THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

The Honorable Michael Nettles, Circuit Court Judge

Case No. 2019-002066

April Jones……..…….Appellant,

v.

Tim Ringer, Individually and as employee/agent of WAL-MART STORES, INC. d/b/a WAL-MART STORE # 630; WAL-MART STORES, INC.; and WAL-MART STORES EAST, L.P.……..…Respondents.

APPELLANT'S RETURN TO RESPONDENTS' MOTION FOR COSTS

This Court should not award costs to Respondents because Respondents failed to file a proper Motion for Costs within the fifteen-day window to do so provided by Rule 222. As the Court is aware, there is no common law right to attorney's fees and costs of litigation. Accordingly, Rule 222 is in derogation of the common law. As a result, Respondents must strictly comply with Rule 222 in order to be awarded fees. They have not complied; strictly or otherwise.

Because there is no provision for costs other than Rule 222, and because Respondents did not comply with Rule 222 (and cannot comply now, the deadline having passed), this Court should deny costs to Respondents.

Rule 222, SCACR sets forth the procedure for taxing costs on appeal. The three procedural provisions of Rule 222 at issue here are contained in subjection "b."[1] They are as follows:

1. "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." Rule 222(d) (emphasis added).

2. "[T]he motion ***shall*** be accompanied by a ***sworn***, itemized statement of costs incurred in the form prescribed in the Appendix to these rules." Rule 222(d) (emphasis added).

3. "[T]he motion ***shall*** be accompanied by a sworn, itemized statement of costs incurred ***in the form prescribed in the Appendix to these rules.***" Rule 222(d) (emphasis added).

Use of the word "shall" indicates that the above are mandatory requirements, not suggestions. *Collins v. Doe*, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002) ("Under the rules of statutory interpretation, use of words such as 'shall' or 'must' indicates the legislature's intent to enact a mandatory requirement."); *State v. Oglesby*, 384 S.C. 289, 293, 681 S.E.2d 620, 622 (Ct. App. 2009) ("When interpreting a court rule, an appellate court applies the same rules of construction used in interpreting statutes.").

I. Respondents did not file a proper motion for costs before the deadline to do so.

Filing a motion means filing a ***proper*** motion. *First Union Nat. Bank of S.C. v. Soden*, 333 S.C. 554, 572, 511 S.E.2d 372, 381 (Ct. App. 1998) (Appellant's "request for fees and costs incurred in this appeal must be addressed by a ***proper*** motion pursuant to Rule 222, SCACR.") (emphasis added). The deadline for filing such a proper motion is fifteen days after issuance of the remittitur.

[1] Because Respondents' motion is fatally defective procedurally, Appellant does not herein address its substantive defects, but reserves the right to do if such becomes necessary.

Here, the remittitur was issued on June 24, 2020, thus putting the deadline for filing a proper motion for costs at July 9, 2020. July 9, 2020 has passed. As described below, Respondents did not file a proper motion for costs before the deadline. Accordingly, Respondents are not entitled to costs.

II. Respondents' motion is improper because the required itemization of costs is not "sworn" as required by Rule 222.

Rule 222(d) states that "the motion ***shall*** be accompanied by a ***sworn***, itemized statement of costs incurred in the form prescribed in the Appendix to these rules." Rule 222(d) (emphasis added). As noted above, use of the word "shall" indicates that it is mandatory for a ***sworn*** statement to accompany the motion. However, despite the mandatory requirement, Respondents did not include a sworn statement with its motion.

A sworn statement has "generally been interpreted to mean a statement under oath, given before a person authorized to take oath. In South Carolina, Section 26-1-90 of the Code of Laws of South Carolina, 1976, vests in notaries public the general power to administer oaths and to take depositions or affidavits.") 1984 WL 249706, at *1 (S.C.A.G. Aug. 30, 1984) (internal citations omitted).

Nothing in Rule 222(d) suggests that "sworn itemized statement" means anything other than what the plain language clearly says – an itemized statement under oath, given before a person authorized to take oath. *Smith v. Tiffany*, 419 S.C. 548, 556, 799 S.E.2d 479, 483 (2017) ("The words found in the statute must be given their plain and ordinary meaning and if the words are unambiguous, we must apply their literal meaning.") (internal citations and alterations omitted)). Moreover, if any further support for applying the plain meaning of "sworn" were needed, it is found in the very form that Rule 222 required Respondents to use.

Form 17 is the required form, and it plainly includes a large section for the notary to complete as shown in pertinent part below. [Appendix C, Form 17, SCACR].

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)

Despite the mandatory requirement of a sworn statement, Respondents did not provide one. No notary signed the statement. Neither of the words "swear" or "sworn" even appear in the statement. The statement is not even personally signed. See pertinent excerpt below. Under no stretch of the English language is Respondents' statement a ***sworn*** statement.

I, Nashiba Boyd, do declare that the foregoing costs are correct and were necessarily incurred in this action. A copy of this statement has been served upon opposing counsel via United States First Class Mail, postage prepaid.

s/ Nashiba Boyd
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July 1, 2020

Columbia, South Carolina

Moreover, it appears that not only did Respondents fail to have the document notarized, Respondents did not even attempt to provide an acceptable substitute for notarization. Whether Section C(16), "Certification in Lieu of Affidavit", of the Supreme Court's *Operation of the Trial Courts During the Coronavirus Emergency* Order[2] would have applied here does not matter, because Respondents did not comply with even that minimal standard.

Section C(16) provides an alternative to affidavits in the trial courts during the Coronavirus Emergency. Section C(16) provides as follows:

> **(16) Certification in Lieu of Affidavit.** If a statute, court rule or other provision of law requires an affidavit to be filed in an action, the requirement of an affidavit may be satisfied by a signed certification of the maker stating, "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment by contempt."

The relevant common feature of sworn notarized statements and Sections C(16)'s "Certification in Lieu of Affidavit" is the consequence of making a false statement – just as a sworn notarized statement subjects the signer to punishment for perjury, compliance with Section C(16) subjects the signer to punishment by contempt. In contrast, nothing in Respondents' document even suggests, much less states, that the signer is subject to punishment for making a false statement. Instead, by merely signing the document, Respondents are exposed only to the same Rule 267(b) consequences that apply to every other document signed by an attorney and submitted to this Court.[3] Rule 222 requires more. Accordingly, there is no serious argument that

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[2] Order re: *Operation of the Trial Courts During the Coronavirus Emergency*, Appellate Case No. 2020-000447 (initially filed on April 3, 2020, and amended April 14 and 22, 2020).

[3] Order re: *Operation of the Appellate Courts During the Coronavirus Emergency*, Appellate Case No. 2020-000447 (initially filed on March 20, 2020, and amended May 29, 2020) (Section (f) "**Signatures of Lawyers and Self-Represented Litigants on Documents.** While this order remains in effect, a lawyer or self-represented litigant may sign documents using "s/ [typed name of person]," a signature stamp, or a scanned or other electronic version of the person's signature. Regardless of form, the signature shall still act as a certificate under Rule 267(b), SCACR, that the person has read the document; that to the best of the person's knowledge, information, and belief there is good ground to support it; and that the document is not interposed for delay.").

Respondents' document is the functional equivalent of Certification in Lieu of Affidavit to satisfy Rule 222's sworn statement requirement.

It is doubtful that compliance with Section C(16) would have helped Respondents anyway, since the order by its terms applies to trial courts, not this Court, and a corresponding provision does not appear in the analogous appellate court order.[4] However, the point is that Respondents did not even try. Respondents did not even ***attempt*** to comply with the notarization requirement.

III. Respondents' motion is improper because it is not "in the form prescribed in the Appendix" as required by Rule 222.

Rule 222(d) states in pertinent part: "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***." Rule 222(d) (emphasis added). The drafters did not add the last ten words of that sentence with the intent that they be ignored. *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) ("[W]e must read the statute so that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous, for the General Assembly obviously intended the statute to have some efficacy, or the legislature would not have enacted it into law." (internal marks and citations omitted)). Presumably, the drafters specified that Form 17 be used so that parties would get it right and not omit necessary items as Respondents did.

The rules matter. *Henning v. Kaye*, 307 S.C. 436, 437, 415 S.E.2d 794, 794 (1992) ("Counsel is advised that the South Carolina Appellate Court Rules are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals in this State. ***It is incumbent upon counsel to provide material that complies with the Rules*** and

[4] Order re: *Operation of the Appellate Courts During the Coronavirus Emergency*, Appellate Case No. 2020-000447 (initially filed on March 20, 2020, and amended May 29, 2020).

facilitates appellate review.") (emphasis added). Accordingly, Respondents cannot ignore the rules without consequence.

This is not an instance of Appellant elevating form over substance. It is not as if Respondents used the wrong font or extra-wide margins. Here, the deviation in form is ***also*** a deviation in substance, because Respondents made substantive alterations and deletions to Form 17. Specifically, Respondents changed the language so that the document was no longer a sworn statement, but rather a declaration ("I, Nashiba Boyd, do declare . . ."). Moreover, Respondents deleted the notarization section.

Our courts have long recognized the difference between a sworn notarized document and one which is merely signed. *See, e.g. Dawkins v. Fields*, 354 S.C. 58, 67, 580 S.E.2d 433, 438 (2003) (holding that a verified complaint – one sworn-to before a notary – may operate as "an acceptable substitute for an affidavit at the summary judgment phase," unlike a complaint that is not verified – i.e. not sworn and notarized – which cannot). Accordingly, Respondents' deletion of the notary section from Form 17 cannot be disregarded as if the words "in the form prescribed in the Appendix to these rules" were mere surplusage with no force or effect.

CONCLUSION

The Rules matter. They especially matter where, as here, Respondents (a multi-billion-dollar corporation) are asking this Court to seize money from Appellant (a disabled, wheelchair-bound amputee[5]) based solely on a court rule in derogation of the common law. As the Court is aware, there is no common law right to attorney's fees and costs of litigation.[6] Accordingly, in

[5] Who alleges that she got that way in the first place as a result of Respondents' negligence. This Court should not allow Respondents to victimize Appellant a second time.

[6] *Harris-Jenkins v. Nissan Car Mart, Inc.*, 348 S.C. 171, 176, 557 S.E.2d 708, 710 (Ct. App. 2001) ("There is no common law right to recover attorney's fees.").

order to seize Appellant's money in derogation of the common law, Respondents must strictly comply with Rule 222.[7] They have not. As a result, Respondents' motion should be denied.

Respectfully submitted,

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[7] *Belton v. State*, 339 S.C. 71, 74, 529 S.E.2d 4, 5 (2000) ("A statute allowing attorney fees is in derogation of the common law and must be strictly construed.").

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PROOF OF SERVICE

I hereby certify that I have served Appellant's Return to Respondents' Motion for Costs, by depositing a copy of same in the United States Mail, postage prepaid, on July 10, 2020, on Respondents' attorneys of record, Regina H. Lewis and Nashiba Boyd, addressed as follows:

Regina Hollins Lewis, Esquire
Nashiba Boyd, Esquire
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3700 Forest Drive, Suite 400
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[signature on following page]

s/Lane D. Jefferies
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*OF COUNSEL

July 10, 2020

Sent Via U.S. Mail
The Honorable Jenny Abbott Kitchings
Clerk, SC Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RE: *April Jones v. Wal-Mart Stores, Inc., et al*
Case No.: 2019-002066

Dear Ms. Kitchings,

Enclosed please find Appellant's Return to Respondents' Motion for Costs. If you should have any questions, please do not hesitate to contact us.

Thank you.

Sincerely,

Lane D. Jefferies, Esq.

cc: Regina Hollins Lewis, Esquire
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