

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

**RECEIVED**

Ralph King Anderson, III, Chief Administrative Law Judge

JUN 22 2017

**SC Court of Appeals**

Lower Court Case No. 2007-ALJ-04-0517-AP  
Court of Appeals Appellate Case No. 2014-001199  
Supreme Court Appellate Case No. 2016-001221

Fred Gatewood, #289775, ..... Appellant,

v.

South Carolina Department of Corrections, ..... Respondent.

**RESPONDENT’S RETURN TO APPELLANT’S MOTION FOR COSTS**

The Appellant, Fred Gatewood [“Gatewood”], submitted his motion for costs to this Court on June 12, 2007, and the Respondent, the South Carolina Department of Corrections [“SCDC”], respectfully submits, pursuant to SCACR 222(d) and 240, its instant return to Gatewood’s motion.

**I. OVERVIEW OF GATEWOOD’S MOTION, SUPPORTING MEMORANDUM, AND SUPPORTING DOCUMENTATION**

Gatewood moved this Court to tax costs against SCDC totaling \$1,386.61.<sup>1</sup> Gatewood provided an “Itemized Statement of Costs” to support of his motion,<sup>2</sup> in which he apportioned the costs he demanded as follows:

<sup>1</sup> See Motion, pp. 1, 3, and 6

<sup>2</sup> *Id.*, pp. 5 – 6.

1. Attorney's fees in the amount of \$1,000.00;<sup>3</sup>
2. Printing and binding costs of \$264.16;<sup>4</sup>
3. Various taxes totaling \$22.45 as described at the bottom of a receipt generated November 13, 2014;<sup>5</sup> and
4. A filing fee of \$100.00.<sup>6</sup>

Gatewood asserted as follows regarding his demand for both costs and attorney's fees:<sup>7</sup>

SCACR 222(a) provides that when an appeal is affirmed or reversed in part or is vacated, costs shall be allowed only as ordered by the appellate court. Moreover, an SCACR 222 attorney fee award has been called "automatic" by the Supreme Court. [*Muller v. Myrtle Beach Golf & Yacht Club*, 438 S.E.2d 248, 250 (S.C. 1993)].

Gatewood then summarized the Court's March 9, 2016 decision in the instant matter:<sup>8</sup>

... the Court of Appeals affirmed in part and reversed in part the [South Carolina Administrative Law Court] order upholding SCDC's denial of Gatewood's wage grievance; and remanded the issue of Gatewood's entitlement to costs, attorney fees, and pre and post-judgment interest, to the ALC for reconsideration in light of the Court of Appeals' decision reversing the ALC's conclusion that § 24-1-295 applied retroactively to Gatewood's pre-August 1, 2007 earnings. In addition, neither [the Court of Appeals nor the ALC] has ordered taxation of costs in a manner other than as provided in the rule.

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<sup>3</sup> See Motion, p. 6. In the final sentence on the first page of his motion, Gatewood also reserved the right to petition for "attorney fees, etc.," under S.C. Code Ann. § 15-77-300 before the South Carolina Administrative Law Court ["ALC"] on remand. *Id.*, p. 1.

<sup>4</sup> *Id.*, pp. 3 and 5 – 6. Gatewood included a receipt dated November 13, 2014 from an Office Depot in the Charleston Area with his "Itemized Statement of Costs." *Id.*, p. 8.

<sup>5</sup> *Id.*, pp. 3, 6, and 8.

<sup>6</sup> *Id.*, p. 6.

<sup>7</sup> *Id.*, p. 2. As referenced in SCACR 222(b), the maximum amount recoverable as attorney's fees is \$1,000.00.

<sup>8</sup> *Id.*, pp. 2 – 3.

As Gatewood acknowledged,<sup>9</sup> our Supreme Court, by an order it issued May 30, 2017, denied the parties' petitions for writs of certiorari.

On June 2, 2017, this Court remitted the instant matter back to the ALC.

## II. SOUTH CAROLINA APPELLATE COURT RULE 222

SCACR 222 is entitled "Costs on Appeal." In its entirety, SCACR 222(a), which is entitled "To Whom Allowed," provides as follows:

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.** [emphasis supplied].

The provisions of SCACR 222(d) also apply to the instant matter. SCACR 222(d) is entitled "Motion for Costs," and, in pertinent part, it provides as follows:

Any return or reply to the motion shall be served and filed in the manner provided by Rule 240. **The return may oppose the request for costs or seek a reduction of the amount of costs to be awarded.** [emphasis supplied].

## III. SYNOPSIS OF THIS COURT'S MARCH 9, 2016 DECISION

Gatewood did not provide a complete accounting of the rulings articulated by this Court in its March 9, 2016 decision. 785 S.E.2d 600 (S.C. Ct. App. 2016).

This Court, 785 S.E.2d at 605, identified eight (8) issues associated with Gatewood's appeal of an ALC order which upheld SCDC's denial of various prison industries pay claims he presented in an administrative grievance he filed with the agency under Policy GA-01.12.

SCDC accounts for the eight (8) issues identified by this Court in the table immediately below, and, in doing so, SCDC addresses them in a sequence different than the sequence in which they appeared in the March 9, 2016 decision:

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<sup>9</sup> *Id.*, pp. 1 and 3.

#	ISSUE	RULING	RESULT
7	Did the ALC err in declining to consider whether SCDC should process grievances for all inmates participating “in the program?”	The ALC did not err in declining to consider whether SCDC should process grievances for other inmates participating “in the program” who did not file their own grievances, because Gatewood’s demand was manifestly without merit. 785 S.E.2d at 612 – 13.	This Court <b>affirmed</b> the ALC’s decision on issue #7.
8	Did the ALC err in declining to enjoin SCDC from further wage violations?	The ALC did not err in declining to enjoin SCDC from further wage violations, because Gatewood’s demand was manifestly without merit. 785 S.E.2d at 613.	This Court <b>affirmed</b> the ALC’s decision on issue #8.
1	Did the ALC err in denying Gatewood’s motion to supplement the record?	The ALC’s error – if any – in denying Gatewood’s motion to supplement the record was harmless. 785 S.E.2d at 605.	This Court <b>affirmed</b> the ALC’s decision on issue #1.
5	Did the ALC err in holding that the issue of overtime was not preserved for review?	The ALC did not err when it declined to address the merits of Gatewood’s overtime pay argument, because Gatewood did not articulate claim for overtime pay in his grievance. 785 S.E.2d at 611 – 12.	This Court <b>affirmed</b> the ALC’s decision on issue #5.
3	Did the ALC err in holding that security and overhead constituted “other required deductions” for purposes of § 24-1-295?	The ALC did not err by concluding that security costs and overhead constituted “other required deductions” for purposes of § 24-1-295. 785 S.E.2d at 608 – 09.	This Court <b>affirmed</b> the ALC’s decision on issue #3.
2	Did the ALC err in applying § 24-1-295 rather than § 24-3-40 to determine the deductions from Gatewood’s gross wages?	The ALC erred in applying deductions from § 24-1-295 to Gatewood’s gross wages rather than deductions from § 24-3-40 to his gross wages, <b>but only for the month of July 2007</b> . 785 S.E.2d at 605 – 08.	This Court reversed the ALC’s decision on issue #2, but <b>it limited the ALC’s error to the month of July 2007</b> , as this Court ruled that “SCDC was not entitled to deduct security costs and overhead for July 2007” from Gatewood’s gross wages.

#	ISSUE	RULING	RESULT
4	Does § 24-1-295 apply retroactively to Gatewood's pre-August 1, 2007 work?	The ALC erred by retroactively applying the deductions from § 24-1-295 to the gross wages SCDC paid Gatewood before August 1, 2007. 785 S.E.2d at 609 – 11	This Court reversed the ALC's decision on issue #4.
6	Did the ALC err in denying Gatewood's request for pre-judgment interest, post-judgment interest, costs, and attorney's fees?	The ALC, because it rejected his wage claims, did not consider Gatewood as the prevailing party, and, consequentially, the ALC never considered his request for pre-judgment interest, post-judgment interest, costs, and attorney's fees. 785 S.E.2d at 612.	This Court <b>remanded</b> issue #6 to the ALC for reconsideration.

#### IV. ARGUMENT IN OPPOSITION TO GATEWOOD'S MOTION FOR COSTS

SCDC opposes the entirety Gatewood's motion for costs, including his demand for attorney's fees.

##### A. GATEWOOD'S FLAWED INTERPRETATION OF *Muller*

Gatewood asserted in his motion that "an SCACR 222 attorney fee award has been called 'automatic' by [our] Supreme Court," and, to support his assertion, he cited *Muller*, 438 S.E.2d at 250.<sup>10</sup> Gatewood's interpretation of *Muller* is flawed.

The entirety of the operative language from *Muller*, 438 S.E.2d at 250, upon which Gatewood relied, reads as follows:

Second, as to appellate costs, [SCACR 222] provides an **automatic** attorney's fee award of \$750 **for the prevailing party on appeal**, which is "taxed in the appellate court." [emphasis supplied].

Thus, to animate the "automatic attorney's fee award" described by the *Muller* Court, Gatewood must have been the prevailing party in this Court's March 9, 2016 decision.

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<sup>10</sup> See note 7 above.

Under his interpretation of *Muller*, however, Gatewood need only move for costs to receive attorney's fees even if he was not the prevailing party or if this Court affirmed in part, reversed in part, or vacated the ALC's ruling subject to his appeal.

**B. SECTION 15-77-300, *Masi*, and *Video Gaming***

S.C. Code Ann. § 15-77-300 is entitled "Allowance of fees, applicability of law,"<sup>11</sup> and, in its entirety, it provides as follows:

In any civil action brought by the State, any political subdivision of the State or any party who is contesting state action, unless the prevailing party is the State or any political subdivision of the State, **the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:**

**(1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and**

**(2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust.**

The provisions of this section do not apply to civil actions relating to the establishment of public utility rates, disciplinary actions by state licensing boards, habeas corpus or post conviction relief actions, child support actions, except as otherwise provided for herein, and child abuse and neglect actions. [emphasis supplied].

In *City of Charleston v. Masi*, 609 S.E.2d 301, 304 (S.C. 2005), our Supreme Court interpreted § 15-77-300, and it stated as follows:

There are three prerequisites that must be established prior to the recovery of attorney's fees and costs by a party contesting state action. [*Heath v. County of Aiken*, 394 S.E.2d 709 (S.C. 1990)]. First, the contesting party must be the "**prevailing party;**" second, the court must find that **the agency acted without substantial justification in pressing its claim against the party;** and third, the court must find that **there are no special circumstances that would make an award of attorney's fees unjust. *Id.*** [emphasis supplied].

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<sup>11</sup> Gatewood referenced § 15-77-300 in his motion. See note 3 above.

In *Video Gaming Consultants, Inc., v. S.C. Dep't of Revenue*, 595 S.E.2d 890, 891 – 92

(S.C. Ct. App. 2004), this Court quoted both § 15-77-300 and *Heath* when it ruled as follows:

The Department argues the trial court erred in awarding attorney's fees to Video Gaming. We agree.

**The prevailing party to a civil action may recover attorney's fees against a state agency only if "the agency acted without substantial justification in pressing its claim against the party" and there are no "special circumstances that would make the award of attorney's fees unjust."** [quoting § 15-77-300]. Our supreme court held "substantial justification" does not mean "'justified to a high degree,' but rather 'justified in substance or in the main'- that is, justified to a degree that could satisfy a reasonable person." [quoting *Heath*; other citation and footnote omitted]. **In deciding whether a state agency acted with substantial justification, the courts look to the agency's position in litigating the case to determine "whether it is one which has a reasonable basis in law and fact."** [citation omitted]. **An agency's loss on the merits does not create a presumption that its position was not substantially justified.** [citations omitted]. [emphasis supplied].

**C. GATEWOOD DID NOT PREVAIL ON FIVE (5) OF THE EIGHT (8) ISSUES IDENTIFIED BY THIS COURT IN ITS DECISION**

As illustrated in the table provided above in Section III, this Court affirmed the ALC's rulings on five (5) of the eight (8) issues it identified in its March 9, 2016 decision.

In affirming the ALC on issues #7 and #8, this Court ruled that Gatewood's demands were "manifestly without merit." In affirming the ALC on issue #1, this Court ruled that any error committed by the ALC constituted "harmless error."

Regarding issue #5, this Court affirmed the ALC's decision not to address the merits of Gatewood's overtime pay argument, because Gatewood failed to preserve the issue for review. Regarding issue #3, this Court affirmed the ALC's holding that security and overhead constituted "other required deductions" for purposes of § 24-1-295, the effective date of which this Court recognized as August 1, 2007.

Gatewood simply did not prevail on five (5) of the eight (8) issues (i.e. #1, #3, #5, #7, and #8) this Court identified in its March 9, 2017 decision, and his flawed interpretation of *Muller* runs contrary to not only *Muller* itself, but also § 15-77-300, *Masi*, and *Video Gaming*.

**D. SCDC ACTED WITH SUBSTANTIAL JUSTIFICATION IN PRESSING ITS CLAIMS AGAINST GATEWOOD**

Under § 15-77-300, *Masi*, and *Video Gaming*, this Court, to award attorney's fees to Gatewood attributable to the two (2) issues upon which it reversed the ALC, must find that SCDC acted without substantial justification in pressing its claim against Gatewood.

While it reversed the ALC on issue #2, this Court limited its holding on issue #2 to the month of July 2007, the period between the expiration of the sixth and final annual budget proviso and § 24-1-295's effective date.

SCDC's position regarding whether the provisions of § 24-1-295 took effect on July 1, 2007, the day after the expiration of the sixth and final proviso, or on August 1, 2007, the effective date confusingly declared by the legislation that enacted § 24-1-295, had a reasonable basis in law and fact, and, consequentially, SCDC acted with substantial justification in pressing its claim against Gatewood.

Neither party addressed the one (1) month "gap" between the expiration of the sixth and final proviso and § 24-1-295's effective date in the final briefs they filed in December 2014. Instead, the Court raised the one (1) month "gap" during oral argument on November 2, 2015.

In response to the Court's questioning during oral argument, SCDC articulated a viable rationale for its position regarding the one (1) month "gap" between the expiration of the sixth and final proviso on June 30, 2007 and § 24-1-295's effective date of August 1, 2007. Gatewood, on the other hand, stated that he hadn't considered the impact of such a "gap."

Regarding issue #4, this Court's decision to reverse the ALC constituted the only instance in which it flatly reversed the ALC in its March 9, 2016 decision.

SCDC's loss on the merits of issue #4 does not, under *Video Gaming*, create "a presumption that its position was not substantially justified," and SCDC articulated positions grounded upon a reasonable basis in law and fact, in both its brief and during oral argument, as to whether § 24-1-295 applied to Gatewood's pre-August 1, 2007 work.

**E. "SPECIAL CIRCUMSTANCES" EXIST WHICH MAKE AN AWARD OF ATTORNEY'S FEES AND COSTS TO GATEWOOD UNJUST**

Under § 15-77-300, *Masi*, and *Video Gaming*, this Court, to award attorney's fees to Gatewood on the two (2) issues upon which it reversed the ALC, must also find that no "special circumstances" exist which would make an award of attorney's fees to Gatewood unjust.

In its March 9, 2016 decision, this Court remanded Gatewood's requests for pre-judgment interest, post-judgment interest, costs, and attorney's fees, requests bundled together to comprise issue #6, back to the ALC for reconsideration. Accordingly, Gatewood may still prosecute his demand for attorney's fees before the ALC on remand.

In the motion for costs he submitted to this Court, Gatewood explicitly reserved his right, under § 15-77-300, to petition the ALC for attorney's fees, as well as other costs, on remand.<sup>12</sup> By making such a clear declaration to this Court, Gatewood animated the prospect of receiving a double award of attorney's fees and costs – one from this Court and one from the ALC.

SCDC respectfully asserts, under § 15-77-300, *Masi* and *Video Gaming*, that the prospect of such a double award of attorney's fees and costs constitutes "special circumstances" which would make an award of attorney's fees and costs to Gatewood by this Court unjust.

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<sup>12</sup> See notes 3 and 11 above.

## V. CONCLUSION

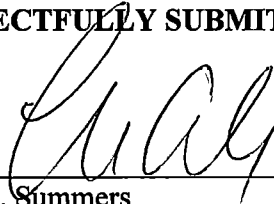
For the above-stated reasons, SCDC respectfully opposes the entirety of Gatewood's motion for costs. Should this Court nonetheless favorably consider his motion for costs, SCDC respectfully urges the Court to reduce the award of costs from the amount Gatewood demanded as permitted under SCACR 222(d).

The final sentence of SCACR 222(a) addresses the precise contingency presented by this Court's March 9, 2016 decision, namely when "an appeal is affirmed or reversed in part or is vacated." In such a contingency, the final sentence of SCACR 222(a) declares that "costs shall be allowed only as ordered by the appellate court."

As an alternative to the award of costs and attorney's fees demanded by Gatewood, SCDC respectfully offers the figure of \$346.65, which equals 25% of the total award he demanded in his instant motion.

This percentage reflects the reality that Gatewood prevailed on only two (2) of the eight (8) issues identified by this Court in its March 9, 2016 decision, and an award of \$346.65 would cover the \$286.61 in copying costs, binding costs, and various state taxes Gatewood itemized in his instant motion.

**RESPECTFULLY SUBMITTED:**



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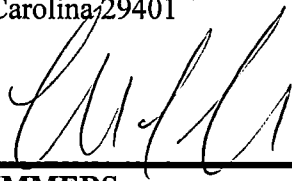
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**PROOF OF SERVICE**

I certify that I have served the **Respondent's Return to Appellant's Motion for Costs** on the above-named Appellant by mailing a copy of it to his counsel, first class postage pre-paid, at the following address:

Douglas H. Westbrook, Esquire  
Attorney at Law  
23 Broad Street  
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**LAKE E. SUMMERS**

June 22, 2017