the Respondent must have filed a timely “sworn, itemized statement of costs incurred in the form prescribed in the Appendix to these rules” and she must have filed it **with the motion**. The Respondent has not complied with this mandate.

The form used by the Respondent (Exhibit 1) may initially appear to be similar to Form 17 (Exhibit 2) which is the form referred to in SCACR 222(d). However, it is neither the same, nor is it substantially the same. Firstly, Form 17 as well as SCACR 222(d) contemplate that a party moving for the taxation of costs under SCACR 222 will file a “**sworn**, itemized statement of costs” with the motion. The Respondent did not. Not only did the Respondent file an **unsworn** request, her request was just that - request for attorneys’ fee. It was not an itemized statement of costs incurred. In fact, there is nothing in any of the documentation submitted by Respondent which indicates whether she incurred any costs or not.

Fees are recoverable when they are a cost incurred. Most assuredly, the Courts did not devise fees under SCACR 222(b) to be either a penalty for losing an appeal nor an award for simply winning an appeal. It is one of a very narrow few exceptions to the “American Rule” followed by the Courts of South Carolina. Its purpose is compensation and not penalization.

As the South Carolina Court of Appeals has noted that “recovery under [Rule 222] 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.”** *Martin v. Paradise Cove Marina, Inc.*, 348 S.C. 379, 384, 559 S.E.2d 348 (Ct.App.2001). (All emphasis added) Thus, the appellate Courts have affirmed that the taxation of attorneys’ fees under SCACR is compensatory for actual “costs incurred.” *Id.* If the Respondent has not incurred fees as an actual cost, then she is not entitled to fees as a penalty or

an award as they, like all other awardable costs under SCRCP 222(b) are compensation for the expenditures made in defending the appeal.

It is the duty of the Respondent to demonstrate the expenditure of attorneys' fees in regard to the defense of the appeal. Rule 222(d) specifies the manner in which she must do so. She not only failed to do so in the manner prescribed by the Rules, there is not one shred of indication, sworn or unsworn in the motion, memorandum in support of the motion, or Itemized Statement of Costs (Exhibit 1) that she made any expenditure of attorneys' fees in regard to the appeal. The Appellant would respectfully point out that the motion and the memorandum of law merely point out that attorneys' fees and costs are recoverable under SCACR 222, which is a point that Appellant does not contest. However, that conclusion of law is a far cry from the establishment of fact that fees and costs were incurred.

Had the Respondent used the "form prescribed in the Appendix to these rules..."¹ which would have been ever so easy to do, the Respondent would have certified to this Honorable Court:

I, _____, do swear or affirm that the foregoing costs are correct and were necessarily incurred in this action. A copy of this statement was (mailed to/served upon) opposing counsel.²

Yet this Honorable Court should note that in the Respondent's Itemized Statement of Costs there is not only no sworn statement that the "costs are correct and were necessarily incurred in this action," there is no statement at all that such "costs are correct and were necessarily incurred in this action."

The Rules mandate that a party seeking costs under SCACR 222(b) do so within a specified time frame and in a specified manner. If one seeks the taxation of costs under SCRCP

¹ SCACR 222(d).

² Language contained in Appendix form 17.

222(b) then one must follow the procedures set forth in SCACR 222(d). The taxation of attorneys' fees is a cost specifically enumerated under SCACR 222(b). Therefore, a motion for the taxation of attorneys' fees must be compliant with SCACR 222(d).

No motion was filed within 15 days of the remittitur which was “**accompanied by a sworn, itemized statement of costs incurred in the form prescribed in the Appendix to these rules**” within the prescribed time for filing so. SCACR 222(d) (emphasis added). The respondent has ultimately failed to demonstrate any costs incurred in the appeal, sworn or otherwise. The South Carolina Supreme Court has held that while there is a right to receive attorneys' fees under SCRPAP 222, that a party waives that right to this award [if] he fail[s] to file an itemized statement of costs with the court prior to the issuance of the remittitur.” *Muller v. Myrtle Beach Golf & Yacht Club*, 313 S.C. 412, 416, 438 S.E.2d 248, 250 (1993) (while the Rule has since changed to require a motion within 15 days of the remittitur instead of prior to the remittitur, the holding that a failure to file a timely “itemized statement of costs” prior to the set deadline constitutes a waiver has not changed).

Under the Rules of Appellate Procedure, there is but one exception to the general rule regarding remittiturs and jurisdiction of the Court of Appeals thereafter. The general rule is that “[t]he sending of the remittitur end[s] appellate jurisdiction... .” [*Stogsdill v. S.C. Dep't of Health & Human Servs.*, 415 S.C. 568, 569, 784 S.E.2d 669, 670 (2016). See also *Jim Lancaster v. Georgia-Pacific Corp.*, 403 S.C. 136, 742 S.E.2d 867 (2013). This one exception to the general rule is found in SCACR Rule 222(d). That allows one motion and one motion only to be heard post remittitur, and that is a **timely** motion for costs “**accompanied by a sworn, itemized statement of costs incurred** in the form prescribed in the Appendix to these rules.” No such filing has been made. The remittitur is complete. The jurisdiction over the case has been

returned to the trial court and, as of the fifteenth day after the remittitur, been divested from this Honorable Court.

Conclusion

Because no proper motion was filed for attorneys' fees in a timely and rule-compliant manner, the award of fees was waived the motion should be dismissed.

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Post Office Box 127
Charleston, South Carolina 29402
SC Bar No. 64865
(843) 416 1047
Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Mildred Anne Kinghorn as Trustee for the Mildred Anne
Kinghorn Trust, Dated April 28, 2004, Respondent,

v.

George C. Sakakini, Appellant.

APPELATE CASE NO. 2016-001278

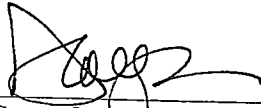
Opinion No. 5632

ITEMIZED STATEMENT OF COSTS

The Appellate Court is requested to tax the following costs against George C. Sakakini.

COSTS TAXABLE UNDER RULE 222, SCACR	NO. OF PAGES	RATE	REQUESTED	ALLOWED
Attorney's fee provided by Rule 222 (b) SCACR	1		\$2,500.00	
	TOTAL		\$2,500.00	

RESPECTFULLY SUBMITTED.


C. Scott Graber, Esquire
SC Bar No. 2193
Attorney for the Defendants
605 Carteret Street
Beaufort, SC 29902
843-524-8204

Beaufort, South Carolina
March 27, 2019

**FORM 17
ITEMIZED STATEMENT OF COSTS**

THE STATE OF SOUTH CAROLINA
In The Court of Appeals
[In The Supreme Court]

v.)
)
)
)
)
)
)
)

The Appellate Court is requested to tax the following costs against

(Name of Party)

COSTS TAXABLE UNDER RULE 222, SCACR	NO. OF PAGES	RATE	REQUESTED	ALLOWED (For Court Use Only)
Cost of Printing or Copying Final Brief				
Cost of Printing or Copying Final Reply Brief				
Cost of Printing or Copying Record on Appeal				
Filing Fee Paid Under Rule 203(d), SCACR				
Cost of Court Reporter's Transcript				
Attorney's Fee Provided By Rule 222(b), SCACR				
Other (specify and explain):				

COSTS TAXABLE UNDER RULE 242(j), SCACR				
Cost of Printing or Copying Brief				
Cost of Printing or Copying Reply Brief				
Cost of Printing or Copying Appendix				
Filing fee paid under Rule 242(c), SCACR				
Attorney's fee provided by Rule 242(j)(2), SCACR				
Other (specify and explain):				
		TOTAL		

I, _____, do swear or affirm that the foregoing costs are correct and were necessarily incurred in this action. A copy of this statement was (mailed to/served upon) opposing counsel.

(Signature)
Attorney for _____

Subscribed and sworn to before me this _____ day of _____, 20_____.

Notary Public for _____

My Commission Expires: _____

(Seal)

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

Carmen T. Mullin, Circuit Court Judge

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Case No. 2016-001278

SC Court of Appeals

Opinion, No.: 5632

Mildred Ann Kinghorn as
Trustee for the Mildred Ann
Kinghorn Trust, dated 28
April 2004

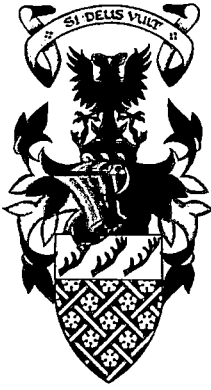
Respondent,

George Sakakini, Appellant.

CERTIFICATE OF SERVICE

I certify that I have served the Return to Respondent's Motion for Costs on Appeal on the Respondent Mildred Ann Kinghorn, by depositing a copy of it in the United States Mail, postage prepaid, on 01/11 April, 2019, addressed to her attorney of record, C. Scott Graber, 605 Carteret Street, Beaufort, South Carolina 29902.

M. Richardson Hyman, Jr.
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SC Bar No: 64855;
(843) 416 1047
Attorney for Appellant



M. RICHARDSON HYMAN, JR.

P.O. Box 127

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MRHCHAS@COMCAST.NET

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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Mildred Ann Kinghorn as Trustee for the Muldred Ann Kinghorn Trust, dated 28 April 2004 v. George Sakakini

Appellant, Case No. 2016-12-001278

Dear Ms. Kitchings:

Enclosed for filing is the Appellant's Return to Respondent's Motion for Costs on Appeal along with 6 copies thereof and the certificate of service the above case. I thank the Court for its kind attention to this matter.

Sincerely,


M. Richardson Hyman, Jr.

PO Box 127

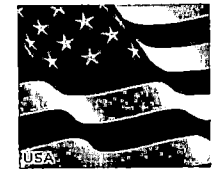
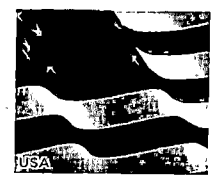
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Attorney for the Appellant

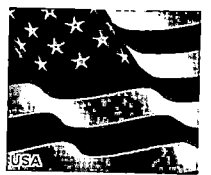
cc: C. Scott Graber, Esquire
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Attorney for Respondent

To Box 127
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