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MAR 19 2019

SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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MAR 18 2019

S.C. SUPREME COURT

APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas  
Edgar W. Dickson, Circuit Judge

Court of Common Pleas Case No. 2015-CP-08-00547  
Appellate Case No. 2018-002002

IN RE: TRUST EIP CREATED UNDER THE LAST WILL AND TESTAMENT OF  
EUNICE I. PAGE DATED OCTOBER 14, 1992,

RICHARD S. HENSON AND VANN KENNETH HENSON,  
Respondents,

v.

ALBERT T. HENSON, JR. AND JULIAN REID HENSON,  
Respondents in the Court below,

Of whom ALBERT T. HENSON, JR. is the Petitioner.

**RETURN TO MOTION FOR COSTS AND FEES**

Petitioner Albert T. Henson, Jr. ("Petitioner") respectfully submits the following return in opposition to the Motion for Costs and Fees on Appeal filed by Respondents Richard S. Henson and Vann K. Henson ("Respondents"). For the reasons expressed below, Respondents' motion must be denied in its entirety and/or reduced in amount:

As a threshold matter, Respondents have filed their motion in the wrong court. Respondents' motion states they seek an award of fees and costs pursuant to SCACR 222 and 242. Statutes or rules allowing for the recovery of costs or attorneys' fees are in derogation of the common law and must be strictly construed. Steinert v. Lanter, 284 S.C. 65, 66, 325 S.E.2d 532, 533 (1985). Rule

242(j) applies to the taxation of costs when a Petition for a Writ of Certiorari has been granted. See SCACR 242(j) (entitled “Costs When a Writ of Certiorari Has Been Granted”). When a Petition for a Writ of Certiorari has been granted and this Court has decided the appeal on the merits, then Rule 242(j)(2) provides that “[t]he party entitled to recover costs may recover all those costs specified in Rule 222(b), to include the attorney’s fee provided by that rule.” Id. 242(j)(2). In determining to whom costs and fees may be awarded, this Court must consider whether its decision has the effect of affirming, reversing, affirming or reversing in part, or vacating the judgment of the lower court or tribunal which was reviewed by the Court of Appeals. Id. 242(j)(1).

On the other hand, the Court of Appeals must assess whether costs and fees should be taxed on appeal when a Petition for a Writ of Certiorari has been denied. See SCACR 222(e) (“If a petition for a writ of certiorari is sought under Rule 242, the Court of Appeals shall tax costs only in those cases in which the petition for a writ of certiorari is denied. In all cases in which a writ of certiorari is granted, costs shall be awarded in the manner provided by Rule 242(j).”).

As Respondents’ motion acknowledges, this Court denied Appellant’s Petition for a Writ of Certiorari by Order issued on February 20, 2019. Thus, this Court never accepted jurisdiction over this case and never made any determination as to whether the Circuit Court’s Order that was reviewed by the Court of Appeals should be affirmed, reversed, affirmed or reversed in part, or vacated.<sup>1</sup> Nothing in Rule 242 authorizes the Court to award fees or costs when it denies a Petition for a Writ of Certiorari; rather, such a determination must be made by the Court of Appeals.

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<sup>1</sup> This is not a case in which this Court entertained any matters in its original jurisdiction or granted any extraordinary writs pursuant to SCACR 245, thus costs may not be taxed under S.C. CODE ANN. § 14-3-420 (Law. Co-op. 1976).

This is also evidenced by the fact that Rule 222(d) mandates in pertinent part that “[a] party desiring costs to be taxed shall, within fifteen (15) days of the issuance of the remittitur, serve and file a motion requesting that costs be assessed under this Rule,” see SCACR 222(d), and Rule 242(j)(5) further states that “[c]osts under this Rule shall be taxed by the Supreme Court” and “[i]f costs are taxed, they shall become part of the judgment of the appellate court and shall be added to the remittitur.” See SCACR 222(b). In this case, the remittitur was issued by the Court of Appeals on February 26, 2019, not by this Court (because this Court never accepted jurisdiction over the case). See “Exhibit A” attached hereto. Simply stated, Respondents should have filed their motion in the Court of Appeals, not in this Court.

For these reasons alone, the Court should deny Respondents’ motion in its entirety. Furthermore, even assuming the Court disregards the provisions of Rules 222 and 242 and nevertheless entertains Respondents’ motion, the motion should still be denied or reduced on the grounds that it improperly seeks to recover double the amount of attorneys’ fees permissible under the appellate rules and it also seeks particular costs that are not allowed under the rules.

Respondents’ motion asks for a total of \$5,000.00 in attorneys’ fees—\$2,500.00 under SCACR 222(b) and an additional \$2,500.00 under SCACR 242(j)(2). Rule 222(b) provides that “the party entitled to recover costs under this rule . . . shall be entitled to recover an attorney’s fee in an amount which shall be set by order of the Supreme Court.” See SCACR 222(b) (emphasis added). By Order dated January 17, 2018, this Court increased the amount of the attorneys’ fees authorized under Rule 222(b) from \$1,000.00 to \$2,500.00. See “Exhibit B” attached. The Order states “[t]his 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.” Id. Therefore, if a party is entitled to

recover costs under Rule 222, the rule now states the party usually will also recover an attorney's fee of \$2,500.00 in cases involving a decision of the appellate court filed on or after January 17, 2018.<sup>2</sup>

Rule 242(j)(2) also states in its entirety as follows:

The party entitled to recover costs may recover all those costs specified in Rule 222(b), to include the attorney's fee provided by that rule. Additionally, the party may, to the extent the party actually incurred these costs, recover: (1) the filing fee paid under Rule 242(c); (2) the cost of printing the Appendix under Rule 242(e) and (i); and (3) the cost of printing the party's brief(s) under Rule 242(i). The party may also recover an additional attorney's fee in an amount which shall be set by order of the Supreme Court.<sup>[2]</sup> The allowance of additional costs will generally not be allowed except in the most extraordinary circumstances.

See SCACR 242(j)(2) (emphasis added). This Court's January 17, 2018 Order also increased the amount of the attorneys' fees authorized under Rule 242(j)(2) from \$1,000.00 to \$2,500.00 with such increase to "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)." See "Exhibit B" attached.

As discussed above, Rule 242(j) only allows for "an additional attorney's fee" up to \$2,500.00 when a Petition for a Writ of Certiorari has been granted. See JEAN H. TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 397 (3<sup>rd</sup> ed. 2016) ("Thus, an attorney may recover two separate attorneys' fees . . . *when a writ of certiorari has been granted* regarding a decision of the Court of Appeals." (emphasis added)). This Court did not render a decision which gives rise to the right to seek costs under Rule 242(j), thus the attorneys' fee referenced in this Court's January 17,

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<sup>2</sup> Consequently, even though the recoverable attorneys' fee was limited to \$1,000.00 under the rule in place when Petitioner filed his appeal in the Court of Appeals on January 17, 2017, by the time the Court of Appeals issued its decision on June 13, 2018 affirming the Circuit Court's Order, the amount had been increased to \$2,500.00.

2018 Order is inapplicable.

Rule 242(j) does not allow for an additional attorney's fees in any amount when a Petition for a Writ of Certiorari has been denied. Because the Petitioner's Petition for a Writ of Certiorari was denied in this case, even assuming for argument's sake that Respondents have filed their motion in the correct court, Respondents still are improperly seeking to double-bill or recover twice the permissible amount of attorneys' fees allowed by the rules.<sup>3</sup>

Respondents' motion also seeks particular costs that are not allowed under the appellate rules. For example, for the proceedings in this Court, Respondents' itemized statement of costs shows they are seeking to recover \$18.19 for the costs of printing or copying the Appendix filed in this Court. However, Rule 242(j)(2) only permits "the cost of printing the Appendix under Rule 242(e) and (i)." See SCACR 242(j)(2). Respondents did not prepare or file the Appendix in this Court under Rule 242(e) or (i). Instead, Petitioner was the "petitioner" in this Court and he alone incurred the expense of preparing, printing, and copying the Appendix. Respondents apparently are seeking to recover their internal law firm charges for photocopying the Appendix, but such costs are

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<sup>3</sup> Even assuming *arguendo* that Rule 242(j) is applicable to Respondents' motion, unlike Rule 222(b), which uses "shall," Rule 242(j)(2) states a party "may" recover an additional attorneys' fee. This difference in terminology suggests that an additional attorneys' fee under Rule 242(j)(2) is not automatic in every case, but is discretionary with the Court. The word "shall" is mandatory, while "may" is permissive in nature. Williams v. Intier Automotive Interiors of America, Inc., 2011 WL 6965807, \*11 (D.S.C. 2011); Conner v. City of Forest Acres, 348 S.C. 454, 464, 560 S.E.2d 606, 611 & n.4 (2002); Youngblood v. QualServe Corp., 2005 WL 7083483, \*3 n.3 (S.C. Ct. App. 2005); Horton v. Darby Elec. Co., 360 S.C. 58, 599 S.E.2d 456, 461 n.7 (2004). Even assuming the Court has discretion in this case, Respondents motion articulates no reason why the Court should exercise discretion in this case and award an additional attorneys' fee under Rule 242(j)(2). Appellant respectfully submits such discretion should not be exercised given the fact this Court did not even accept jurisdiction over the case, no briefs were filed pursuant to SCACR 242(i), no oral argument was held, and the Petition for a Writ of Certiorari was denied.

not recoverable under the rules.<sup>4</sup>

As another example, Respondents seek \$22.61 for the costs of printing or copying their brief filed in this Court. However, Rule 242(j)(2) only permits “the cost of printing the party’s brief(s) under Rule 242(i).” Because this Court denied Petitioner’s Petition for a Writ of Certiorari, the parties never reached the stage of preparing or filing any briefs under Rule 242(i). Respondents again are apparently seeking to recover their internal law firm charges for photocopying their response to Petitioner’s Petition for a Writ of Certiorari, which are not recoverable under the rules.

In addition to improper costs under Rule 242(j)(2), the Respondents are also improperly seeking particular costs not allowed under Rule 222(b) for the prior proceedings in the Court of Appeals. For example, Respondents seek \$63.24 for the costs of printing or copying the Record on Appeal that was filed in the Court of Appeals. However, Rule 222(b) only permits “the cost of printing the Record on Appeal under Rule 209.” See SCACR 222(b). Respondents did not prepare or file the Record on Appeal in the Court of Appeals under Rules 209 or 210. Instead, as the

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<sup>4</sup> Notably, Respondents’ motion does not attach copies of any invoices, receipts, or other records memorializing payments to any printing service, court reporter, or other vendor for any of the costs they are seeking to recover in their motion. As such, it is impossible to ascertain with certainty whether the costs reflected in the motion are the internal charges of their law firm (i.e., overhead) or whether the charges actually reflect payments made to outside vendors. If the former, these expenses ordinarily are not recoverable as costs. See Johnson v. Thomas, 794 N.E.2d 919, 934 (Ill. Ct. App. 2003) (“Generally overhead office expenses, namely expenses that an attorney regularly incurs regardless of specific litigation, including telephone charges, in-house delivery charges, in-house photocopying, check processing, newspaper subscriptions, and in-house paralegal and secretarial assistance, are not recoverable as costs of litigation.”); Landmark Winter Park, LLC v. Colman, 24 So. 3d 787, 789 (Fla. Dist. Ct. App. 2009) (“We conclude it was improper for the trial court to tax the following overhead costs to the Seller: postage, online research, facsimile charges, courier services, photocopies, scanning documents and trial supplies.”); Wilson v. Glancy, 913 P.2d 286, 292 (Okla. 1996) (holding that expenses of photocopies, delivery service, telephone calls, Westlaw research, and postage are part of the overhead and are not recoverable as costs).

appellant in the Court of Appeals, Petitioner alone incurred the expense of preparing, printing, and copying the Record on Appeal. It again appears Respondents are seeking to recover their internal law firm charges for photocopying the Record on Appeal, but such costs are not recoverable under the rules.

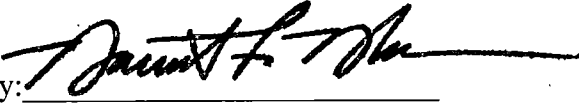
Additionally, Respondents seek another \$32.25 for the costs of the court reporter's transcript. However, there is no evidence that Respondents ordered any court reporter's transcript for this appeal pursuant to Rule 207(a). Because Petitioner was the appellant in the Court of Appeals, he ordered and filed the court reporter's transcript from the lower court for inclusion in the Record on Appeal. See "Exhibit C" attached. It appears that Respondents may be attempting to recover their costs for ordering their own copy of the transcript, even though it wasn't necessary to do so because Petitioner had ordered it pursuant to the mandate in SCACR 207(a). If so, such expenses are not recoverable. Martin v. Paradise Cove Marina, Inc., 348 S.C. 379, 384, 559 S.E.2d 348, 351 (Ct. App. 2001) ("[R]ecovery [of costs under Rule 222] is clearly limited to costs *incurred in pursuing the appeal . . .*").

Finally, Respondents seek \$94.48 for the costs of printing their final brief in the Court of Appeals. Because Respondents' motion fails to attach any invoices or receipt for any payment to any printing service to copy their final brief, Petitioner is unable to determine whether the costs reflected on this line item are the internal charges of their law firm or whether the charges actually reflect payments made to an outside vendor.

For the reasons stated, the Appellant respectfully requests the Court to deny Respondents' Motion for Costs and Fees on Appeal.

Respectfully submitted,

ROSEN HAGOOD, LLC

By: 

Daniel F. Blanchard, III (SC Bar 65342)

151 Meeting Street, Suite 400

Post Office Box 893

Charleston, SC 29402

(843) 577-6726

ATTORNEYS FOR PETITIONER

March 14, 2019.



# The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS  
CLERK

V. CLAIRE ALLEN  
DEPUTY CLERK

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

February 26, 2019

The Honorable Cheryl L. Graham  
5200 E Jim Bilton Blvd  
St George SC 29477-8020

## REMITTITUR

Re: Albert Henson v. Julian Henson  
Lower Court Case No. 2016CP1801849  
Appellate Case No. 2017-000095

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.

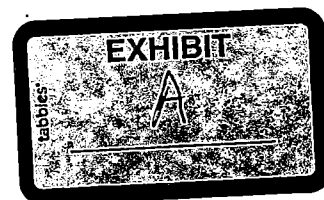
Very truly yours,

*V. Claire Allen, Deputy*

CLERK

Enclosure

cc: Daniel Francis Blanchard, III, Esquire  
Trudy Hartzog Robertson, Esquire  
Paul M. Lynch, Esquire  
E. Brandon Gaskins, Esquire



2018-01-17-02

# The Supreme Court of South Carolina

Re: Attorney's Fees Under Rules 222 and 242 of the  
South Carolina Appellate Court Rules

ORDER

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).

s/Donald W. Beatty C.J.

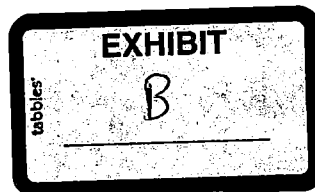
s/John W. Kittredge J.

s/Kaye G. Hearn J.

s/John Cannon Few J.

s/George C. James, Jr. J.

Columbia, South Carolina  
January 17, 2018



# ROSEN | HAGOOD

Daniel F Blanchard, III  
dblanchard@rrhlawfirm.com  
843-266-8123

January 17, 2017

Hilda M. Jordan  
P.O. Box 435  
Lexington, SC 29071

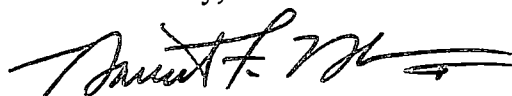
Re: *In re: Trust EIP Created Under the Last Will and Testament of Eunice I. Page dated October 14, 1992*  
*Richard S. Henson and Vann Kenneth Henson v. Albert T. Henson, Jr. and Julian Reid Henson,*  
Case No. 2016-CP-18-1849

Dear Ms. Jordan:

For the purpose of an appeal, please accept this correspondence as our formal request for the transcript of the motion hearing in the above-referenced case conducted by Circuit Judge Edgar W. Dickson on November 21, 2016 in Orangeburg. This is for a case pending in the Dorchester County Court of Common Pleas.

If you have any questions, please contact my assistant, Deborah Wooten at (843) 266-8236 or by email at [dwooten@rrhlawfirm.com](mailto:dwooten@rrhlawfirm.com). Thank you for your assistance in this matter.

Sincerely,



Daniel F. Blanchard, III

Cc: Barry I. Baker, Esquire  
Kyle Varner, Esquire  
Trudy H. Robertson, Esquire  
Paul Lynch, Esquire  
Ashley G. Andrews, Esquire  
Mr. Albert T. Henson, Jr.  
SC Court of Appeals, Clerk of Court  
Office of the Court Administration



# ROSEN | HAGOOD

Daniel F Blanchard, III  
dblanchard@rrhlawfirm.com  
843-266-8123

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S.C. SUPREME COURT

March 23, 2017

Hilda M. Jordan  
P.O. Box 435  
Lexington, SC 29071

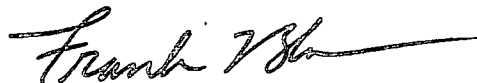
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*Richard S. Henson and Vann Kenneth Henson v. Albert T. Henson, Jr. and Julian Reid Henson,*  
Case No. 2016-CP-18-1849

Dear Ms. Jordan:

On January 17, 2017, we ordered the transcript of the motion hearing held in the above-referenced case before Circuit Judge Edgar W. Dickson on November 21, 2016 in Orangeburg. As we haven't received the transcript, I wanted to follow up on this request and check on the status. It would be greatly appreciated if you will let us know when the transcript will be completed.

If you have any questions, please contact my assistant, Deborah Wooten at (843) 266-8236 or by email at [dwooten@rrhlawfirm.com](mailto:dwooten@rrhlawfirm.com). Thank you for your assistance in this matter.

Sincerely,



Daniel F. Blanchard, III

Cc: Barry I. Baker, Esquire  
Kyle Varner, Esquire  
Trudy H. Robertson, Esquire  
Paul Lynch, Esquire  
Ashley G. Andrews, Esquire  
Mr. Albert T. Henson, Jr.  
SC Court of Appeals, Clerk of Court  
Office of the Court Administration

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas  
Edgar W. Dickson, Circuit Judge

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Court of Common Pleas Case No. 2015-CP-08-00547  
Appellate Case No. 2018-002002

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EUNICE I. PAGE DATED OCTOBER 14, 1992,

RICHARD S. HENSON AND VANN KENNETH HENSON,  
Respondents,

v.

ALBERT T. HENSON, JR. AND JULIAN REID HENSON,  
Respondents in the Court below,

Of whom ALBERT T. HENSON, JR. is the  
Petitioner.

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**PROOF OF SERVICE**

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I certify that I have served the Return to Motion for Costs and Fees on the Respondents by mailing a copy to their attorneys of record on March 14, 2019, via first-class mail, postage prepaid, and addressed as follows:

Trudy H. Robertson, Esquire  
Paul Lynch, Esquire  
E. Brandon Gaskins, Esquire  
Moore & Van Allen, PLLC  
78 Wentworth Street  
Charleston, SC 29401

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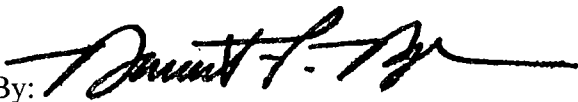
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March 14, 2019.

# ROSEN | HAGOOD

Daniel F Blanchard, III  
dblanchard@rrhlawfirm.com  
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March 14, 2019

The Honorable Daniel E. Shearouse, Clerk of Court  
South Carolina Supreme Court  
P.O. Box 11330  
Columbia, SC 29211

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Re: *In re: Trust EIP Created Under the Last Will and Testament of Eunice I. Page dated October 14, 1992 Richard S. Henson and Vann Kenneth Henson v. Albert T. Henson, Jr. and Julian Reid Henson,*  
Court of Common Pleas Case No. 2016-CP-18-1849  
Appellate Case No. 2018-002002

Dear Mr. Shearouse:

Enclosed for filing in the above-referenced case are:

- [1] The original and seven copies of Petitioner Albert T. Henson, Jr.'s Return to Motion for Costs and Fees, and
- [2] The original and one copy of the Proof of Service.

Please return date-stamped copies in the enclosed self-addressed return envelope.

With kindest regards, I am

Sincerely,



Daniel F. Blanchard, III

DFB/db  
Encls.

Cc: Trudy H. Robertson, Esquire (w/ encl.)  
Paul Lynch, Esquire (w/ encl.)  
E. Brandon Gaskins, Esquire (w/ encl.)  
Mr. Albert T. Henson, Jr. (w/o encl.)

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**SC Court of Appeals**

The Honorable Daniel E. Shearouse, Clerk of Court  
 South Carolina Supreme Court  
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