

THE STATE OF SOUTH CAROLINA

In the Supreme Court

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APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

George C. James, Jr., Circuit Court Judge

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Opinion No. 27434 (S.C. Sup. Ct. Filed August 20, 2014)

Appellate Case No. 2012-208490

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SEP 30 2014

Stevens & Wilkinson of South Carolina, Inc., Gary Realty Company, Inc., Garfield Traub Development, LLC, and Turner Construction Company, Plaintiffs, Of Whom Stevens & Wilkinson of South Carolina, Inc., Gary Realty Company, Inc., and Garfield Traub Development, LLC, are Respondents,

S.C. Supreme Court

v.

City of Columbia, Paul C. "Bo" Aughtry III, Windsor/Aughtry Co., Inc., Vista Hotel Partners, LLC, and Hilton Hotels Corporation, Defendants, Of Whom the City of Columbia, is Petitioner.

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**RESPONDENT STEVENS & WILKINSON OF SOUTH CAROLINA, INC.'S  
RETURN TO MOTION FOR COSTS**

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Respondent Stevens and Wilkinson of South Carolina, Inc. ("Stevens & Wilkinson"), file this return in opposition to Petitioner City of Columbia's Motion for Costs. For the reasons set forth below, herein Stevens & Wilkinson submit the motion should be denied or, in the alternative, the amount sought by Petitioner should be substantially reduced.

Petitioner's motion is made pursuant to Rules 222 and 242(j) of the South Carolina Appellate Court Rules. Rule 242(j)(2), provides:

**Costs Allowed.** The party entitled to recover costs may recover all those costs specified in Rule 222(b), to include the attorney's fee provided by that rule. Additionally, the party may, to the extent the party actually incurred these costs, recover: (1) the filing fee paid under Rule 242(c); (2) the cost of printing the Appendix under Rule 242(e) and (i); and (3) the cost of printing the party's brief(s) under Rule 242(i). The party may also recover an additional attorney's fee in an amount which shall be set by order of the Supreme Court. [A maximum of \$1,000.00 attorneys' fees is set forth in a footnote to the Rule.] The allowance of additional costs will generally not be allowed except in the most extraordinary circumstances.

Rule 222(b), SCACR, contains largely the same language of Rule 242(j)(2), and provides:

**(b) Costs Allowed.** The party entitled to recover costs under this rule may, to the extent the party actually incurred these costs, recover the following: (1) the filing fee paid under Rule 203(d); (2) the cost of the court reporter's transcript; (3) premiums paid for costs of supersedeas bonds or other bonds obtained to preserve rights pending appeal; (4) the cost of printing the Record on Appeal under Rule 209; and (5) the cost of printing the party's final brief(s) under Rule 210. In addition, the party shall be entitled to recover an attorney's fee in an amount which shall be set by order of the Supreme Court [\$1,000.00 maximum]. The allowance of additional costs will generally not be allowed except in the most extraordinary of circumstances.

In one of the few cases construing the proper measure of costs allowed under Rule 222, the court of appeals observed that “[a]lthough Rule 222(d) provides that a party seeking costs must file a motion with the appellate court within fifteen days of the issuance of the remittitur, **recovery under the rule is clearly limited to costs incurred in pursuing the appeal**, such as the filing fee, the cost of obtaining the transcript, the cost of printing the Record on Appeal and final briefs, and limited attorney fees.” Martin v. Palisades Cove Marinas, Inc., 348 S.C. 379, 384, 559 S.E.2d 348, 351 (2001) (emphasis added).

In its Motion for costs and fees, the Petitioner is seeking much more than the costs incurred in pursuing the appeal. Petitioner is seeking virtually all the costs of litigation, a total reimbursement of \$24,050.70. For example, in its itemized statement of costs, Petitioner asks for reimbursement of \$15,701.31 costs incurred for deposition transcripts comprising some 3,275

pages. (See pages 5 and 6 of Petitioner's Motion for Costs). The entire Appendix filed with the Supreme Court in the case consists of approximately 1,916 pages, only 41 pages of which were deposition transcripts (See Appendix, pages 343-383). Clearly, the Petitioner seeks to be reimbursed for all costs incurred in the litigation, but this is far beyond the scope of Rules 222 and 242(j). See Martin, supra.

In addition to seeking costs of deposition transcripts not properly recoverable under the appellate court rules, Petitioner's Motion fails to make any attempt to distinguish or define what portion of costs and fees it seeks to recover against the individual Respondents. There are three separate Respondents to the Petition: Stevens & Wilkinson, Gary Realty Company, Inc. and Garfield Traub Development, LLC. Two separate Records on Appeal were filed with the court of appeals before that court initially decided the appeal and reversed the trial court's grant of summary judgment. The Record on Appeal filed by Stevens & Wilkinson consisted of approximately 640 pages. According to the index to the Appendix, filed by Petitioner, the portion of the Appendix that is relevant to Stevens & Wilkinson's appeal comprises 736 pages at most. See Index to Appendix, page i. While Petitioner had the ability to separate the various Respondent's Records of Appeal (it did so in the Appendix), Petitioner made no attempt to allocate the amount requested in its Motion for Costs among the Respondents. Apparently Petitioner is relying on the Court to make this allocation.

Respondent Stevens & Wilkinson submits that it is patently unfair to require one party to reimburse Petitioner for all the costs of litigation and that as the movant for costs, Petitioner should be required to at least specify the amount it seeks to recover from each Respondent, or to at least provide the Court with some guidance on how the total amount requested should be equitably apportioned among the Respondents. Because it failed to do so in its Motion, Respondent Stevens

& Wilkinson respectfully requests that the Motion be denied in full and no costs or fees be imposed against Respondent Stevens & Wilkinson.

In the alternative, and assuming the Court disagrees that the motion should be denied in full, Respondent Stevens & Wilkinson submits that no costs should be taxed for the costs of deposition transcripts. These costs were incurred in the underlying litigation and not in pursuing the appeal. It follows that these costs are not recoverable under Rule 222 or 242(j), SCACR. Further, the costs of pursuing the appeal, e.g., copying briefs, appendices, and records on appeal, to the extent these costs are recoverable, should equitably be apportioned between the three Respondents. Petitioner asks for \$5,246.08 for Costs of Printing and copying the 1916-page Appendix. See page 6, Motion for Costs. This amount equals slightly less than \$2.74 per page of the Appendix. As set forth above, only 736 pages of the Appendix relate to Respondent Stevens & Wilkinson's appeal. If the total amount requested is apportioned between the three Respondents, Stevens & Wilkinson's pro-rata share of the total amount requested would be \$2,015.20. Further, Petitioner seeks the maximum attorneys' fees allowed by the rules, or \$2,000.00. If this amount is pro-rated, as it should be, Stevens & Wilkinson's share would be \$666.67.

Petitioner also requests reimbursement of \$141.45 for the "Cost of printing and copying Final Brief in appeal by Garfield Traub and Gary Realty". See page 4, Motion for Costs. Respondent Stevens & Wilkinson should not be required to reimburse Petitioner for any costs associated with the appeals filed by Garfield Traub and Gary Realty. Garfield Traub and Gary Realty are independent parties and assuming the costs of those parties' appeals are taxed against any Respondent, those costs should be borne by the appealing parties and not by the Respondents collectively.

Finally, this appeal is a companion case to Stevens & Wilkinson of South Carolina, Inc., v. City of Columbia, Opinion No. 27433 (S.C. Sup. Ct. Filed August 20, 2014) (Appellate Case No. 2012-208527). That appellate argument was heard on the same day as the argument in this case, and the opinion filed on the same day as this case. In Opinion No. 27433, the Court ruled in favor of Respondent Stevens & Wilkinson, awarded Stevens & Wilkinson \$650,000.000 in damages, and remanded the case to the circuit court to determine whether Stevens & Wilkinson is entitled to additional damages based on the Petitioner's conduct.

Many of the costs and fees Petitioner now seeks to recover were pertinent to the issues involved in the companion case – there was significant factual overlap between the two related cases, and the record's on appeal contain many of the same documents and materials. Respondent Stevens & Wilkinson submit that as the prevailing party in Opinion No. 27433, it should not be required to pay any appellate fees or costs in the companion case. It would be inequitable to require Respondent Stevens & Wilkinson to reimburse the Petitioner for costs in this appeal where Stevens & Wilkinson obtained substantial relief in the companion case and where the two cases arise out of the same set of facts and circumstances, and the appellate records are similar.

### **CONCLUSION**

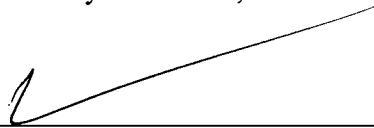
The language of Rules 222 and 242(j), SCACR, as interpreted by the court of appeals in Martin, supra, do not permit a party to recover the costs of litigation in a motion for fees filed in the appellate courts. Rather, under these rules recovery “is clearly limited to costs incurred in pursuing the appeal.” Id. Respondent Stevens & Wilkinson submits that because Petitioner has made no attempt to separately identify the costs it incurred pursuing the appeals filed by the separate parties, the Motion for Costs should be denied outright. Neither this Court nor the Respondents should be required to parse the Appendix to determine each Respondent's pro-rata

share – particularly where Petitioner has made no real attempt to do so. As an additional reason to deny the Motion for costs outright, Respondent Stevens & Wilkinson was the prevailing party in the companion case, Stevens & Wilkinson of South Carolina, Inc., v. City of Columbia, Opinion No. 27433 (S.C. Sup. Ct. Filed August 20, 2014) (Appellate Case No. 2012-208527), and obtained the relief it sought in that case. Respondent Stevens & Wilkinson should not be required to pay Petitioner's costs in this appeal where Respondent prevailed in the companion case and both cases are based on the same facts.

Assuming the Court disagrees that the motion should be denied outright, Respondent Stevens & Wilkinson submits Petitioner should not be awarded any costs incurred in acquiring transcripts of depositions taken in the underlying litigation. The bulk of the costs Petitioner seeks are for deposition transcripts, not for costs incurred pursuing this appeal. Of the total requested, \$24,050.70, \$15,701.31 (the costs of acquiring deposition transcripts) should be deducted or disallowed. In addition, Respondent Stevens & Wilkinson should not be required to pay for the costs of printing matters in the Appendix that relate solely to the appeals filed by Garfield Traub and Gary Realty. This amount, calculated at the per-page rate of \$2.74, should be reduced from \$5,246.08, the amount requested for the entire Appendix, to a maximum of \$2,015.20, the amount incurred in compiling that portion of the Appendix related to Respondent Stevens & Wilkinson's appeal, a reduction of \$3,230.88. Further, Respondent Stevens & Wilkinson should not be required to pay any of the costs associated with copying briefs filed by the other Respondents, totaling \$141.45. Finally, Respondent Stevens & Wilkinson should only have to pay a maximum of \$666.67 attorneys' fees, 1/3 of the maximum amount permitted under the rules. Based on all of the above, Respondent Stevens & Wilkinson submits that the maximum it should be required to pay under Rules 222 and 242(j) is \$3,643.73, not the exorbitant sum requested by the Petitioner.

Respondent Stevens & Wilkinson has attached to this return a spreadsheet reflecting how it arrived at this total and incorporates that spreadsheet herein.

Respectfully submitted,



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ATTORNEYS FOR RESPONDENT STEVENS  
& WILKINSON

Columbia, South Carolina  
September 30, 2014

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S.C. Supreme Court Tracking No.: 2012-208490

Stevens and Wilkinson of South Carolina, Inc., Gary  
Realty Company, Inc., Garfield Traub Development, LLC,  
and Turner Construction Company, ..... Plaintiffs,

Of Whom  
Stevens & Wilkinson of South Carolina, Inc.,  
Gary Realty Company, Inc., and Garfield Traub  
Development, LLC are ..... Respondents,

vs.

City of Columbia, Paul C. "Bo" Aughtry III,  
Windsor/Aughtry Co., Inc., Vista Hotel Partners  
LLC, Hilton Hotels Corporation ..... Defendants,

Of Whom  
City of Columbia, South Carolina is ..... Petitioner.

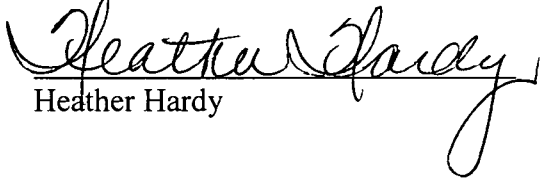
CERTIFICATE OF SERVICE

I, Heather Hardy, Paralegal to Richard A. Harpootlian, PA, who represent Stevens & Wilkinson of South Carolina, Inc., hereby certify that on September 30, 2014, I did serve, via HAND DELIVERY , the following documents to the below mentioned person(s):

**Documents:**                      **Respondent Stevens & Wilkinson of South Carolina, Inc.'s  
Return for Motion for Costs.**

**Served:**                              Michael Tighe, Esquire  
D. Reece Williams, Esquire  
Kathleen M. McDaniel, Esquire  
Richard C. Detwiler, Esquire  
Callison Tighe & Robinson, LLC

Palmetto Armory Office Building  
1812 Lincoln Street, Suite 200  
Columbia, South Carolina 29201

  
Heather Hardy

**Total amount requested:** \$24,050.70

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Minus the amount incurred in acquiring deposition transcripts (not recoverable under Rules or Martin case):	(\$15,701.31)
Minus the costs of copying/ printing Appendix not related to Stevens & Wilkinson appeal:	(\$3,230.88)
Minus the cost of copying Garfield Traub/Gary Realty briefs not related to Stevens & Wilkinson appeal:	(\$141.45)
Minus the portion of requested Attorneys' fees attributed to Garfield Traub/Gary Realty appeals:	(\$1,333.33)

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**Total of sum requested equitably apportioned to Respondent Stevens & Wilkinson:** \$3,643.73