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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
In the Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Appellate Case No. 2020-000050

South Carolina Lottery Commission .....Respondent,

v.

George S. Glassmeyer.....Petitioner.

RESPONDENT'S RETURN IN OPPOSITION TO PETITIONER'S MOTION FOR COSTS AND FEES

Pursuant to Rule 240(e), SCACR, Respondent South Carolina Lottery Commission submits this return in opposition to Petitioner George S. Glassmeyer's motion for costs and attorney's fees. For the reasons that follow, the Court should deny the motion.

Petitioner argues he is "entitled to the taxation of costs" because he "has prevailed in this case before the Supreme Court."[1] Pet'r Mot. for Costs at 1, ¶¶ 1–2. To be sure, in some instances not applicable here, certain specified costs are recoverable. See Rule 222(a), SCACR ("When a judgment is reversed, costs shall be taxed against the respondent unless the court orders

[1] At the outset, "prevailed" is not a term used in deciding whether appellate costs are recoverable. Compare Rule 222, SCACR, and Rule 242(j), SCACR, with S.C. Code Ann. § 30-4-100(B). Our appellate rules focus on the effect of the Court's ruling. See Rule 222(a), SCACR; Rule 242(j)(1), SCACR.

otherwise."); Rule 242(j)(1), SCACR ("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."). But Petitioner overlooks that the Court effectively affirmed both the circuit court and court of appeals' decisions, in part, by holding that "the Lottery Commission had the right to bring a declaratory judgment action asking the circuit court to determine whether the exemption applied."[2] S.C. Lottery Comm'n v. Glassmeyer, Op. No. 28023 (S.C. Sup. Ct. filed Apr. 21, 2021) (Shearouse Adv. Sh. No. 13 at 25). Further, the Court vacated the circuit court's injunction. Id. at 24–25, 28.

In other words, the judgment effectively was only reversed in part. As a result, Petitioner is not entitled to the costs he seeks as a matter of right. See Rule 222(a), SCACR ("When an appeal is affirmed or reversed in part or is vacated, costs shall be allowed only as ordered by the appellate court."); Rule 242(j)(1), SCACR ("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."). For the same reason, Petitioner is not entitled to recover—as a matter of right—the two attorney's fees allowed for a party who obtains a reversal on certiorari. See Rule 222(b) & n.2, SCACR; 242(j)(2) & n.2, SCACR. Given the mixed results, whether to award costs and the $5,000 in attorney's fees rests solely in the discretion of the Court. See Rule 222(a), SCACR; Rule 242(j)(1), SCACR. Under these circumstances, however, the Court should not award Petitioner all costs and fees. Instead, the Court should either (1) order the parties to each bear their own costs and fees, or (2) at least reduce any award in light of the partial affirmance and vacation of the injunction. See id.

[2] Petitioner strenuously argued for dismissal on this ground at each level, and the Court granted certiorari on the question. See, e.g., Pet'r Br. at 1, 19–21 & 23–24; Pet'r Reply Br. at 14–15; (App'x pp. 95–101, 166–68, 341–43 & 365–68); Order Gr. Cert., S.C. Lottery Comm'n v. Glassmeyer, App. No. 2020-000050 (S.C. Sup. Ct. filed July 8, 2020).

Because Petitioner is not entitled to costs and fees as a matter of right, his request for over $50,000 as "an additional award of attorney's fees" is steep. Pet'r Mot. for Costs at 2, ¶¶ 4–5. As an initial matter, the rules only allow for "additional costs," not additional attorney's fees. Rule 222(b), SCACR; Rule 242(j)(2), SCACR. And the rules distinguish between costs and attorney's fees. See id. Further, as Petitioner seems to acknowledge, Rule 269, SCACR is inapplicable. See Pet'r Mot. for Costs at 3, ¶ (d). After all, the Lottery Commission did not "appeal" anything, and no "petition, motion[,] or return" is at issue. Rule 269, SCACR. Procedural questions aside, Petitioner has not articulated "the most extraordinary circumstances" envisioned under the rules to justify such an award. Rule 222(b), SCACR; Rule 242(j)(2), SCACR. Petitioner's contention that the Lottery Commission advanced frivolous arguments is without merit.

Importantly, Petitioner ignores that two courts sided with the Lottery Commission. That this Court ultimately disagreed with the entry of judgment on the pleadings and remanded the case for trial does not translate into a finding of frivolousness. Indeed, to accept his argument would be tantamount to calling the orders and opinions of this Court's colleagues—Chief Judge James E. Lockemy, Judge Paula H. Thomas, Judge John D. Geathers, and Judge L. Casey Manning—frivolous. Respectfully, that is a bridge too far. Reasonable minds can disagree on the issues. And once judgment was entered in favor of the Lottery Commission, it was allowed to defend the rulings of the circuit court and court of appeals.

Against this backdrop, Petitioner's arguments for purportedly sanctionable conduct cannot hold water for two reasons. First, Petitioner is taking the Court's holding on judgment on the pleadings out of context. In its opinion, the Court stated "[t]he Lottery Commission presented no evidence to support the statements" about the safety of lottery winners. Glassmeyer, Op. No. 28023, at 27. The Court explained that, "[w]ithout a trial on the issues to develop a factual record,

there is no evidence on which the circuit court could base its judgment." Id. at 26; cf. (App'x 353) (asking circuit court to reconsider finding "as facts six unfortunate incidents of crime against lottery winners" because "no trial was had, so that they could be examined in an appropriate context"). Just because the Court found no record evidence supported the assertions does not mean the Lottery Commission had no good grounds to make the safety arguments. To the contrary, the Lottery Commission reasonably believed the unobjected to article links, case law, and exhibits to the complaint—along with other facts capable of judicial notice—were sufficient to support the judgment on the pleadings. See Resp. Br. at pp. 8–9, 25; (App'x 198, 201, 205–08, 221–323). But the Court disagreed. Fair enough. The Lottery Commission respects the Court's decision and understands it wants the parties to present a fully developed record at trial on whether the FOIA exemption applies. So the Lottery Commission elected not to file a petition for rehearing on this ground and, instead, intends to move forward according to the Court's instructions. The parties have their respective marching orders. E.g., Glassmeyer, Op. No. 28023, at 27 (stating Petitioner's "reason for seeking the information . . . should be developed at trial").

Second, concessions are a routine part of appellate practice in this State. Indeed, as retired Chief Justice Toal has instructed, it is wise "to immediately concede [a] point and quickly guide the argument back to the attorney's primary arguments" when appropriate because the failure to do so can make "the attorney's position seem[] unreasonable." HON. JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 482 (3d ed. 2016). Here, the Lottery Commission's primary argument was that both courts correctly held the unreasonable-invasion-of-personal-privacy exemption to FOIA authorized it to withhold disclosure of the information sought, see S.C. Code Ann. § 30-4-40(a)(2), and a trial was not necessary for the Court to affirm. Notably, the court of appeals did not address Petitioner's argument regarding the scope and necessity of the

injunction. See S.C. Lottery Comm'n v. Glassmeyer, 428 S.C. 423, 423–40, 835 S.E.2d 524, 524–32 (Ct. App. 2019). While Petitioner may believe this was the most important aspect of the case, the Lottery Commission felt it was incidental to the ruling on the principal question at hand—whether the exemption applies. Regardless, the Lottery Commission read the room during oral arguments and understood the Court was concerned with this aspect of the decision. Digging its heals in on the injunction would have done nothing to advance the ball. Because it would not have affected the overall outcome, the Lottery Commission appropriately conceded the question from Justice Few and argued affirming the declaratory judgment would suffice if the circuit court's injunction gave the Court heartburn. Nothing is improper about that.

Finally, it is worth noting Petitioner can still seek reasonable attorney's fees under FOIA if he ultimately prevails on the merits.[3] See S.C. Code Ann. § 30-4-100(B) ("If a person or entity seeking relief under this section prevails, he may be awarded reasonable attorney's fees and other costs of litigation specific to the request. If the person or entity prevails in part, the court may in its discretion award him reasonable attorney's fees or an appropriate portion of those attorney's fees."). That remains true even if this Court denies the present motion. See TOAL ET AL., supra, at 395 ("The appellate court's denial of a Rule 222 motion has no preclusive effect on an attorney's attempt to seek statutory attorney's fees in the circuit court, including appellate fees and the post-appellate fees incurred in enforcing the judgment." (citing Austin v. Stokes-Craven Holding Corp., 406 S.C. 187, 199–200, 750 S.E.2d 78, 84–85 (2013))).

But the statute allowing for recovery of fees has not yet been triggered because Petitioner is not a prevailing party. See S.C. Code Ann. § 30-4-100(B); see also Sloan v. Friends of the

[3] The Lottery Commission reserves the right to contest the reasonableness of the fees sought. For instance, Petitioner's motion to argue against precedent in the court of appeals was not reasonable. Likewise, Petitioner cannot recover fees for the time spent researching, briefing, and arguing whether the Lottery Commission could bring a declaratory judgment action. He lost on that issue.

Hunley, Inc., 393 S.C. 152, 156, 711 S.E.2d 895, 897 (2011) (defining "a prevailing party" as "'one who successfully prosecutes an action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention [and] is one in whose favor the decision or verdict is rendered and judgment entered'"). Judgment was not entered in favor of Petitioner. Rather, the Court expressly declined to reach the merits. Glassmeyer, Op. No. 28023, at 27 ("revers[ing] the declaratory judgment—without addressing the merits—and remand[ing] the action to the circuit court for trial"). Thus, at this juncture, his request is premature.

In sum, the Court should deny Petitioner's motion for costs and fees. As Petitioner notes, this was "a highly contested case." Pet'r Att'y Aff. at ¶ 4(a). It will be on remand too. But the Lottery Commission respectfully rejects Petitioner's attempt to ascribe nefarious motives. The Lottery Commission has acted and continues to act in good faith, and its arguments were not frivolous. Sanctions are therefore not warranted. Consequently, the Court should either deny the motion, in full, or only award partial costs expressly allowable under Rules 222(b) and 242(j)(2). In any case, Petitioner is not entitled to "additional attorneys' fees" of $50,162.50.

(Signature page to follow)

Respectfully submitted,

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