

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, Circuit Court Judge

Opinion No. 5527 (S.C. Ct. App. Filed Dec. 20, 2017)
S.C. Ct. App. Case No. 2016-000106

RECEIVED

AUG 02 2018

SC Court of Appeals

Harold Raynor a/k/a Harold Raynor and Michael Caldwell,

Respondents,

v.

Charles C. Byers, John T. Bakhaus, Kurt Kasler and Kenneth Smith,

Defendants,

Of whom,

Charles C. Byers, John T. Bakhaus, and Kenneth Smith are

Appellants.

**RESPONDENTS' REPLY TO APPELLANTS' RETURN TO RESPONDENT'S MOTION
FOR COSTS**

COME NOW the above-named Respondents ("Respondents") in Reply to the Appellants' Return to Respondents' Motion for Costs against Charles Byers, John Backhaus, and Kenneth Smith which was received by Respondents on July 23, 2018. In support of this Reply, and as further demonstrated by the affidavit of Thomas J. Rode attached hereto as Exhibit A which is incorporated by reference, Respondents state as follows:

I. As to Appellant's Contention that the Instant Motion is not Timely.

1. After this Court issued an Opinion affirming the trial court, Appellants filed a Petition for Writ of Certiorari in the South Carolina Supreme Court.
2. On May 20, 2018, the below-signed counsel entered an appearance with the Supreme Court

by way of filing a Return to Appellants' Petition for Writ of Certiorari.

3. Appellants' Petition for Writ of Certiorari was denied by Order of the Supreme Court on June 27, 2018.
4. Unbeknownst to the below-signed counsel, the Court of Appeals issued a remittitur on June 29, 2018.
5. Although the below-signed counsel was copied on the Order denying the Petition for Writ of Certiorari that was sent from the Clerk of the Supreme Court to the Clerk of the Court of Appeals, the below-signed was not copied on the notice of the June 29, 2018, remittitur issued by the Court of Appeals. *See* (Appendix 1 to **EXHIBIT A**).
6. The below-signed counsel, having made an appearance in the Supreme Court anticipated receiving notice of the remittitur.
7. Respondents filed the instant Motion for Costs on July 19, 2018, which Appellants assert is untimely.
8. In candor, the below-signed counsel acknowledges that the instant motion is out of time pursuant to the 15-day deadline set forth in Rule 222, SCACR.
9. However, having not received notice of the remittitur issued by this Court, the Respondents assert that good cause exists to accept the instant motion out of time.

II. As to Appellants' Contention that Fees are limited to \$1,000.00 rather than \$2,500.00 as provided by Order 2018-01-17-02

1. Rule 222(e) provides that the denial of a petition for writ of certiorari will entitle the prevailing party to costs by motion in the Court of Appeals¹.
2. Order 2018-01-17-02, provides that it shall apply to all decisions after January 17, 2018,

¹ Appellant's contention that the instant motion is filed in the wrong court is unfounded. *See* Rule 222(e) ("If a petition for writ of certiorari is sought . . . the **Court of Appeals** shall tax costs only in those cases in which the petition for writ of certiorari is denied.") (emphasis added).

which entitled the prevailing party to collect costs.

3. Here the Order denying Appellants' Petition for Writ of Certiorari entitled Respondents to costs pursuant to Rule 222(e), SCACR, and this Order was entered on June 27, 2018, which is after January 17, 2018; and, therefore Respondents are entitled to recover \$2,500.00 pursuant to Order 2018-01-17-02.

THEREFORE, for good cause as stated above, and as further shown by the affidavit of Thomas J. Rode, attached hereto as **Exhibit A**, Respondents herein request that this Court accept Respondents' Motion for Costs out of time and award costs of \$2,500.00 pursuant to Order 2018-01-17-02.

Respectfully submitted,



Thomas J. Rode, SC Bar No. 77480
THURMOND KIRCHNER & TIMBES, P.A.
15 Middle Atlantic Wharf
Charleston, SC 29401
Phone: 843.937.8000
Email: thomas@tktlawyers.com

This 30th day of July, 2018.
Charleston, SC.

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Harold Raynor a/k/a Harold Raynor and Michael Caldwell,

Respondents,

v.

Charles C. Byers, John T. Bakhaus, Kurt Kasler and Kenneth Smith,

Defendants,

Of whom,

Charles C. Byer, John T. Bakhaus, and Kenneth Smith are

Appellants.

AFFIDAVIT OF SERVICE

I, Moira K. McIntire, an employee of Thurmond Kirchner & Timbes, P.A., attorneys for the Respondents, do hereby certify that I have this date, mailed, postage prepaid, a true and correct copy of the Respondents' Motion for Costs to the following counsel of record:

FOR PETITIONERS:

Spencer A. Syrett, SC Bar No. 05459
Post Office Box 7403
Columbia, SC 29202
Phone: 803-765-2110
syrettlaw@sc.rr.com



Moira K. McIntire
Paralegal to Michael A. Timbes/Thomas J. Rode

This 30th day of July, 2018
Charleston, South Carolina

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In the Court of Appeals

APPEAL FROM AIKEN COUNTY
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The Honorable Doyet A. Early, Circuit Court Judge

Opinion No. 5527 (S.C. Ct. App. Filed Dec. 20, 2017)
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Of whom,

Charles C. Byers, John T. Bakhaus, and Kenneth Smith are

Appellants.

EXHIBIT A

AFFIDAVIT OF THOMAS J. RODE

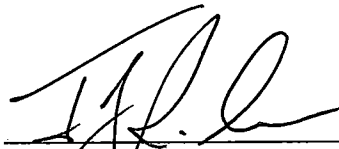
The undersigned affiant, Thomas J. Rode, who first being duly sworn, does swear and affirm under penalty of perjury as follows:

1. I am over the age of 18 and competent to make this affidavit.
2. I am an attorney with the firm of Thurmond Kirchner and Timbes, PA, and licensed to practice in South Carolina.
3. I represented the Respondents in the above captioned matter for the purpose of responding to a Petition for Writ of Certiorari filed by the Appellants with the South Carolina Supreme Court (hereinafter the "Supreme Court").

4. On May 21, 2018, I entered my appearance in this matter with the Supreme Court by way of filing a Return to Appellant's Petition for Writ of Certiorari.
5. Appellants' Petition for Certiorari was denied by Order of the Supreme Court on June 27, 2018, and on the same date a copy of this Order was sent by the Clerk of Court of the Supreme Court to the Clerk of Court for the Court of Appeals.
6. I was copied on this Order when it was sent to the Court of Appeals. *See (Appendix 1)*.
7. Pursuant to Rule 222, SCACR, and on behalf of Respondents, I filed a Motion for Costs on July 19, 2018.
8. On July 23, 2018, my office received a copy of Appellants' Return to this motion asserting that the motion was untimely pursuant to Rule 222, SCACR(d) as a result of a remittitur issued by the Court of Appeals on June 29, 2018.
9. I make this affidavit in support of Respondents' request for the Court of Appeals to accept Respondents' Motion for Costs out of time.
10. Despite having made an appearance in the Supreme Court and having also been copied on the Order sent from the Clerk of the Supreme Court to the Clerk of the Court of Appeals, I was not provided notice of the remittitur issued by the Court of Appeals on June 29, 2018. *Compare (Appendix 1) with (Appendix 2)*.
11. Further, my review of the online C-Track Case Management System for this matter on July 18, 2018, did not reflect the issuance of a remittitur.
12. In anticipation of time out of the office for a family vacation between July 20 – July 30, and because I had not received notice from the Court of Appeals regarding the issuance of any remittitur, I reviewed the online C-Track Case Management System for this matter on July 18, 2018, which did not reflect the June 29, 2018 remittitur.

13. Upon information and belief, the Court of Appeals generally accepts Motions for Costs after the issuance of the remittitur. However, expecting an extended absence for vacation, I filed the instant Motion for Costs on July 19, 2018.
14. It was not until my receipt of Appellants' Return to this motion and my return from vacation on July 30, 2018, that I learned of the June 29, 2018 remittitur.
15. On July 30, 2018, I contacted the Clerk's office for the Court of Appeals and confirmed that notice of the June 29, 2018 remittitur was not provided to me. *See (Appendix 2)*

END AFFIDAVIT.



Thomas J. Rode, SC Bar No. 77480
THURMOND KIRCHNER & TIMBES, P.A.
15 Middle Atlantic Wharf
Charleston, SC 29401
Phone: 843.937.8000
Email: thomas@tktlawyers.com

Subscribed and sworn before me this 30th day of July, 2018.



Notary Public for South Carolina
My commission expires 11/16/2020

(seal)

APPENDIX 1

(June 27, 2018 Notice of Order Denying Petition for Writ of Certiorari)

The Supreme Court of South Carolina

Harold Raynor a/k/a Harold Reynor, and Michael
Caldwell, Respondents,

v.

Charles C. Byers, John T. Bakhaus, Kurt Kasler, and
Kenneth Smith, Defendants,

Of whom Charles C. Byers, John T. Bakhaus, and
Kenneth Smith are the Petitioners.

Appellate Case No. 2018-000750
Trial Court Case No. 2009CP0200706

ORDER

Based on the vote of the Court, the petition for a writ of certiorari is denied.

FOR THE COURT

BY



CLERK

Columbia, South Carolina

June 27, 2018

cc:

Spencer Andrew Syrett, Esquire
Kevin Nicklaus Molony, Esquire

Thomas James Rode, Esquire
Michael A. Timbes, Esquire
The Honorable Robert J. Harte
The Honorable Jenny Abbott Kitchings

APPENDIX 2

(June 29, 2018 Remittitur as issued by the Court of Appeals)



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK
V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

June 29, 2018

The Honorable Robert J. Harte
PO Box 583
Aiken SC 29802

REMITTITUR

Re: Harold Raynor v. Charles Byers
Lower Court Case No. 2009CP0200706
Appellate Case No. 2016-000106

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

V. Claire Allen, Deputy

CLERK

Enclosure

cc: Spencer Andrew Syrett, Esquire
Robert J. Harte, Esquire
Kevin Nicklaus Molony, Esquire.

July 30, 2018

VIA FACSIMILE & U.S. MAIL
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate St.
Columbia, SC 29201
Fax to: (803) 734-1839

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AUG 02 2018

SC Court of Appeals

Re: *Case Tracking No.: 2016-000106*
Harold Raynor v. Charles Byers
Case No.: 2009-CP-02-0706

Dear Ms. Kitchings:

This firm represents Respondents Harold Raynor and Michael Caldwell in connection with the above appeal. Enclosed for filing please find an original and seven (7) copies of Respondents' Reply to Appellants' Motion for Costs. I would appreciate it if you would please file these documents with the Court and return any file-stamped copies to me using the enclosed self-addressed, stamped envelope. Your assistance with this matter is greatly appreciated. Should you have any questions or concerns, please do not hesitate to contact us.

With best regards, I am

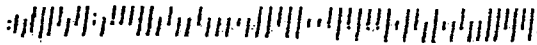
Sincerely,

THURMOND KIRCHNER & TIMBES, P.A.

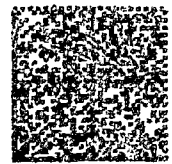


Moira McIntire
Paralegal to Thomas J. Rode

cc: All Counsel of Record (w/ enclosure)



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THURMOND KIRCHNER & TIMBES, P.A.
ATTORNEYS & COUNSELORS AT LAW

15 MIDDLE ATLANTIC WHARF
CHARLESTON, SOUTH CAROLINA 29401

TO:

The Honorable Jenny Abbott Kitchens
South Carolina Court of Appeals
1220 Senate St.
Columbia, SC 29201

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