

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

George C. James, Jr., Circuit Court Judge

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S.C. Supreme Court

Opinion No. 27434 (S.C. Sup. Ct. filed August 20, 2014)  
S.C. 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,  
and Hilton Hotels Corporation..... Defendants,

Of Whom

City of Columbia is..... Petitioner.

**RESPONDENTS GARY REALTY COMPANY, INC., AND GARFIELD  
TRAUB DEVELOPMENT, LLC'S, RETURN TO PETITIONER  
CITY OF COLUMBIA'S MOTION FOR COSTS**

Respondents Gary Realty Company, Inc., and Garfield Traub Development, LLC, file this return in opposition to Petitioner City of Columbia's Motion for Costs. For the reasons set forth below, Respondents submit the Motion should be denied or, in the alternative, the amount sought by Petitioner should be substantially reduced.

## OPPOSITION TO COSTS

Beginning, “[u]nless otherwise ordered by the Supreme Court or agreed by the parties, costs shall be assessed....” Rule 242(j), SCACR, makes clear that the Supreme Court is not required to award costs. The “[u]nless otherwise ordered” language provides that Supreme Court may choose not to allocate costs to a party. The case *sub judice* has been highly contentious. Respondents unanimously won their appeal before a three-judge panel at the Court of Appeals. Respondents had one dissenting vote before the Supreme Court. Given this history and the merits of their case, it can be found that the Respondents had a good faith basis for their position/appeal. Accordingly, Respondents respectfully request that the Motion for costs be denied.

Further, Petitioner’s Motion fails to designate what percentage of costs should be apportioned to which individual Respondent and does not in any way distinguish what specific costs it seeks to recover against which party. While Gary Realty and Garfield Traub Development filed their initial complaint and appellate briefs together, Stevens & Wilkinson sat in a different position and did not always join with the filings of Gary Realty and Garfield Traub Development. Stevens & Wilkinson filed a separate complaint and had slightly differing causes of action from Gary Realty and Garfield Traub Development. Ultimately, the Record on Appeal regarding Gary Realty and Garfield Traub was separate and distinct from that regarding Stevens & Wilkinson (See Index to Appendix). The Appendix before the Supreme Court consisted of some 1,916 pages; however, all of these pages did not relate to Respondents’ case, and hundreds of these pages dealt solely with Stevens & Wilkinson’s appeal. Petitioner’s Motion needed to state how the claimed costs should be specifically apportioned.

Some of the costs claimed in Petitioner’s motion have absolutely nothing to do with Gary Realty and Garfield Traub Development. By way of example, Petitioner is seeking \$139.74 for

“Costs of printing and copying amended final Brief in appeal by Stevens & Wilkinson.” (Petitioner’s Motion, p. 4). Costs such as this should be borne by the specific party and not by the Respondents collectively. Seemingly, Petitioner is either looking for a double/triple recovery from the Respondents or it is looking for the Court to undertake the task of apportioning costs.

Although Petitioner had the ability to separate the Respondents’ Records of Appeal, it made no attempt to allocate the amount requested in its Motion for Costs. Respondents submit that it is patently unfair to require one party to reimburse Petitioner for all the costs of litigation and, as the movant for costs, Petitioner should be required to at least specify the amount it seeks to recover from each individual Respondent, or, at a minimum, to provide the Court with some guidance on how the total amount requested should be equitably apportioned among the Respondents. Because Petitioner failed to do so in its Motion for Costs, Respondents respectfully request that the Motion be denied, with no costs or fees be imposed.

**REQUEST FOR A REDUCTION IN COSTS**

Alternatively, Respondents Gary Realty Company, Inc., and Garfield Traub Development, LLC, seek a reduction of the amount of costs to be awarded.

Petitioner City of Columbia is seeking its costs from both the appeal heard before the Supreme Court and appeal heard before the Court of Appeals. However, Respondents Gary Realty and Garfield Traub Development prevailed before the Court of Appeals, as the three judge panel reversed the circuit court’s order. Rules 222(a) and 242(j), are not intended to be piggy-backed in such a way. As Gary Realty and Garfield Traub Development were victorious before the Court of Appeals, Petitioner City of Columbia should not recover costs associated with that appeal – Gary Realty and Garfield Traub Development should not have to pay costs

related to the Court of Appeals action in which they were victorious. Thus, the following costs should be stricken from Petitioner's request:

- (1) Attorney's Fees Provided by Rule 222(b), SCACR = \$1,000.00
- (2) Costs of printing and copying amended final Brief in appeal by Garfield Traub and Gary Realty = \$141.45

Further, even if this Court does find that Rules 222(a) and 242(j) can be combined when the responding party before the Supreme Court initially won before the Court of Appeals, Petitioner is seeking costs for deposition transcripts that go far beyond what Rule 222 allows.

Rule 222(b), SCACR, provides that the costs a party may seek include: "(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." Notably, the second listing, "the cost of the court reporter's transcript," is singular – implying that the rule envisioned solely the cost of the one transcript from the trial, summary judgment hearing, or other proceeding that was the subject of the appeal, and as described in Rule 207, SCACR. The cost of the court reporter's transcript from the proceeding at issue is only transcript cost that is intended to be recoverable.

"[R]ecovery 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*). Petitioner, however, has requested the cost of twenty-two deposition transcripts that were utilized in the ordinary course of litigating the case before the trial court. Further, the majority of these deposition transcripts were never

even used in the appeal in any way (compare Index to Record on Appeal with the costs sought by Petitioner).

Petitioner seeks \$15,701.31 in costs for an astounding 3,275 pages of deposition transcripts. (See pages 5 and 6 of Petitioner's Motion for Costs). However, in contrast, the entirety of the Record on Appeal consisted of only 1,916 pages. Of those pages and of the parts related to Respondents' Appeal, only 80 pages were from deposition transcripts (See Appendix, pp. 738-741, Index to Record on Appeal in regard to Gary Realty Company, Inc., and Garfield Traub Development, LLC). Petitioner is improperly seeking to be reimbursed for costs incurred in the underlying litigation, not the appeal, which is far beyond the scope of the cost recovery envisioned in either Rule 222 or 242(j), SCACR.

As the Rules of Appellate Practice are designed to award costs related to the appeal, not litigating the case, the following deposition transcript costs should be stricken from Petitioner's request:

- (1) Court reporter's transcript of Steven Gantt = \$458.20
- (2) Court reporter's transcript of Bob Wislinksi = \$127.40
- (3) Court reporter's transcript of Bo Aughtry = \$428.10
- (4) Court reporter's transcript of Brian Fry = \$570.55
- (5) Court reporter's transcript of Greg Dickhens = \$870.00
- (6) Court reporter's transcript of Damon Jeter = \$339.00
- (7) Court reporter's transcript of John Lumpkin = \$1,438.60
- (8) Court reporter's transcript of Bobby Lyles = \$780.50
- (9) Court reporter's transcript of Greg Garfield = \$1,763.50
- (10) Court reporter's transcript of Paul Little = \$567.70
- (11) Court reporter's transcript of Mark Alles = \$485.22
- (12) Court reporter's transcript of Charles Gary = \$440.50
- (13) Court reporter's transcript of Raymond Garfield = \$1,498.25
- (14) Court reporter's transcript of Tameika Isaac Devine = \$569.25

- (15) Court reporter's transcript of Mark Woodworth = \$1,275.59
- (16) Court reporter's transcript of Tony Traub = \$1,228.55
- (17) Court reporter's transcript of City of Columbia = \$427.65
- (18) Court reporter's transcript of Charles Pinkowski = \$522.25
- (19) Court reporter's transcript of Jeff Sachs = \$396.90
- (20) Court reporter's transcript of Charles Phillips = \$276.50
- (21) Court reporter's transcript of Dean Morr = \$910.85
- (22) Court reporter's transcript of Donna Jumper = \$326.25

Provided the Court does not find that Petitioner's the motion should be denied in whole, Respondents submit that the appropriate costs should be divided/apportioned between (1) Stevens & Wilkinson and (2) Gary Realty and Garfield Traub Development. Respondents' share of those costs would be as follows:

Cost of court reporter's transcript from the hearings on the City's motion for summary judgment (\$345.20 ÷ 2 = \$172.60)	\$172.60
Attorney's Fee Provided by Rule 242(j)(2) (\$1,000 ÷ 2 = \$500)	\$500.00
Cost of printing and copying Final Brief (\$276.48 ÷ 2 = \$138.24)	\$138.24
Cost of printing and copying Final Reply Brief (\$100.44 ÷ 2 = \$50.22)	\$50.22
Cost of printing and copying Appendix (\$5,246.08 ÷ 2 = \$2,623.04)	\$2,623.04
Filing fee paid under Rule 242(c), SCACR (\$100.00 ÷ 2 = \$50.00)	\$50.00
<b>TOTAL</b>	<b>\$3,534.10</b>

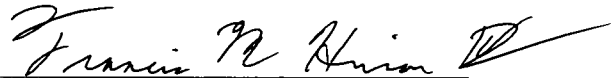
### CONCLUSION

Because Petitioner has made no attempt to separately identify the costs it incurred pursuing the various appeals filed by the various and distinct parties, Respondents submit that Petitioner's Motion for Costs should be denied outright. Neither this Court nor the Respondents

should be required to parse through the requested costs and the various Records on Appeal in order to determine each Respondents' share of the costs sought by Petitioner.

Assuming the Court disagrees that the motion should be denied outright, Respondents submit that Rules 222 and 242(j), SCACR, as interpreted in Martin, *supra*, do not permit a party to recover the costs of litigation in a motion for fees filed in the appellate courts. Recovery "is clearly limited to costs incurred in pursuing the appeal." Id. Petitioner should not be awarded any costs related to deposition transcripts that were taken in the underlying litigation.

Respectfully submitted,



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*Attorneys for Respondents Gary Realty  
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October 2, 2014  
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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vs.

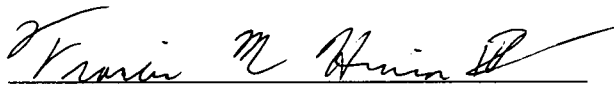
City of Columbia, Paul C. "Bo" Aughtry III,  
Windsor/Aughtry Co., Inc., Vista Hotel Partners LLC,  
and Hilton Hotels Corporation ..... Defendants,

Of Whom

City of Columbia is..... Petitioner.

**CERTIFICATE OF SERVICE**

I certify that I have served the **RESPONDENTS GARY REALTY COMPANY, INC., AND GARFIELD TRAUB DEVELOPMENT, LLC'S RETURN TO PETITIONER CITY OF COLUMBIA'S MOTION FOR COSTS** on the Petitioner herein, by causing a copy of the same to be mailed via U.S. Mail, first-class postage prepaid, to its attorneys of record, Michael W. Tighe, D. Reece Williams, III, Richard C. Detwiler and Kathleen M. McDaniel, Callison, Tighe & Robinson, LLC, Post Office Box 1390, Columbia, South Carolina 29202-1390 on the 2nd day of October 2014.



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ATTORNEYS AT LAW

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S.C. Supreme Court

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The Honorable Daniel E. Shearouse  
Clerk of Court  
Supreme Court of South Carolina  
P.O. Box 11330  
Columbia, S.C. 29211

Re: Steven & Wilkinson of South, Inc., Gary Realty Company, Inc. and Garfield  
Traub Development, LLC v. City of Columbia, S.C.  
Supreme Court Case Tracking No. 2012-208190

Dear Mr. Shearouse:

Enclosed for filing please find the original and six (6) copies of the Respondents Gary Realty Company, Inc. and Garfield Traub Development, LLC's Return to Petitioner City of Columbia's Motion for Costs, in connection with the above referenced matter.

By copy of this letter, the enclosed is being served upon all counsel of the Petitioner.

Yours truly,

Hal Ray  
Paralegal

HRR/ms  
Enclosures

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