

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

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Alex Kinlaw, Jr., Circuit Court Judge

Common Pleas Case No. 2018-CP-23-00513

Appellate Case No. 2019-002040

DAVID ROSEN,

Appellant,

v.

JOSEPHINE MIDDLETON,

Respondent.

Reply in Support of Motion for Costs

Howard W. Anderson III (#100329)
LAW OFFICE OF HOWARD W.
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Lead Counsel for Respondent

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Comes now Respondent in Reply in Support of her Motion for Costs would respectfully show the Court as follows:

I. A \$2,500 Attorney’s Fee Is Presumptively Available Under R. 222, SCACR.

Appellant’s lengthy argument about costs under R. 242, SCAR, misses the mark. As Appellant himself concedes in a footnote, [Opp. at 2 n.1], Rule 222, SCACR, supplies the authority for costs where, as here, certiorari to the South Carolina Supreme Court has been denied. And under Rule 222, SCACR, Ms. Middleton—as the party who successfully obtained a dismissal of the appeal—“shall be entitled to recover” the currently applicable \$2,500 attorney’s fee, unless and until sufficient cause is shown to reduce or eliminate the fee.

II. The Presumptive \$2,500 Award Is Appropriate.

No good reason exists to deny the full fee set forth in Rule 222, SCACR.

First, it was black-letter law that the order at issue was not immediately appealable. *E.g.*, *Posick v. Sea Coast Constr.*, 380 S.C. 584, 589 (Ct. App. 2008). Indeed, this Court found the law so-well settled as to only require an unpublished memorandum decision.

Second, despite the black-letter prohibition on the interlocutory appeal, Appellant not only resisted the motion to dismiss but then filed a petition for certiorari with the

South Carolina Supreme Court, necessitating further briefing from Ms. Middleton.¹

Third, undaunted, Appellant has advised that he will be filing a petition for certiorari with the U.S. Supreme Court—even though such a petition there has even lower odds than the petition to the South Carolina Supreme Court given the lack of any preserved federal issue, much less one that is subject to a circuit split.

Finally, undersigned counsel can certify that Ms. Middleton actually paid undersigned counsel \$2,500 for handling the appeal at the outset of the appeal.² Undersigned counsel correctly anticipated that the appeal would be dismissed.

Appellant filed this appeal with eyes open as to the long odds of success and the presumption that, if Appellant could not overturn decades of caselaw, Appellant would be assessed a \$2,500 fee. “Someone has to bear the costs of litigation, and the winner has much the better claim to be spared them.” *Luckey v. Baxter Healthcare*

¹ As this Court’s records show, Ms. Middleton’s memorandum in support of the Motion to Dismiss was three pages of argument, and her Reply in Support of her Motion to Dismiss was a little more than a page. As indicated on the online docket, her Return to the Petition for Certiorari was six pages long. Thus, in total, Ms. Middleton had to draft a little more than 10 pages of briefing in an appeal that never should have been filed.

² Given that counsel already submitted the sworn itemization of costs in support of the motion, it is unclear why Appellant wonders whether the fee was actually incurred.

Corp., 183 F.3d 730, 734 (7th Cir. 1999). Appellant, not Ms. Middleton, should bear the \$2,500 for which Ms. Middleton is currently out of pocket.

Dated this 28th day of October 2020.

JOSEPHINE MIDDLETON

s/Howard W. Anderson III
Howard W. Anderson III
SC Bar No. 100329
Lead Counsel for Respondent

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Proof of Service

I, the undersigned, served a copy of this Reply in Support of Motion for Costs on the following counsel of record this 28th day of October, 2020, by email to their address of record in the AIS:

Joshua T. Hawkins
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“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.” Dated this 28th day of October, 2020.

s/Howard W. Anderson III
Howard W. Anderson III
SC Bar No. 100329
Counsel for Respondent

Rosen v Middleton, No. 2019-002040 - Reply in Support of Motion for Costs

1 message

Howard Anderson <howard@hwalawfirm.com>

Wed, Oct 28, 2020 at 1:55 PM

To: Josh Hawkins <josh@hjllcsc.com>, Helena Jedziniak <Helena@hjllcsc.com>

Cc: Devon Puriefoy <devon@truluckthomason.com>, Kimberly Thomason <kim@truluckthomason.com>

Counsel:


Please see the attached Reply in Support of Motion for Costs, which is being electronically filed with the Court of Appeals (along with this email).

Best,
Howard--
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