STATE OF SOUTH CAROLINA
IN THE
SUPREME COURT

Appeal from the Court of Common Pleas
For Charleston County
Honorable J. C. Nicholson, Jr., Circuit Judge
Civil Action Nos.: 2010-CP-10-9096
And 2011-CP-10-8840
Appellate Case Tracking No. 2017-00640

Frank Gordon, Jr., Individually and as Trustee of the Dorothy S. Gordon (Deceased) Trust,

Respondent.

v.

Donald W. Lancaster,

Petitioner.

Respondent's Return to Petitioner's Motion for Assessment of Appellant Costs, Pursuant to Rule 242(j), SCACR

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OPPOSITION TO COSTS

Respondent Frank Gordon, Jr., Individually and as Trustee of the Dorothy S. Gordon (Deceased) Trust ("Gordon") files this Return to Petitioner Donald Lancaster's ("Appellant") Motion for Assessment of Appellant Costs, Pursuant to Rule 242(j), South Carolina Appellate Court Rules (SCACR) filed on March 4, 2019.

The case *sub judice* has been long and highly contentious. In Gordon's previous case against Drews, which gave rise to this action, Gordon won both his trial and appeal at the Court of Appeals and this Court denied certiorari in the matter. Gordon was awarded appellate fees and costs in that action, which were never paid. In the instant action, Gordon won both his trial and appeal at the Court of Appeals. Upon Appellant's petition for a writ of certiorari, this Court granted review of only a single, limited issue; since the writ was denied as to the issue of Appellant's fraud against Gordon, the Court of Appeals' finding of fraud remains uncontradicted. Ultimately, Gordon's position was partially vindicated by one dissenting vote against the Opinion issued by the Supreme Court.

Given this history and the merits of his case, it can and should be found Gordon had a good-faith basis for his position. Rule 242(j)(1) of the South Carolina Appellate Court Rules gives the Court discretion in awarding costs. Accordingly, Gordon respectfully requests the Court use its discretion to deny Appellant's Motion for Assessment of Appellate Costs and order each party to bear his own costs for this appeal. In the alternative, should the Court entertain any award of costs and fees to Appellant, it should not exceed $2,839.34, to reflect the proper calculations under the Rules and ensure a just result.

A. Appellant's Motion Should Be Denied in Its Entirety Because It Would Be Manifestly Unjust for Appellant to Benefit from His Fraud.

Appellant should not recover any costs here. The Court granted certiorari on a single issue: whether the Drews judgment retained "active energy" and, thus, was enforceable. *Gordon v. Lancaster*, No. 2017-000640, 2018 WL 6072352, at *2 (S.C. Nov. 21, 2018) ("While Lancaster sought certiorari on multiple issues, this Court granted certiorari solely on whether the judgment retained "active energy" and thus, was enforceable."); s*ee also* Order dated December 13, 2017 ("Based on the vote of the Court, the petition for a writ of certiorari to review the Court of Appeals' decision in *Gordon v. Lancaster*, 419 S.C. 48, 795 S.E.2d 857 (Ct. App. 2016), is granted as to Question A and denied as to the remaining questions."). Appellant's writ of certiorari sought to challenge several of the Court of Appeals' findings, including the finding that Lancaster and his uncle engaged in multiple fraudulent conveyances, committing "actual moral fraud, [which] involves a conscious intent to defeat, delay, or hinder [one's] creditors in the collection of their debts". But Appellant's writ was denied as to this and all issues aside from the active energy question. *Gordon v. Lancaster*, 419 S.C. 48, 62, 795 S.E.2d 857, 864 (Ct. App. 2016). As a result, the Court of Appeals' finding of fraud is uncontradicted. Appellant received and retained the Drews' funds that rightfully belonged to Gordon as a judgment creditor. Appellant is guilty of committing fraud against Gordon. *See Godfrey v. Heller*, 311 S.C. 516, 520–21, 429 S.E.2d 859, 862 (Ct.App.1993) (stating an unappealed ruling is the law of the case).

It would be a tortured and unjust reading of both Rules 222 and 242, SCACR to allow Appellant to reap the benefit of his fraud by forcing Gordon to foot the bill. *Fryer v. Bryan*, 11 S.C. Eq. 56, 60 (S.C. App. L. & Eq. 1834) (finding those who lend their name to fraud ought not to derive any benefit from it); *PCS Nitrogen Inc. v. Ross Dev. Corp. Rivers*, 126 F. Supp. 3d 611, 645 (D.S.C. 2015) (holding a fraudulent conveyance action is an equitable action and an equitable

remedy may be fashioned to give effect to that right as courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible); *see also Singleton v. Singleton*, 60 S.C. 231, 38 S.E. 468 (1901) ("Fraud is a word of serious import in the law, but, where the word 'actual' is placed in conjunction with it, it is far more serious."). To ensure a just result, Gordon respectfully requests Appellant's Motion be denied given that Appellant committed actual fraud.[1]

B. Even if an Award Is Considered, Appellant's Fee and Expense Request Should Be Reduced.

There are five reasons why any amount considered as an award to Appellant should be reduced: (1) Appellant did not prevail before the Court of Appeals, therefore, he is not entitled to recover costs he incurred for that litigation; (2) Appellant's itemization includes costs he did not actually incur; (3) Appellant disregarded the Order of the Supreme Court that sets the maximum allowable amount of attorney's fees recoverable; (4) fees were awarded to Gordon in the Drews action, but were never paid; and (5) Appellant inflated his costs by including extraneous material in the Record on Appeal. In consideration of these factors, and, as discussed below, Appellant's costs and fees should not exceed $2,839.34.

1. Appellant's Costs at the Court of Appeals Should Be Deducted From His Request.

[1] Moreover, both Rule 222(a) and Rule 242(a), SCACR, provide: "When an appeal is affirmed in part or reversed in part or is vacated, costs shall be allowed only as ordered by the appellate court." Here, certiorari was only granted in part. It follows that the reversal itself was only in part giving this Court discretion to order costs as it sees just. Given the mixed result in this appeal, Gordon respectfully requests this Court equitably refrain from awarding appeal costs in favor of or against any party and to simply leave the parties to bear only their own respective costs. *See, e.g., Priestley v. Astrue*, 651 F.3d 410, 430 (4th Cir. 2011) (actions grounded in equity explicitly direct a court to apply traditional equitable principles in ruling upon an application for counsel fees by a prevailing party).

Gordon prevailed before the Court of Appeals; that Court affirmed the trial court. *Gordon v. Lancaster*, 419 S.C. 48, 63, 795 S.E.2d 857, 865 (Ct. App. 2016). Rule 222, SCACR is titled "*Costs on Appeal*," and deals with matters before the Court of Appeals. It provides:

> ***(a) To Whom Allowed.*** **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.

Gordon should not have to pay costs related to the Court of Appeals action in which he was victorious, and Appellant should not recover costs associated with that appeal. Each party should bear its own costs for this appeal under Rule 222, SCACR. At a minimum, Appellant's request for these costs should be removed, reducing Appellant's total by $6,814.40.

2. Appellant's Itemization Includes Costs He Did Not Actually Incur.

Appellant cannot charge Gordon for costs he did not actually incur. Rule 267(c) of the Appellate Court Rules states, "If the Record on Appeal or Appendix exceeds 100 pages, copy must be typed or reproduced on both sides of the paper." While Appellant submitted his Record on Appeal and Appendix double-sided, he charged Gordon as though each page was a single-sided sheet of paper. *See* Rule 242(j)(2) (stating that a party may only recover costs "to the extent the party *actually incurred* these costs.") (emphasis added). The total combined cost of the line items for the Record on Appeal and Appendix are $6,540.75 according to Appellant. Because Rule 267(c), SCACR required Appellant to print double-sided pages – and he did so – Appellant only incurred costs for double-sided pages. Pursuant to Rule 242(j)(2), Appellant cannot charge Gordon for a single-sided page cost he did not incur. Thus, Gordon requests the combined $6,540.75 cost

of the line items for the Record on Appeal and Appendix be reduced by half for a maximum of $3,270.37 for these line items.[2]

3. Appellant's Attorney's Fee Request Exceeds the Maximum Allowable by Order of the Supreme Court, Therefore, It Must Be Reduced.

Appellant may recover no more than $1,000 as to the Court of Appeals ruling because that ruling was issued before July 17, 2018. The appropriate reduction in Appellant's fee request is $1,500.

The South Carolina Supreme Court entered an order increasing the maximum amount of attorney's fees recoverable from $1,000 to $2,500 for decisions filed on or after the Order's date, January 17, 2018:

> The attorney's fee **under Rule 222(b)** of the South Carolina Appellate Court Rules is hereby increased to $2,500. This increased fee shall apply to any appeal where a decision is filed **on or after the date of this order which gives rise to the right to seek costs under Rule 222.**
>
> The attorney's fee **under Rule 242(j)(2)** of the South Carolina Appellate Court Rules is increased to $2,500. This fee shall apply to any case where a decision is filed **on or after the date of this order which gives rise to the right to seek costs under Rule 242(j).**

Re: Attorney's Fees Under Rules 222 and 242 of the South Carolina Appellate Court Rules (Jan. 17, 2018).[3] The decision of the Court of Appeals, affirming the trial court in favor of Gordon was filed on November 2, 2016, more than a year before the Supreme Court's Order increasing the maximum allowable amount above $1,000. *See* Rule 222(a) ("[C]osts shall be taxed against the appellant when the appeal is dismissed or **judgment on appeal is affirmed**.") (emphasis added). As a result, Appellant should only be permitted to recover, at most, $1,000 in attorney's fees under

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[2] Should the Court deny Appellant costs under Rule 222, SCACR as requested by Gordon, these line items would need to be reduced by $1,736.55, rather than $3,270.37, to properly account for copying costs of the Appendix only. *See* Itemization Chart at Section page 8, *infra.*

[3] The two rules concern separate circumstances. "*Costs on Appeal*" are addressed under Rule 222 while "*Costs When a Writ of Certiorari Has Been Granted*" are addressed under Rule 242(j).

Rule 222(b), SCACR. And, Appellant's maximum recovery for attorney's fees under both rules, contrary to Appellant's request, may not exceed $3,500.[4]

4. Appellant's Costs Should Be Reduced By the Unpaid Amount Awarded to Gordon in the Drews Action.

In September 2005, this Court denied certiorari as to the $108,482.62 judgment for Gordon in the Drews action, which included attorney's fees. *See Gordon v. Drews*, 358 S.C. 598, 595 S.E.2d 864 (Ct. App. 2004). On September 28, 2005, Gordon was awarded $1,467.21 in appellate court costs and expenses. R. p. 39. Gordon's appellate court costs and expenses were never paid. Any award considered for the Appellant here should be reduced by $1,467.21 given that Gordon suffered actual fraud and the Court of Appeals' decision to award Gordon costs and expenses remains an uncontradicted determination.

5. Appellant's Request for the Extraneous Pages in the Record on Appeal Must Be Deducted From His Costs.

Appellants added a Supplement to the Record on Appeal. *See* Rule 242(j)(2)(c), SCACR; Rule 222(c), SCACR. Several of Appellant's designations in the Record on Appeal and Appendix were duplicative and had no relevancy to the issues decided on this appeal, including this Supplement, especially considering this Court limited its review to only one issue out of the five submitted by Appellant. *See* Rule 242 (j)(3)-(4), SCACR; *see also Garrison v. Coca-Cola Bottling Co.*, 174 S. C. 396, 177 S. E. 656 (1934) ("Only necessary and pertinent testimony should be printed. If more than the necessary testimony is printed, the court may tax the cost of all testimony

[4] Should the Court grant Gordon's request under Section B.1, *supra*, the Court may disregard this requested deduction as moot. *See* Itemization Chart at page 8, *infra.*

unnecessarily printed against the offending party.") Consequently, Gordon requests a reduction of $357.00 for the 70-page Supplement included in the Record on Appeal and Appendix.[5]

In sum, the errors detailed above require reductions to any award the Court may consider as follows:

Total requested by Appellant:	**$13,036.00**
Less Appellant's costs and fees before the Court of Appeals (Section B.1):	($6,814.40)
Less Appellant's Actual Cost for Duplex Printing Appendix (Section B.2):	($1,736.55)
Less Gordon's Unpaid Appellate Fees from Drews action (Section B.4):	($1,467.21)
Less Appellant's 70-page Supplement (Section B.5):	($178.50)
Total:	**$2,839.34**

Any award considered by the Court should not exceed $2,839.34.

CONCLUSION

For the foregoing reasons, the Court should decline to award any costs or fees to Appellants, as Appellants were found to have committed actual fraud, and Gordon prevailed at five of the six tribunals in this litigation. If the Court entertains any fee or cost award, the total sought by Appellant should be reduced by any amount attributable to fees or costs incurred at the Court of Appeals, since Gordon, not Appellant, prevailed; should be reduced by the amount of fees awarded to Gordon in the Drews action that remain unpaid; should be reduced to an amount permissible under the South Carolina Appellate Court Rules; and should be reduced to correct Appellant's calculation errors, and should not exceed $2,839.34.

[5] Should the Court deny costs under Rule 222, SCACR as requested in Section B.1, *supra*, this reduction should be $178.50, as opposed to $357.00, for costs associated with the Appendix only. *See* Itemization Chart at page 8, *infra*.

Respectfully Submitted,

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March 15, 2019
Mount Pleasant, SC

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Proof of Service for Respondent's Return to Petitioner's Motion for Assessment of Appellant Costs, Pursuant to Rule 242(j), SCACR

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I, Justin O'Toole Lucey, Esquire, hereby certify that on March 15, 2019 I served a copy of the ***Respondent's Return to Petitioner's Motion for Assessment of Appellant Costs, Pursuant to Rule 242(j), SCACR*** submitted by the Respondent, Frank Gordon, Jr., Individually and as Trustee of the Dorothy S. Gordon (Deceased) Trust, on counsel for Petitioner Donald W. Lancaster, via the United States Mail, postage pre-paid, and addressed as follows:

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Mount Pleasant, SC
March 15, 2019