

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

John D. McLeod, Administrative Law Judge

Case No. 10-ALJ-07-0851-CC

Thomas Dewey Wise,

Appellant,

v.

South Carolina Department of Health
and Environmental Control and
South Fenwick, LLC,

Respondents.

RETURN TO MOTION TO ASSESS COSTS

Respondent South Carolina Department of Health and Environmental Control (DHEC), pursuant to Rule 222(d) respectfully files this Return to Appellant's Motion for Award of Fees and Costs. Respondent seeks \$1,522.99 in attorney's fees and costs to be taxed against the Respondent. DHEC respectfully requests that the Court order that fees and costs not be taxed against DHEC.

Rule 222, the rule cited by Respondent, is the applicable rule for costs:

unless otherwise ordered by the appellate court or agreed by the parties' costs shall be taxed against the appellant when the appeal is dismissed or judgment on appeal is affirmed. When a judgment is reversed, costs shall be taxed against the respondent unless the court orders otherwise. When an appeal is affirmed or reversed in part or is vacated, costs shall be allowed only as ordered by the appellate court.

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(emphasis added). The emphasized language specifically authorizes the Court to order that costs not be taxed against an Appellant. Whether to tax costs appears to be solely in the Court's discretion. DHEC respectfully submits that it would be proper for the court to order that fees not be taxed against DHEC in this appeal.

Though there are no factors specified in the Rule for guiding the Court's decision on whether to order that attorneys fees not be taxed as costs against the Appellant, DHEC looks to the standards in the fee shifting statute, S.C. Code Ann. § 15-77-300 (Supp. 2010), for guidance. In that statute, fees can only be shifted if, among other things, the court finds that the agency acted without substantial justification in pressing its claim against the party¹ and the court finds that there are no special circumstances which that would make the award of attorneys fees unjust. *Id.* DHEC submits that the following two factors support issuance of an order denying costs: (1) DHEC's budget and (2) DHEC's assertion the Administrative Law Court lacked jurisdiction was grounded in undisputed facts.

The Court can take judicial notice of the budget and its impact on DHEC. Though the fees authorized under Rule 222 are limited set at \$1,000 by order of June 24, 1997, DHEC submits that the \$1000 requested by Respondent is best spent implementing the many statutes and programs the DHEC implements at the behest of the General Assembly.

Regarding DHEC's justification in pressing its claim, it is undisputed that Island Preservation, LP did not request a contested case hearing before the ALC within 30 days of receipt of the Board's decision not to conduct a review conference. Furthermore, it is undisputed that although Appellant (Mr. Wise) did request a contested case hearing before the ALC on November 11, 2010, he never requested a final review conference before the Board.


¹ The statute specifies that an agency "is presumed to be substantially justified in pressing its claim against the party if the agency follows a statutory or constitutional mandate that has not been invalidated by a court of competent jurisdiction."

Accordingly, since the Administrative Law Judge found that neither Appellant Wise nor Island Preservation, LLC had properly invoked the jurisdiction of that Court, DHEC contends that substantial justification existed for pressing its claim.

CONCLUSION

Given the budget constraints imposed on DHEC by the General Assembly as well as the basis for DHEC's Motion to Dismiss before the Administrative Law Court, DHEC respectfully requests that the Court order that fees not be taxed against DHEC. In the alternative, DHEC respectfully requests that the Court reduce the requested fees as the Court deems just and proper.

Respectfully submitted,



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Attorneys for Respondent SCDHEC

May 15, 2013
Charleston, South Carolina

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date he has served on behalf of the Department of Health and Environmental Control, ***Return to Motion for Costs*** in this matter upon all parties of record by placing copies of same in the **United States Mail**, first class postage prepaid, addressed to:

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May 15, 2013
Charleston, South Carolina



Catherine B. Templeton, Director

Promoting and protecting the health of the public and the environment

May 15, 2013

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211


Re: Thomas Wise v. SCDHEC and South Fenwick
Case Tracking No. 201188446

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of DHEC's Return to Motion to Assess Costs. I would appreciate your returning a clocked copy in the enclosed envelope.

If you have any questions or need any additional information, please give me a call.

Very truly yours,



Bradley D. Churdar
Chief Counsel

BDC/mdc

Enclosure

cc: David K. Haller, Esquire
Richard L. Tapp, Jr., Esquire
Stephen P. Groves, Sr., Esquire

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SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
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