

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

James O. Spence, Master-in-Equity

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Appellate Case No. 2014-002710  
Common Pleas Case No. 2012-CP-32-2816

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FV-I, Inc. in trust for Morgan Stanley Mortgage Capital Holdings LLC,.....Appellant,

v.

Bryon J. Dolan; Lisa S. Dolan; First Citizens Bank and Trust Company, Inc.; Wells  
Fargo Bank, N.A.; Branch Banking and Trust Company, Defendants,

Of whom Bryon J. Dolan and Lisa S. Dolan are the.....Respondents.

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RESPONDENTS' REPLY TO APPELLANT'S RETURN TO RESPONDENT'S  
MOTION FOR COSTS ON APPEAL AND ATTORNEY'S FEES

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Respondents hereby submit the following reply to the Appellant's return to  
Respondents' motion for costs and attorney's fees:

1. While the Appellant spends much time discussing issues relating to sanctions for frivolous litigation conduct, frivolity is not the basis on which Respondents seek attorney's fees from the Appellant. The Appellant's discussion of Rule 11, SCRCP, and the Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-16-10, does not address the issue subject of this motion.

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APR 14 2015

**SC Court of Appeals**

2. Rule 269, SCACR, provides that “[w]here an appeal, petition, motion or return is frivolous or taken solely for the purposes of delay, *or is not in compliance with these Rules*, the appellate court may upon its own motion or that of a party, after ten (10) days notice, impose upon offending attorneys or parties such sanctions as the circumstances of the case and discouragement of like conduct in the future may require.” (Emphasis added.)
3. Respondents seek the imposition of the sanction of the Appellant having to compensate Respondents’ counsel for his time in this appeal because the appeal was not brought in compliance with the South Carolina Appellate Court Rules. Despite the fact that Rules 240 and 241(d)(7), SCACR, provide that the process of seeking review of an order that lifts, imposes, or modifies a stay, or declines to do so, is the motion process under Rule 240, SCACR, the Appellant superfluously brought this appeal *in addition to* pursuing that motion process. This use of duplicative processes in an attempt to achieve one result required Respondents’ counsel to spend time on this appeal that he never should have had to spend, all because of the Appellant’s failure to comply with the Appellate Court Rules.
4. Also, in its return the Appellant engages in the logical fallacy of an *ad hominem* attack. “*Ad hominem* arguments, of course, constitute one of the most common errors in logic: Trying to win an argument by calling your opponent names (‘Jane you ignorant etcetera . . .’) only shows the paucity of your own reasoning.” Huntington Beach City Council v. Superior Ct., 115 Cal. Rptr. 2d 439, 448, 94 Cal.

App. 4th 1417, 1430 (Cal. App. 2002). The paragraph beginning on page 3 and running onto page 4 of the Appellant's return has nothing to do with the issues that were subject of this appeal and nothing to do with the instant motion.

5. The Appellant presents nothing tending to contradict Respondents' counsel's affidavit noting that he spent 14 hours working on this appeal, time that he never would have had to spend at all if Appellant had not brought this appeal that plainly does not comply with the Appellate Court Rules. Respondent's counsel spent that time and has sworn to the truth of that. The Appellant does not say that Respondent's counsel did not spend this time but relies, instead, on unsubstantiated suggestion.
6. The attorney's fee reasonableness factors are amply supported by the material served with the Respondents' motion.
7. Further, "[w]hen determining the reasonableness of attorney's fees under a statute" – or rule of court – "mandating the award of attorney's fees, the contract between the client and his counsel does not control the determination of a reasonable hourly rate" or other measure of an attorney's fee award. Jackson v. Speed, 326 S.C. 289, 308, 486 S.E.2d 750 (1997). There are plenty of times when an attorney's fee award cannot exceed the amount of fees incurred, but this is not one of them. The language of Rule 269, SCACR, shows that the touchstones of the court's analysis of what sanctions to impose for noncompliance with the Rules are "the circumstances

of the case and [what] discouragement of like conduct in the future may require.”

8. The amount of \$4,200.00 (or such other amount as the court deems appropriate) would discourage such duplicative conduct as the Appellant’s in the future. That would be appropriate in this case.
9. The amount sought is modest given the nature of appellate work and is appropriate in light of the work occasioned by this improper appeal.

WHEREFORE Respondents pray for an order taxing costs and attorney’s fees in the amount of \$4,295.20; in the alternative, for an order taxing costs in the amount of \$1,095.20 (which the Appellant concedes is proper); or, in the further alternative, for the taxation of costs and/or attorney’s fees in the amount deemed appropriate by the court, against the Appellant in this appeal.

Respectfully submitted,



Andrew S. Radeker  
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Attorney for Respondents

April 14, 2015

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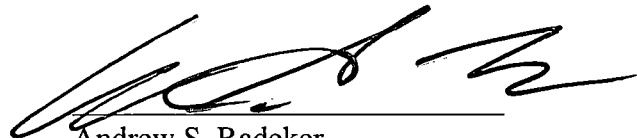
PROOF OF SERVICE

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I certify that I served the foregoing reply to return to motion for costs on  
appeal and attorney's fees by depositing a copy of it on the date shown below in the  
United States Mail, postage prepaid, addressed as follows:

Charles S. Gwynne, Jr., Esq.  
Rogers Townsend & Thomas, PC  
P.O. Box 100200  
Columbia, SC 29202

April 14, 2015



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April 14, 2015

**VIA HAND DELIVERY**

The Hon. Jenny Abbott Kitchings  
Clerk of Court, Court of Appeals of South Carolina  
1220 Senate Street  
Columbia, South Carolina 29201

**Re: FV-I, Inc., etc. v. Bryon J. Dolan, et al.**  
**Common Pleas Case No.: 2012-CP-32-2816**  
**Appellate Case No.: 2014-002710**

Dear Ms. Kitchings:

Enclosed herewith for filing in the above-referenced case are an original and seven copies of reply to the return to the Respondents' motion for costs on appeal and attorney's fees, with attached proof of service thereof.

Kindly file these documents and return a file-stamped copy to the bearer of this letter. Of course, if you or your staff have any questions or concerns, please do not hesitate to contact me.

With kind regards, I am,

Very truly yours,  
**HARRISON & RADEKER, P.A.**



Andrew S. Radeker

ASR/

Enclosures

cc: Charles S. Gwynne, Jr., Esq.

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