

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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APPEAL FROM RICHLAND COUNTY  
COURT OF COMMON PLEAS

The Honorable G. Thomas Cooper  
The Honorable J. Ernest Kinard

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Case No. 2011-CP-40-6705

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DEC - 2 2015

S.C. Supreme Court

JOSEPH S. AZAR, FRANK J. CUMBERLAND, JR.  
AND MICHAEL A. LETTS, INDIVIDUALLY  
AND AS CLASS REPRESENTATIVES, ..... APPELLANTS,

v.

CITY OF COLUMBIA, ..... RESPONDENT.

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**RESPONDENT CITY OF COLUMBIA'S RETURN TO  
APPELLANTS' MOTION FOR COSTS**

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Pursuant to Rule 222(a), SCACR, Appellants moved to recover costs on appeal. Under Rule 222(a), SCACR, “[w]hen a judgment is reversed, costs shall be taxed against the respondent unless the court orders otherwise.” (emphasis added). “When an appeal is affirmed or reversed in part or is vacated, costs shall be allowed only as ordered by the appellate court.” *Id.* (emphasis added). “It is within this Court's discretion whether to award fees and costs under Rule 222.” *Austin v. Stokes-Craven Holding Corp.*, 406 S.C. 187, 199, 750 S.E.2d 78, 84 (2013). Respondent respectfully asks this Court to deny Appellants’ motion.

An award of costs of an appeal to the Supreme Court is intended to reward the prevailing party in the appeal. *Sub-Zero Freezer Co. v. R.J. Clarkson Co.*, 308 S.C. 188, 192, 417 S.E.2d

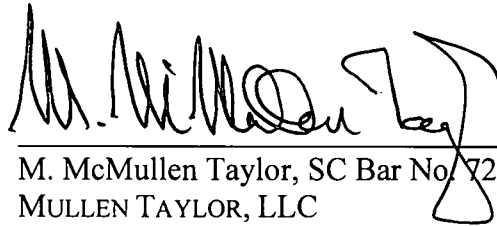
569, 571-572 (1992); *Cunningham v. Cauthen*, 47 S.C. 150, 163, 25 S.E. 87, 91 (1896). The definition of a prevailing party “clearly envisions a victory to some degree on the merits.” *EFCO Corp. v. Renaissance on Charleston Harbor, LLC*, 370 S.C. 612, 618, 635 S.E.2d 922, 925 (Ct. App. 2006). This Court has defined a prevailing party as “one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention and is the one in whose favor the decision or verdict is rendered and judgment entered.” *Id. citing to Heath v. County of Aiken*, 302 S.C. 178, 182-83, 394 S.E.2d 709, 711 (1990).

Appellants sought from this Court: 1) reversal of the trial court’s denial of class certification; 2) reversal of the trial court’s summary judgment dismissing Plaintiffs Azar and Letts for lack of standing; and 3) reversal of the trial court’s summary judgment concluding that Respondent’s use of net utility revenues were lawful, and remand for entry of summary judgment in Appellants’ favor. On the merits, this Court ruled in favor of Respondent concerning the issues of class certification and lack of standing; thus making Respondent, not Appellants, the prevailing party on two out of three issues on appeal.

As for the issue of whether the Respondent’s actions violated S.C. Code Ann. § 6-1-330, this Court did not rule on the merits. Instead, contrary to Appellants’ assertion that no material facts were in dispute, this Court found genuine issues of material fact in dispute, and thus concluded that summary judgment was premature. *Azar v. City of Columbia*, 2015 S.C. LEXIS 325, \*16 (2015); Appellants’ Brief, p. 1. Appellants did not prevail on this issue.

For these reasons, Appellants are not entitled to recover costs. There is no real justification for rewarding Appellants at the expense of Respondent.

Respectfully submitted,



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Dec. 2, 2015

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IN THE SUPREME COURT

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APPEAL FROM RICHLAND COUNTY  
COURT OF COMMON PLEAS

The Honorable G. Thomas Cooper  
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Case No. 2011-CP-40-6705  
Appellate Case Number 2014-000032

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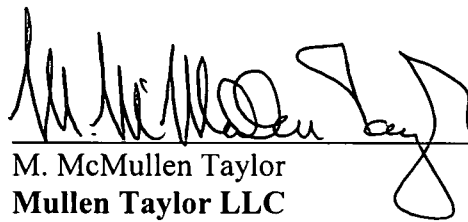
**CERTIFICATE OF SERVICE**

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I certify that I have served Respondent's Return to Appellants' Motion for Costs upon Appellants' counsel by depositing a copy of it in the United States Mail, postage prepaid, and by electronic mail, on the 2nd day of December, 2015, addressed to counsel of record, as follows:

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