

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from the
ADMINISTRATIVE LAW COURT
The Honorable Deborah Brooks Durden, ALC Judge

RECEIVED
JAN 02 2019
SC Court of Appeals

Appellate Case No. 2018-001064
Case No. 18-ALJ-17-0005-CC

Five Points Roost, LLC, d/b/a Five Points Roost.....Appellant,

v.

South Carolina Department of Revenue.....Respondent,

and

Thomas R. Gottshall and April C. Lucas.....Intervenors, Respondents.

MOTION FOR FEES AND COSTS

This dispute arises from a contested-case hearing before the Administrative Law Court (ALC) resulting in a Final Order denying Appellant Five Points Roost, LLC d/b/a Five Points Roost (Roost) a beer and wine permit and liquor-by-the-drink license. Roost filed a notice of appeal, filed an initial brief, and then, on the eve of Respondent South Carolina Department of Revenue (DOR) and Intervenors, Respondents Thomas R. Gottshall and April C. Lucas filing their initial briefs, Roost sought to unilaterally dismiss this appeal (in violation of the rules) and moved the Court for voluntary dismissal over Mr. Gottshall and Ms. Lucas's objection.

Mr. Gottshall and Ms. Lucas now respectfully move the Court for fees and costs pursuant to Rules 222 and 269 of the South Carolina Appellate Court Rules.

PROCEDURAL BACKGROUND

The ALC entered a Final Order denying a permit and license because:

- (1) Roost failed to disclose the identity of two general managers responsible for day-to-day operations and “intentionally misrepresented” the role of a third principal, Pour House owner Daniel Wells;
- (2) Roost’s location is not suitable because granting a permit and license would adversely impact the community welfare; and
- (3) Roost is not a business “primarily and substantially” in the business of preparing and serving meals, as required by the state Constitution and statutory law.

Five Points Roost, LLC v. S.C. Dep.’t Rev., 18-ALJ-17-0005-CC, 2018 WL 1724696, at *6–12 (Apr. 3, 2018) (hereafter, “Final Order”). Roost’s motion for reconsideration was denied.

On June 7, 2018, Roost noticed an appeal. On July 2, 2018, Roost moved to extend its deadline to file an initial brief by 30 days. That motion was granted, and, on August 8, 2018, Roost filed an initial brief. Thereafter, DOR, requested and received a 30-day extension to file an initial brief. On August 31, 2018, Mr. Gottshall and Ms. Lucas requested and received a 30-day extension, setting all Respondents’ deadlines to file an initial responsive brief on or before Monday, October 8, 2018.

On Friday, October 5—just one business day before Respondents’ briefs were due—Roost filed a notice of “voluntary withdrawal” purporting to dismiss the appeal “pursuant to Rule 260(c) of the South Carolina Appellate Court Rules.” Upon receipt of the notice, Mr. Gottshall and Ms. Lucas’s counsel conferred with DOR’s counsel and indicated Intervenors intended to file a responsive brief and go forward with the appeal because Rule 260 does not permit unilateral dismissal but requires either the written consent of all parties or dismissal “upon such terms as may be fixed by the court.” See Rule 260(b)–(c), SCACR. Several hours later, Roost filed a motion for voluntary withdrawal claiming it sought dismissal of the appeal because (1) Roost is closed,

(2) “the business assets are under contract for sale[,]” (3) Roost has no intention to re-open the business and plans to terminate the entity, (4) its termination of the entity renders it unable to obtain a permit and license, and (5) the appeal is (purportedly) moot. See Roost Mot. Voluntary Withdrawal, 1. Roost’s counsel did not consult prior to either filing.

On October 8, 2018, Mr. Gottshall and Ms. Lucas filed a return in opposition to the motion to dismiss and, alternatively, moved the Court to assess fees and costs on Roost for advancing a frivolous appeal. After highlighting some of the hotly contested issues disputed in this appeal, Intervenor’s disputed the notion that a forthcoming Roost sale was grounds for dismissal and by highlighting the suspicious nature of the Roost enterprise:

Moreover, as discussed in the ALC’s Final Order and in the [I]ntervenor’s initial brief, the shady machinations surrounding Roost’s financing was central to the ALC’s decision to deny a permit and license. See Gottshall Int. Br. 10 (citing testimony by Roost’s manager that opposing counsel was the intermediary that brokered the suspect business arrangement between Roost’s equity partners and undisclosed principal Daniel Wells). To the extent Roost’s attempt to abandon its appeal here is motivated by its purported “contract” to sell its “assets,” this dispute [i]s capable of repetition while evading review, a classic exception to the mootness doctrine. See, e.g., Holden v. Cribbs, 349 S.C. 132, 138, 561 S.E.2d 634, 638 (Ct. App. 2002).

Gottshall Opp. Mot. Vol. Withdrawal, 3.

On November 29, 2018, the Court entered an Order granting Roost’s motion for voluntary withdrawal, while noting Mr. Gottshall and Ms. Lucas’s “request regarding costs is premature.” Order (citing Rule 222(d), SCACR). This motion followed.

ARGUMENT

Roost filed an appeal it never intended to pursue and then sought dismissal (first in violation of the rules) in a manner that ensured the other parties would waste the maximum possible litigation resources before receiving notice of Roost’s intention to abandon its appeal. The Court should hold Roost responsible for pursuing a frivolous appeal and award fees and costs under Rule

269 of the Appellate Court Rules in an amount of \$17,370.00 in fees and \$1,606.08 in costs. Alternatively, Rule 222 of the appellate rules entitles Mr. Gottshall and Ms. Lucas to recover no less than \$2,500.00 in fees and \$1,606.08 in costs. These arguments are considered in turn.

I. This appeal is frivolous, and Roost should pay reasonable attorneys' fees and costs to compensate counsel for the time wasted on this matter.

The Court should find that Roost's appeal is frivolous and award reasonable attorneys' fees of \$17,370.00 and \$1,606.08 in costs pursuant to Rule 269.

Where 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.

Rule 269, SCACR. The Court should conclude Roost's appeal is frivolous for three reasons.

First, the timing of Roost's abandonment of its appeal suggests an effort to waste litigation resources. By waiting to until the day before Respondents' filing deadline to abandon its appeal, Roost guaranteed all counsel, including DOR, would spend time on a matter only Roost knew it would abandon. As indicated in the attached affidavit in support of this motion (**Exhibit A**), Mr. Gottshall and Ms. Lucas's counsel had already spent at least 18.8 hours preparing an initial brief before being served with a copy of Roost's procedurally defective notice purporting to unilaterally to withdraw the appeal. Through consultation with DOR's counsel, the undersigned learned that DOR *also* spent considerable time preparing a brief to respond to Roost. While DOR may not take issue with the time its counsel spent on this matter, Mr. Gottshall, Ms. Lucas, and their counsel—all taxpayers of this State—do take issue with this waste of public resources. This suggests Roost either did not bother to consider the efficacy of its position before initiating this appeal or it took appeal solely to burden Respondents with the work of preparing a response. Whichever the case may be, sanctions are warranted.

Second, the substance of Roost's initial brief also supports the conclusion that this appeal is frivolous. A review of Roost's brief suggests make-work gamesmanship as it is difficult to conclude Roost intended to go forward with the *10 issues* identified as contested on appeal, many of which are either never addressed in the body of the brief or are so poorly formed it is difficult to follow Roost's position. Compare App.'s Initial Br., with Gottshall Initial Br. In purporting to raise so many issues on appeal, Roost amplified the number of matters the other parties were required to address. Thus, even if poorly formed, Roost's shotgun approach greatly expanded the scope of work required to respond.

Third, the grounds cited in Roost's motion to withdraw the appeal raise more questions than they answer and fail to dispel the notion that the bar's tactics here warrant relief. The bar urged the Court to dismiss this appeal based on the contentions:

1. Appellant's business is closed.
2. Appellant has all of the business assets under contract for sale.
3. Appellant has no intention to re-open or pursue business as Five Points Roost, LLC and will be commencing the termination of that entity.
4. Because of these facts, the only remedy possibly available to the Appellants, the issuance of a [sic] Alcoholic Beverage licenses is not available to them.
5. These facts render the Appeal moot.

Roost Mot. Vol. Withdrawal, 1. As an initial matter, Roost is closed because it is a bar with a business model predicated on late-night alcohol sales (predominately liquor) to underaged students operated by undisclosed principals at an unsuitable location. The ALC's extensive factual findings detail the public harms flowing from Roost's illegal enterprise and offer three alternative grounds for denying it a permit and license. See generally, Final Order. Thus, Roost was "closed" by virtue of the ALC's Final Order long before it sought to dismiss its appeal.

As for the representations that Roost has “all of the business assets under contract for sale” and intends to terminate the entity, these claims warrant scrutiny into the timing and circumstances of this purported forthcoming “sale.” Indeed, whatever representations Roost owners Stephen Bland and Adam Ruonala are making to their lawyer about the state of the business, those representations should not be believed. After observing their demeanor during the final hearing, the ALC found “neither Bland nor Ruonala [are] credible witnesses, and the facts they testified to concerning the ownership and control of the business are unreliable.” Final Order, 2018 WL at *3. Further, it was a still-unexplained transaction between Roost’s current equity members and the owner of the predecessor bar, Daniel Wells¹, that caused the ALC to find that “[e]ven with the astonishing differences in Bland’s deposition and hearing testimony concerning the organization and financing of the business, on neither occasion did he or Ruonala offer any credible explanation as to why they agreed to the financial terms reflected in [Roost’s business records]” and that the “only plausible explanation” was that “Daniel Wells is still controlling the business and has simply reorganized it and transferred his majority ownership interest into an LLC controlled by his mother.” Final Order, 2018 WL at *4. Further still, the intermediary responsible for brokering the sham transaction between Daniel Wells and Roost’s owners is opposing counsel (see Gottshall Int. Br. 10 (citing to the record)), who now reports that Roost plans to pursue a transaction similar to the Pour House-Roost transaction the ALC found to be a sham. Cf. id. at 9–10 (detailing testimony found insufficient to explain what was bought and sold); Final Order, 2018 WL at *2–4 (same).

¹ Daniel Wells owned the Carolina Pour House (Pour House) operating in the same location until the Columbia Police Department initiated a nuisance action to shut it down. See also, Teddy Kulmala and Cynthia Roldan, “Video captures assault outside Five Points bar”, THE STATE (March 28, 2017), <http://www.thestate.com/news/local/crime/article141214933.html> (documenting incident in which Wells choked out a patron of his bar unconscious and dropped him face-first onto the public sidewalk).

In short—and as explained in far greater detail in the Final Order or Intervenors’ Initial Brief (see pp. 6–10 & 22–26)—Roost was denied a permit and license, in part, because its financial arrangement was a sham designed to allow continued ownership of a bar at the location by a known bad actor. The Final Order ended that illegal venture, but Roost now appears headed down a similar path. Thus, Mr. Gottshall and Ms. Lucas respectfully submit that Roost has no credibility and should be afforded no benefit of doubt by this Court in claiming it sought to terminate this appeal based on a bona fide business decision. DIRECTV, Inc. & Subsidiaries v. S.C. Dep’t of Revenue, 421 S.C. 59, 80, 804 S.E.2d 633, 644 (Ct. App. 2017) (“As the fact-finder, the ALC was free to weigh evidence and determine witness credibility in making its factual findings.”), reh’g denied (Jan. 11, 2018), cert. denied (May 2, 2018). To the extent Roost seeks to defend against this motion by maintaining its decision to seek dismissal was engendered by some forthcoming sale, the timing and circumstances of that transaction should be investigated either by this Court in response to a rule to show cause or through a supplemental proceeding supervised by a special master.

Finally, upon concluding this appeal is frivolous, the Court should award \$17,370 in fees (based on 38.6 hours of lawyer time compensated at \$450 per hour) and \$1,606.08 in costs, the basis for which is itemized in the attached affidavit. See Ex. A. As evidenced by the sworn submission of an appellate practitioner, the fees and costs requested here are in line with market rates for similar work in this jurisdiction. See Whitney B. Harrison, Esq. Aff. ¶¶ 4–6 (**Exhibit B**).

II. Roost should pay all fees and costs required by Rule 222

Alternatively, Mr. Gottshall and Ms. Lucas are entitled to recover all fees and costs allowable under Rule 222 of the appellate rules. The rule allows a party to recover certain costs, actually incurred, including: “the cost of the court reporter’s transcript[.]” Rule 222(b), SCACR. “The allowance of additional costs will generally not be allowed except in the most extraordinary

circumstances.” Id. “In addition, the party shall be entitled to recover an attorney’s fee in an amount which shall be set by order of the Supreme Court.” Id. The Supreme Court has set that fee at \$2,500. See Order Re: Attorney’s Fees Under Rule 222 and 242 of the South Carolina Appellate Court Rules (Jan. 17, 2018).

Here, Mr. Gottshall and Ms. Lucas are entitled to an attorneys’ fee award of \$2,500 and to recover the \$1,499.30 spent to obtain the transcript of the proceeding below. For the reasons explained above, the Court should find that this petition meets the “extraordinary circumstances” contemplated by Rule 222 and allow them to recover all costs—an additional \$106.78.

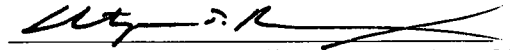
Accordingly, if the Court deems sanctions under Rule 269 unwarranted, it should still award \$2,500.00 in attorneys’ fees and \$1,606.08 in costs.

CONCLUSION

The Court should award Mr. Gottshall and Ms. Lucas attorneys’ fees, in an amount of \$17,370.00, and costs, in an amount of \$1,606.08, along with any such further relief the Court deems just and proper. If the Court is uncertain about the factual predicate for Roost’s dismissal request, it should issue a rule to show cause requiring disclosure of the correspondence and documents touching on the purported sale or authorize a supplemental proceeding supervised by a special master to determine when it decided to abandon this litigation in order to pursue a possible sale of the bar. Otherwise, this motion should be granted.

[signature page follows]

Respectfully submitted by,



Richard A. Harpootlian (SC Bar No. 2725)
Christopher P. Kenney (SC Bar No. 100147)
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ATTORNEYS FOR
INTERVENORS, RESPONDENTS
THOMAS R. GOTTSHALL AND
APRIL C. LUCAS

January 2, 2019
Columbia, South Carolina.

Five Points Roost, LLC, d/b/a Five Points Roost v. SCDOR
Appellate Case No. 2018-001064
Intervenors/Respondents' Motion for Fees & Costs

EXHIBIT A

(Affidavit of Christopher P. Kenney)

THE STATE OF SOUTH CAROLINA
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Appeal from the
ADMINISTRATIVE LAW COURT
The Honorable Deborah Brooks Durden, ALC Judge

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Five Points Roost, LLC, d/b/a Five Points Roost.....Appellant,

v. :

South Carolina Department of Revenue.....Respondent,

and

Thomas R. Gottshall and April C. Lucas.....Intervenors, Respondents.

AFFIDAVIT OF CHRISTOPHER P. KENNEY

Personally, appeared before me, Christopher P. Kenney, who, being duly sworn, deposes and states the following:

1. I am of legal age, sound mind, and competent to testify as to the following matters.
2. I am an attorney of record in the above-captioned matter and employed by Richard A. Harpootlian, P.A. (the "Firm").
3. I have been a member of the South Carolina Bar since 2011. I have also been admitted to practice before the United States Supreme Court, the United States Court of Appeals for the Fourth Circuit, and the United States District Court for the District of South Carolina.

4. My practice is comprised primarily of civil plaintiffs' work—including wrongful death and personal injury, class action, False Claims Act, and business dispute cases—and some criminal law practice. I have prepared and filed briefs in all of the aforementioned jurisdictions and at all levels of this State's courts. I routinely argue motions before the District Court and have argued two matters before the Fourth Circuit and one before the South Carolina Supreme Court.

5. I am counsel primarily responsible for drafting the Initial Brief filed by Intervenors, Respondents Thomas R. Gottshall and April C. Lucas on October 8, 2018.

6. The Firm has incurred the following costs in conjunction with this appeal:

Cost	Amount
Transcript	\$1,499.30
In-house copies (at \$.25 per page)	\$79.50
Postage	\$2.28
Filing fee for motion (for extension)	\$25.00
TOTAL:	\$1,606.08

7. With the exception of the time spent on October 8 (which was re-created), I spent the following time on this appeal according to the Firm's contemporaneous time-keeping system:

Date	Task	Time (hours)
Oct. 3, 2018	Research; draft initial brief	6.5
Oct. 4, 2018	Review record; draft initial brief	7.3
Oct. 5, 2018	Edit, draft initial brief	5.0
Oct. 6, 2018	Edit, draft initial brief; draft oppo. MTD	8.0
Oct. 7, 2018	Edit, draft initial brief	7.3
Oct. 8, 2018	Edit initial brief; create TOA & TOC; edit oppo. MTD.	4.5
TOTAL:		38.6 hours

8. The time reported above does *not* reflect all the time I have spent on this appeal (including time spent on this motion), nor does it include time spent by co-counsel, Richard A. Harpootlian.

9. While the Firm rarely seeks hours-based fee awards for my work, in recent years I have participated in two fee petitions resulting in an hours-based award using the following rates:


Caption	Nature of the representation	Hourly rate awarded
<u>Butler v. Durant</u> , C.A. No. 4:14-cv-2276-RMG, Dkt. No. 183 (D.S.C. Jan. 15, 2016).	Prisoner civil rights	\$190.50/hour (rate capped by 42 U.S.C. § 1997e)
<u>Wray v. CitiMortgage, Inc.</u> , C.A. No. 3:12-cv-3628-CMC, Dkt. Nos. 199 & 208 (D.S.C. July 8, 2015).	SCRA class action	\$350/hour

10. As indicated above, the Butler matter is not reflective of actual market rates due to the attorneys' fee rate cap imposed by 42 U.S.C. § 1997e.

11. Presently, the Firm would bill my time at a rate of \$450 per hour.

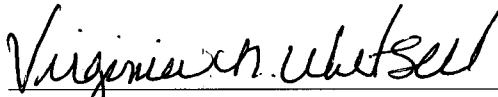
12. I believe an hourly rate of \$450 for a total fee of \$17,370 would fairly compensate the Firm for the time I have spent on this appeal.

FURTHER AFFIANT SAYETH NOT.


Christopher P. Kenney

State of South Carolina
County of Richland

Sworn to and subscribed before me
This 2nd day of January 2019.


Virginia Whetsell, Notary Public
My commission expires: 7/22/24

Five Points Roost, LLC, d/b/a Five Points Roost v. SCDOR
Appellate Case No. 2018-001064
Intervenors/Respondents' Motion for Fees & Costs

EXHIBIT B

(Affidavit of Whitney B. Harrison)

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from the
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v.

South Carolina Department of Revenue.....Respondent,

and

Thomas R. Gottshall and April C. Lucas.....Intervenors, Respondents.

Affidavit of
Whitney B. Harrison

Personally, appeared before me, Whitney B. Harrison, who, being duly sworn, deposes and states the following:

1. I am of legal age and sound mind and competent to testify in this matter. I give this affidavit at the request of Intervenors/Respondent's counsel in the above-captioned matter.
2. I am employed by McGowan, Hood & Felder, LLC.
3. I am a 2010 graduate of the University of South Carolina School of Law. I am admitted to practice in South Carolina, the United States District Court for the District of South Carolina, the Fourth Circuit Court of Appeals, and the United States Supreme Court. My practice

primarily consists of complex civil litigation, novel issues, and constitutional matters. I have argued and briefed numerous appellate matters before the South Carolina Court of Appeals and the South Carolina Supreme Court. I have also prepared briefs to the Fourth Circuit Court of Appeals and petitions to the United States Supreme Court.

4. As part of my ordinary and customary practice, I am retained under three models depending on the client's preference and the complexity of the appeal. These models include: (1) a flat rate of \$ 25,000 for an appeal at the South Carolina Court of Appeals, (2) a contingency basis averaging around 10% of the verdict, and (3) on an hourly basis ranging from \$ 300 to \$ 500 an hour. As it stands, I currently have appeals pending before the Court of Appeals under each of these financial models.

5. Prior to providing this affidavit, I reviewed Intervenor/Respondent's fee petition, affidavits of Intervenor/Respondent's counsel, the initial briefs of both sides, along with the filed motion to withdrawal and the corresponding return.

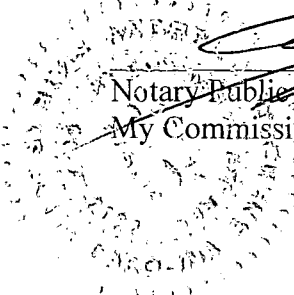
6. In my experience and professional judgment, the fees and costs sought by Intervenor/Respondent's counsel in this matter are reasonable compensation for the type of work performed and are consistent with the legal market in South Carolina.

FURTHER AFFIANT SAYETH NOT.


Whitney B. Harrison

State of South Carolina
County of Richland
Sworn to and subscribed before me
This 26th day of December 2018.


Notary Public
My Commission Expires: 1/7/20



THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Deborah Brooks Durden, Administrative Law Judge

Appellate Case No. 2018-001064
Case No. 18-ALJ-17-0005-CC

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JAN 02 2019

SC Court of Appeals

Five Points Roost, LLC, d/b/a Five Points Roost.....Appellant,

v.

South Carolina Department of Revenue.....Respondent,

and

Thomas R. Gottshall and April C. Lucas.....Intervenors, Respondents.

CERTIFICATE OF SERVICE

I, Holli Miller, paralegal to the attorney for Intervenors/Respondents, Richard A. Harpootlian, P.A., with offices at 1410 Laurel Street, Post Office Box 1090, Columbia, South Carolina 29202, certify that on January 2, 2019, served by placing in the U.S. Mail, first-class postage affixed thereto, the following document to the below mentioned persons:

Document: Intervenors/Respondents' Motion for Fees and Costs

Served: Michael Montgomery, Esq.
Post Office Box 11886
Columbia, SC 29211

Elisabeth Shields, Esq.
SCDOR
300A Outlet Pointe Blvd.
Columbia, SC 29210



Holli Miller



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January 2, 2019
VIA HAND DELIVERY

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

In re: Five Points Roost v. SCDOR
Appellate Case No. 2018-001064

RECEIVED
JAN 02 2019
SC Court of Appeals

Dear Ms. Kitchings:

Enclosed please find the original and three copies of Intervenors/Respondents' motion for fees and costs in connection with the above-referenced matter. Please clock in the original and copies and return the copies to the courier.

I have also included the required filing fee.

Thank you for your assistance in this matter.

With warmest personal regards, I am

Sincerely,


Christopher P. Kenney

/hm

Enclosures

cc: Mike Montgomery, Esq.
Elizabeth Shields, Esq.