

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Judge

Case No. 2018-001064

RECEIVED

JAN 28 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.

REPLY TO INTERVENTORS, RESPONDENTS MOTION FOR FEES AND COSTS

Michael H. Montgomery
SC Bar No. 4034
MONTGOMERY WILLARD, LLC
Post Office Box 11886
Columbia, South Carolina 29211
(803) 779-3500

Attorneys for Appellants

INTRODUCTION

This matter is before the Court on the motion of the Intervenors, Respondents¹ for Fees and Costs in the form of Sanctions under Rule 269, SCACR or for fees and costs under Rule 222, SCACR. The Intervenors make endless arguments and suggestions of impropriety supported only by their imaginative and far-fetched conclusions and not by facts in the record. In essence, they want this Court to punish the Appellants for having the audacity to appeal a decision and then asking the Court to dismiss that appeal when it became legally and factually moot².

Intervenors and their Counsel do not have any fee agreement. The record reflects that their counsel undertook representation as part of a political crusade to stop establishments that serve alcohol from operating in the Five Points entertainment District of Columbia. The only evidence in the record is that Counsel has appeared and handled this matter for free. It is settled law that where a client is not paying attorney fees, he or she is ineligible for an attorney's fee award from this Court. Likewise, there is no evidence to support any factual claim other than the dismissal of the appeal was properly requested and granted by this Court, there is no basis for an award of fees and costs as a sanction.

Since the Court dismissed the appeal in this case, Intervenors have initiated a similar appeal in another case where the ALC granted a license and permit to another entity in Five Points. Their brief in that matter is similar to the one that they unnecessarily filed in this matter. Moreover, more than half of their claimed fees were, by their filing, incurred after they received

¹ Intervenors, Respondents are interchangeably referred to as "Intervenors" throughout this response.

² Of interest, in a similar case where ABL Licenses were issued to an establishment in the neighborhood, Intervenors have filed an appeal with this court raising similar issues (Case No. 2018-1870). This fact, coupled with Intervenors claims in their opposition to Appellants motion

notice of the Appellant's intent to dismiss the appeal, which stayed their obligation to perfect the record until the Court ruled on that motion. Reviewing the matter *in toto*, it seems that it is Intervenor, and not the Appellants as Intervenor allege who have acted in bad faith. For the reasons set forth herein, the Court should deny the motion and refuse to award any fees and costs either as sanctions or pursuant to Rule 222, SCACR.

RELEVANT FACTS

The Administrative Law Court entered a Final Order denying Appellants a beer and wine permit and liquor by the drink license on April 3, 2018. On April 16, 2018, Appellants moved for reconsideration. On May 11, 2018, the Administrative Law Court denied the Motion for Reconsideration. Appellants filed a notice of appeal of the Administrative Law Judges May 11, 2018, Order on June 7, 2018. Appellants filed their Initial Brief and designation of matter August 8, 2018, after receiving a thirty-day extension to do so from the Court. Intervenor sought an extension of time to file their initial brief and designation of matter on August 31, 2018; the Court issued its Order granting that request and extending the time for serving the initial brief until October 8, 2018. On the morning of October 5, 2018, Appellants filed a Voluntary Withdrawal of the appeal and a Motion to dismiss their Appeal. The motion, signed by counsel reported that the Appellant's business is closed; Appellant has all of its business assets under contract for sale; Appellant has no intention to re-open or pursue business as Five Points Roost, LLC and will be commencing the termination of that entity. Those facts made the only remedy available to Appellants, should the appeal be successful, unavailable to them and therefore mooted the Appeal. Intervenor filed an opposition to the Motion to Dismiss the

to dismiss the appeal (appeal was about issues of substantial public importance) supports the idea

Appeal and their Initial Brief and Designation of Matter on October 8, 2018. In opposition, Intervenor, Respondents argued, among other things “Mr. Gottshall and Ms. Lucas oppose dismissing this appeal because the matters before the Court are of considerable public importance . . .³” The Court granted the Motion to Dismiss on November 29, 2018. Intervenor, Respondents filed a Motion for Fees and Costs on January 2, 2019, The Court issued a deficiency Notice on January 10, 2019. Intervenor, Respondents filed an itemized statement of costs on January 18, 2019.

ARGUMENT

Intervenor, Respondents are not entitled to an award of Fees and Costs under Rule 222 or Rule 269, S.C.A.C.R.

I. The Appeal was not Frivolous.

Intervenor disingenuously argue that the appeal is frivolous when the record in this case reflects that the South Carolina Department of Revenue, the agency charged with licensing in this instance advised the Administrative Law Court that “the only issue from the department determines are the public protests” Thus, prior to the hearing, the Department determined that Appellant met the statutory requirements for the issuance of the requested licenses⁴. That finding as indicated on the record supports the validity of the Appeal. Intervenor convinced the Administrative Law Court to overrule the Department of Revenue and then have the temerity to assert here that an appeal from that decision is frivolous.

that the appeal was valid and meritorious prior to its becoming moot.

³ P.2, Intervenor, Respondents Return in Opposition to Motion to Dismiss Appeal

⁴ The Department would have issued the Permit and Licenses to Five Points Roost but for public protests. This is important because it demonstrates that the Agency charged with enforcing the law determined that the location and applicants were suitable in fulfilling its statutory

Additionally, Respondent's counsel himself argued that the Court should not dismiss the appeal claiming "Mr. Gottshall and Ms. Lucas oppose dismissing this appeal because the matters before the Court are of considerable public importance and a decision, in this case, will provide important prospective guidance concerning the issuance of liquor licenses to bars." (Return in Opposition to Motion to Dismiss Appeal, P.2.) Therefore, at least until Intervenors wanted to ask this Court for sanctions, they believed that the appeal had enough merit that they were encouraging the Court to hear the Appeal⁵.

Interestingly, Intervenors have subsequently appealed the issuance of a license to Rooftop Bar, LLC, a nearby establishment, and their brief, in that case, is materially and substantially similar to the brief filed in this case. The fact that they have elected to argue similar legal issues in their own appeal both evinces merit in the dismissed appeal and illuminates their motivation here as the exercise of an opportunity to continue attacking businesses that they wish to eliminate.

The fact that the Administrative Law Court's decision was immediately effective remained unstayed, and Appellant's business was closed as a result further demonstrates the lack of any evidence to support a claim that Appellant undertook this appeal to delay anything. If the Appellants had any intention of trying to reopen or obtain a license and permit to continue their business, paying rent on an empty building is not an effective business strategy for the future of their enterprise. Their only incentive would be to expedite the process, not to act to delay it.

obligations. That factual determination is a strong indication that the Appellants had a valid case and the appeal was not frivolous.

⁵ Presumably, Intervenors would not have encouraged the Court to hear an appeal that was "frivolous" and if they believed that it was interposed for delay or some improper purpose, would have applauded its ending.

Finally, Intervenor offers the Court no evidence that the appeal meets any of the requirements articulated in Rule 269, SCACR. Their arguments for sanctions are meritless.

II. The Appeal is Moot, and this Court correctly dismissed it as Moot.

The basis for dismissal is that the appeal is moot. Even allowing for Intervenor's surmise and conjecture, Intervenor cannot escape the facts. There is no evidence except that Appellant's are out of business, have contracted for the sale of the business assets to an unrelated third party and have no desire, intent or ability to reopen the business or continue pursuing the license and permit denied by the ALC. This factual scenario occurred during the pendency of the appeal and rendered the issues made by this appeal moot and academic. No actual controversy exists between the parties in this case. The South Carolina Supreme Court has held on numerous occasions that it will not pass on moot and academic questions or make an adjudication where there remains no actual controversy. *Fabians Uptown v. South Carolina Tax Commission*, 247 S.C. 164, 46 SE 2d 608. A case becomes moot when judgment if rendered, will have no practical legal effect upon existing controversy. This is true when some event occurs making it impossible for a reviewing Court to grant effectual relief.

Since Five Points Roost, LLC has no business to license, that is the situation here. *See e.g., Mathis v. South Carolina State Highway Dep't*, 260 S.C. 344, 195 S.E.2d 713 (S.C. 1973) where the Court dismissed the appeal of a driver's license suspension as moot where the license was reinstated before the scheduled appeal. *See also Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 630 S.C.E. 2d 474 (S.C. 2006) finding that once documents have been produced pursuant to the South Carolina Freedom of Information Act, no justiciable controversy exists and reaffirming that "A justiciable controversy exists when there is a real and substantial controversy

which is appropriate for judicial determination, as distinguished from a dispute that is contingent, hypothetical, or abstract. A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event makes any grant of effectual relief impossible for the reviewing court. That is the case here.

III. Intervenor did not Incur the Fees Claimed.

Because respondents have no written fee agreement with counsel, have submitted no written fee agreement in this case, nor any evidence that they have actually incurred any fees in this case, no attorney's fees should be awarded under Rule 220 or Rule 269, S.C.A.C.R.); *See generally S.C. Dep't of Soc. Servs. v. Mary C.*, 396 S.C. 15, 720 S.E.2d 503 (Ct. App. 2011); *Williamson v. Middleton*, 383 S.C. 490, 495-96, 681 S.E.2d 867, 870-71 (2009) (finding attorney could not recover attorney's fees when attorney presented no evidence that the client actually incurred fees and when no fee agreement existed between the client and attorney). Intervenor's counsel represented during the hearing that he was not charging a fee or being paid for handling this matter. He made similar representations in the media. Counsel gives the Court no evidence that his clients are obligated to pay. Instead, it appears that he seeks a windfall in an effort to punish appellants when Counsel unnecessarily incurred the vast majority of the claimed fees. Moreover, the affidavit submitted with the Petition indicates that the clients are not obligated to pay any fees. Rather than stating that he has or will bill clients, affiant says "I believe an hourly rate of \$450.00 for a total fee of \$17,370 *would fairly compensate the Firm* for the time I have spent on this appeal."⁶ [emphasis added]

⁶ Affidavit of Christopher P. Kenney, ¶12. Exhibit A to Motion for Fees and Costs. Also, it should be of note, Mr. Kenney finds that "fair" rate to be in excess of any rate ever awarded for his work and unrelated to any fee agreement with his firm's clients.

IV. Intervenor’s Counsel is a Pro-se Party and not Legally Eligible to Recover Fees.

While Respondent’s counsel “represents” fellow Attorneys Gottshall and Lucas – both who also practice law in Columbia, he is, by his admission, a real party in interest and a de-facto pro-se litigant. While not identifying as a party, he certainly has made the cause his own for his personal benefit and political gain. Our Court has repeatedly determined that in such cases, a party is not liable to or subject to attorney’s fees.

Mr. Harpootlian has stated, “We are going to shut down every bar in Five Points without your help, apparently because the city does not have the will to enforce its own laws.”⁷ In another interview, “‘I’m trying to clean up Five Points,’ said Dick Harpootlian, a Columbia attorney who is leading a crusade by neighbors living around the Five Points district to reverse the spread of late-night college bars. ‘If this causes ripples across the state, that’s not my problem.’”⁸

This effort to collect costs and fees is merely another battle in that crusade, this one where Intervenors and their counsel, all wealthy local attorneys, are acting to try and force costs onto Five Points Roost – which they have already put out of business.

Because Mr. Harpootlian represents other attorneys and he is working on behalf of both them and himself, his interests are identical to those of the Intervenors, and as a matter of fact

⁷ See Dick’s Last Resort: Harpootlian is Hell-Bent on Changing Five Points, *Free Times*, May 23, 2018. Available at https://www.free-times.com/news/cover-story/dick-s-last-resort-harpootlian-is-hell-bent-on-changing/article_edf8e5f4-5e28-11e8-b64f-4732cfc8d7bb.html

⁸ See Is a microwave a stove? A hot dog a meal? The answers could affect hundreds of SC bars. *The State*, April 27, 2018. Available at <https://www.thestate.com/news/local/article209970389.html>.

and law, he is a *pro se* party. In *Calhoun v. Calhoun*, 339 S.C. 96, 529 S.E.2d 14 (2000), the South Carolina Supreme Court found that a *pro se* litigant, whether an attorney or layperson, does not become “liable for or subject to fees charged by an attorney.” In *Hopkins v. Hopkins*, 343 S.C. 301; 540 S.E.2d 454 (2000), the Court expanded its rule to apply to cases where an attorney was representing a family member (or perhaps as here, a group of friends and allies in a neighborhood cause). In *Hopkins*, a father in a child support case was being represented by his second wife who was an attorney. The father argued that he was entitled to recover attorney’s fees for his attorney/wife’s service. The Supreme Court disagreed, holding:

Similarly, here, we find no evidence Father actually became “liable for or subject to” attorneys’ fees for his attorney/wife’s service. There is no contract or fee agreement in the record,⁹ nor is there any indication or testimony that Father’s wife/attorney has attempted or intends to collect the fees from Father. Accordingly, Father did not prove that he became liable for the fees, such that the family court properly denied Father’s request. Cf. *Lisa v. Strom*, 183 Ariz. 415, 904 P.2d 1239, 1242 (Ariz. 1995) (finding award of attorneys’ fees has an “indispensable requirement . . . [there] be a genuine financial obligation on the part of the litigants to pay such fees,” and that wife represented by her attorney/husband had no such genuine obligation).

Hopkins, at 457. The general rule against awarding fees to attorney-litigants is based upon a perception that such awards are windfalls to persons who have spent no money and incurred no debt for legal representation. See, e.g., *Lisa v. Strom*, 904 P.2d 1239 (Ariz. 1995) (cited by the S.C. Supreme Court in *Hopkins*). Accordingly, because Respondent’s Counsel was acting *pro se*, and never expected or received payment from the Intervenors an award of attorney’s fees as a sanction or under Rule 222, SCACR is improper in this instance.

⁹ As was previously discussed, Appellant has no fee agreement in place for the current action.

V. Intervenors' claims are improper because they are mainly for time that they did not need to expend

Intervenors' Counsel's affidavit reflects that 24.8 of the 38.6 hours that it claims occurred on the date that notice of the requested withdrawal was served or after¹⁰. The Court previously granted Intervenors an extension to file their brief with the consent of the Appellants, yet even with that, Mr. Kenney's affidavit reflects that they had spent less than fourteen hours on the brief before being notified that Appellants were seeking to dismiss the Appeal.

It is disingenuous for them to attempt to claim foul and seek recompense for almost forty hours of work on their brief after notice of the Motion to dismiss the appeal, where the motion stayed the deadline for filing¹¹. Rule 240(b) SCACR provides *inter alia* "A motion to dismiss an appeal or a motion to relieve counsel shall, however, automatically stay the time limits for perfecting the appeal until the motion is decided." Because of this, the time and effort claimed by the Intervenors for those 24.8 hours was not necessary. Their attempt to obtain compensation for that unnecessary time further evinces the reason that the Court should deny their requests under Rules 269 and 222, SCACR.

VI. Intervenors claimed time was also applied to a subsequent brief.

Intervenors filed an appeal in *Rooftop Bar, LLC d/b/a Rooftop Bar and Lounge, Respondent v. South Carolina Department of Revenue, Respondent and Thomas R. Gottshall and April C. Lucas, Intervenors, Appellants*, Case No. 2018-001870. An analysis of that brief reveals

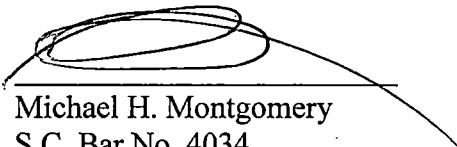
¹⁰ See Paragraph 7, Affidavit of Christopher Kenney filed as Exhibit "A" supporting the Intervenor's Motion. Mr. Kenney reports spending the following time on the brief: October 5 – 5.0 hours, October 6 8.0 hours, October 7, 7.3 hours and October 8 4.5 hours. Appellants filed the first notice before 9:30 AM on the morning of October 5.

significant duplication of argument and verbiage with the brief filed in this matter. The issues, in that case, are likewise similar. Intervenors are asking the Court to Order fees and sanctions for work that was used in another matter. The Court should discourage this by denying their motion here.

CONCLUSION

Intervenors are not entitled to an award of Sanctions in the form of Fees and Costs under Rule 269, SCACR. Because Intervenors' Counsel is unpaid and has no fee agreement, the Court should not tax costs or fees under Rule 222, SCACR. There is no basis for any extraordinary award in this case warranting the allowance of additional costs.

Respectfully submitted,



Michael H. Montgomery
S.C. Bar No. 4034
MONTGOMERY WILLARD, LLC
Post Office Box 11886
Columbia, South Carolina 29211
(803) 779-3500
(803) 799-2755 (fax)
mhm@montgomerywillard.com

Attorneys for Appellant

Columbia, South Carolina
January 28, 2019

¹¹ Intervenors also appear to include the time that they spent opposing the Motion to Dismiss in their claim.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Deborah Brooks Durden, Administrative Law Court Judge

Case No. 2018-001064

RECEIVED
JAN 28 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.

PROOF OF SERVICE

I certify that I have served all parties with the Reply to Intervenor's, Respondents Motion for Fees and Costs, by email and depositing a copy of it in the United States Mail, postage prepaid, on January 28, 2019, addressed to their attorneys of record,

Richard A. Harpootlian
1410 Laurel St.
Post Office Box 1090
Columbia, South Carolina 29202
rahaharpootlianlaw.com

Elizabeth W. Shields, Esquire
South Carolina Department of Revenue
300 A Outlet Pointe Blvd.
Columbia, South Carolina 29210
(Signature page to follow)



Michael H. Montgomery
Montgomery Willard, LLC
Post Office Box 11886
Columbia, South Carolina 29211
(803) 779-3500
(803) 799-2755 (fax)
mhm@montgomerywillard.com

January 28, 2019

Attorneys for Appellant

MONTGOMERY WILLARD, LLC
ATTORNEYS AND COUNSELORS AT LAW
1002 CALHOUN STREET
COLUMBIA, SOUTH CAROLINA 29201

(803) 779-3500

MICHAEL H. MONTGOMERY
MHM@MONTGOMERYWILLARD.COM
DIRECT DIAL No. (803) 753-6484

POST OFFICE BOX 11886
COLUMBIA, SOUTH CAROLINA 29211-1886

CERTIFIED CIVIL MEDIATOR

FACSIMILE (803) 799-2755
WORLD WIDE WEB [HTTP://WWW.MONTGOMERYWILLARD.COM](http://www.MONTGOMERYWILLARD.COM)

January 28, 2019

VIA HAND DELIVERY

South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RECEIVED
JAN 28 2019
SC Court of Appeals

**Re: *Five Points Roost, LLC dba Five Points Roost v. South Carolina
Department of Revenue
Case Number: 2018-001064
Our File number: 2176157***

Dear Ms. Kitchings:

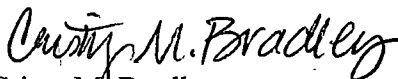
Please find attached the original and four copies of the Reply to Interventors, Respondents Motion for Fees and Costs to be filed. Please file the original and return the four clocked copies to the delivery person.

By copy of this letter, I am serving all counsel of record with a copy of the same. If you have any questions or concerns, please do not hesitate to contact our office.

With kind regards, I am

Very Truly Yours,

Montgomery Willard, LLC


Cristy M. Bradley
Paralegal for
Michael H. Montgomery

Enclosures

cc:

Elisabeth Shields, Esquire
Richard A. Harpootlian, Esquire