

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from Charleston County
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2013-CP-10-03251
Appellate Case No. 2019-002046

RECEIVED

Mar 29 2021

S.C. SUPREME COURT

Rosemary Connelly,

Respondent,

v.

Winsor Custom Homes, LLC,

Petitioner.

PETITIONER'S RETURN TO RESPONDENT'S MOTION FOR COSTS

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Petitioner, Winsor Custom Homes, LLC (“Winsor”), submits this return to the motion for costs filed by Respondent, Rosemary Connelly (“Mrs. Connelly”).

BACKGROUND

By order filed August 10, 2020, the Court granted Winsor’s petition for a writ of certiorari as to Questions IIA2 and IIB3 and denied it as to all other Questions. The parties served and filed the appendix and briefs as provided by Rule 242(i), SCACR, and the Court heard oral argument in the matter on February 2, 2021, via Webex.

On March 10, 2021, however, the Court issued a memorandum opinion dismissing the writ of certiorari as improvidently granted and immediately sent down the remittitur, leaving the Court of Appeals’ decision in favor of Mrs. Connelly undisturbed, i.e., neither affirming nor reversing the Court of Appeals’ decision but simply leaving it alone, just as if Winsor’s petition for a writ of certiorari had been denied from the start.

Mrs. Connelly filed and served the instant motion for costs in this Court on March 17, 2021.

Filed and served Monday, March 29, 2021, this return to Mrs. Connelly’s motion for costs is timely pursuant to Rule 240(e), SCACR (“Any party opposing a motion . . . shall have ten (10) days from the date of service thereof to file . . . his return with the clerk and serve on all parties a copy of the return”) and Rule

263(a), SCACR (“In computing any period of time prescribed or allowed by these Rules, . . . the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a state or federal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor such holiday.”).

ARGUMENT

Rule 242(j), SCACR, provides for this Court to award costs when a writ of certiorari has been granted. In particular, Rule 242(j)(1) provides as follows:

Unless otherwise ordered by the Supreme Court or agreed to by the parties, costs shall be assessed against the appellant if the decision of the Supreme Court has the effect of affirming the judgment of the lower court or tribunal which was reviewed by the Court of Appeals. When the decision of the Supreme Court has the effect of reversing the judgment of the lower court or tribunal which was on appeal, costs shall be assessed against the respondent before the Court of Appeals. When the decision of the Supreme Court has the effect of affirming or reversing in part or vacating the judgment of the lower court or tribunal which was on appeal, costs shall be allowed only as ordered by the Supreme Court.

As explained above, although the Court initially granted Winsor’s petition for a writ of certiorari, it went on to dismiss the writ as improvidently granted, and thus did not address this matter on the merits. The effect of the Court’s dismissal of the writ of certiorari is the same as if the Court had simply denied Winsor’s petition for

a writ of certiorari from the start. In other words, the effect of the Court’s decision was not to affirm the Court of Appeals’ decision (or for that matter to affirm the trial court), but rather to turn what had been the grant of Winsor’s petition for a writ of certiorari into the denial of Winsor’s petition, thus leaving the Court of Appeals’ decision to affirm the trial court wholly undisturbed—just as undisturbed as it would have been had this Court denied Winsor’s petition to begin with.

Rule 242(j) is headed “Costs When a Writ of Certiorari Has Been Granted” (original bold print omitted). But this does not mean that an award of costs is proper when a writ of certiorari is only initially granted but later dismissed as improvidently granted, which, again, has the very same effect as if the petition for a writ of certiorari had been denied from the start. The effect of such a dismissal is no more to “affirm” the Court of Appeals’ decision (or for that matter to affirm the trial court) than is the effect of the denial of a petition for a writ of certiorari. Either way, whether this Court denies a petition for a writ certiorari from the start or first grants but then dismisses a petition for a writ of certiorari on the basis that it should have denied it from the start, the Court of Appeals’ decision remains intact, not because it has been endorsed by this Court via affirmance or anything akin thereto, but because this Court has chosen to exercise its discretion to simply say nothing of substance about the matter at all.

“A petition for a writ of certiorari to the Court of Appeals is a discretionary appeal, not an appeal to which petitioner/respondent is entitled as a matter of right.” *Poston v. State*, 339 S.C. 37, 528 S.E.2d 422 (2000), *overruled on other grounds by Douglas v. State*, 369 S.C. 213, 215, 631 S.E.2d 542, 543 n.1 (2006); *see also* Rule 242(a) (“A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons.”). If the dismissal of a writ of certiorari as improvidently granted had the effect of “affirming” the decision of the Court of Appeals, so too would the denial of a petition for a writ of certiorari, which would mean that it would be effectively impossible for this Court to exercise its discretion to simply decline discretionary review without at least weighing in to some substantial degree on the merits of the Court of Appeals’ decision. In other words, it would mean that when a citation to a decision of the Court of Appeals is accompanied by “cert denied” it should be taken to mean that this Court did not merely decline to review the Court of Appeals’ decision without comment, but rather that this Court effectively affirmed the Court of Appeals’ decision, thereby blessing it with its seal of approval.

Lastly, in support of this return, Winsor attaches hereto and incorporates herein by reference the analogous filings from the only other case in which the undersigned has been involved (that he can recall) where a writ of certiorari was first granted but later dismissed as improvidently granted, *McFarland v. Rashtchian*,

Appellate Case No. 2017-001404, wherein, under substantially identical circumstances, this Court denied the Respondents' motion for costs. See Exhibit 1 (order granting writ of certiorari); Exhibit 2 (memorandum opinion dismissing writ of certiorari as improvidently granted); Exhibit 3 (Respondents' motion for costs); and Exhibit 4 (order denying Respondents' motion for costs).

CONCLUSION

For the reasons set forth herein, Winsor asks the Court to deny Mrs. Connelly's motion for costs.

Respectfully submitted,
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