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May 07 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
George M. McFaddin, Jr., Circuit Court Judge

Appellate Case No. 2019-002081
Case No. 2018-CP-18-1960

Carl Michael Funny, Respondent,

v.

Waffle House, Inc. and Christopher Heithaus, Appellants.

**APPELLANTS’ RETURN TO RESPONDENT’S
MOTION FOR COSTS ON APPEAL**

The Respondent has filed a Motion for Costs wherein he seeks a total of \$7,500 in attorney’s fees pursuant to Rule 222(b), SCACR. The Appellants oppose the award of costs for both procedural and substantive reasons.

First, the Respondent's motion does not comply with the strict requirements of Rule 222(d), SCACR, which 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), SCACR. (Emphasis added). Thus, using the mandatory term "shall," the Appellate Court Rules require the filing of a "sworn, itemized statement of costs." No such sworn statement of costs has been submitted by the Respondent, which should bar his claim.

Additionally, the Respondent makes an unsworn claim for attorney's fees in the amount of \$7,500. Rule 222(b), SCACR, allows for the recovery of attorney's fees "in an amount which shall be set by order of the Supreme Court." Then, by footnote, reference is made to the Supreme Court's Order dated January 17, 2018, setting the maximum allowed amount of attorney's fees at \$2,500. There is no basis for the recovery of three times the allowed limit. Moreover, the Respondent has offer no proof of any amount of attorney's fees that he actually incurred and certainly no evidence that it was in excess of the allowed limit.

The Respondent also states incorrectly that this Court "twice dismissed" the appeal. That is not true. By Order filed January 6, 2020, this Court *sua sponte* dismissed the Appellants' appeal as interlocutory without allowing the parties to be heard. The Appellants filed a petition for rehearing which must have been found by the panel to have sufficient merit in that the panel requested a return to be filed. The appeal did have merit because the Appellants were appealing an award of sanctions for which the Appellants made a credible argument that an immediate appeal should be permitted. The Appellants raised the same issue with the Supreme Court by

petition for writ of certiorari which considered the merits of that position for nine months, which again reflects that it was a legitimate issue presented. As a reminder, the Appellants argued that an order granting monetary sanctions, where the amount of the sanctions is conclusively and finally determined, should be deemed a final order that is immediately appealable. The Appellants argued that there is no reasonable basis to create a distinction between civil contempt monetary sanctions and non-contempt monetary sanctions where one form of sanctions is immediately appealable and the other is not.

In sum, the Respondent's motion for costs on appeal should be denied for failure to comply with the Rule 222(d) requirement of a "sworn, itemized statement of costs." In the alternative, any award should not exceed the allowed amount of attorney's fees permitted by the Supreme Court.

Respectfully submitted,

BY: s/ Andrew F. Lindemann
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Counsel for Appellants

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CERTIFICATE OF SERVICE

Pursuant to Section (g)(3) of the Supreme Court’s Order Re: Operation of the Trial Courts During the Coronavirus Emergency (as amended May 29, 2020), the undersigned employee of Lindemann & Davis, P.A., counsel for the Appellants, does hereby certify that service of **Appellants’ Return to Respondent’s Motion for Costs on Appeal** was made upon all counsel of record by email only this the 7th day of May 2021:

Joshua E. Slavin, Esquire
The Law Offices of Joshua E. Slavin, LLC
Email: josh@attorneycarolina.com

s/ Andrew F. Lindemann



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May 7, 2021

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Via Email Only

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Email: ctappfilings@sccourts.org

RE: Carl Michael Funny v. Waffle House, Inc. and Christopher Heithaus
Appellate Case Number: 2019-002081
Civil Action Number: 2018-CP-18-1960
Claim Number: GL20170000996
Our File Number: 326.20090

Dear Ms. Kitchings:

In accordance with Section (c)(5) of the Supreme Court's Order RE: Operation of the Appellate Courts During the Coronavirus Emergency (as amended May 29, 2020), please find enclosed for filing by email only **Appellants' Return to Respondent's Motion for Costs on Appeal** in the above referenced matter. In accordance with Section (g)(3) of this same order, I am hereby serving copies on all counsel of record by email only. If you have any questions, please advise.

Sincerely,

LINDEMANN & DAVIS, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosure

cc: Joshua E. Slavin, Esquire (w/ Enclosure)

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