

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

RECEIVED

MAR 25 2019

Appellate Case No. 2017-000095
Court of Common Pleas Case No. 2016-CP-18-1849

SC Court of Appeals

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 Appellant.

**RETURN TO MOTION FOR COSTS AND FEES
& MOTION FOR SANCTIONS UNDER SCACR 269**

Appellant Albert T. Henson, Jr. (hereinafter "Appellant") 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") on March 15, 2019. For the reasons expressed below, Respondents' motion must be denied in its entirety and/or reduced in amount. Additionally, Appellant hereby requests the Court find that Respondents' motion is frivolous under SCACR 269 and moves the Court to award Appellant his attorneys' fees incurred in responding to the motion.

As a threshold matter, Respondents failed to timely file their motion in this Court; therefore,

this Court no longer has jurisdiction to entertain their motion. SCACR 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.” SCACR 222(d) (emphasis added). The word “shall” is mandatory—not 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). 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).

“If costs are taxed, they shall become part of the judgment of the appellate court and shall be added to the remittitur.” SCACR 222(e). In this case, the Court issued the remittitur on February 26, 2019. The fifteen-day period for Respondents to file their motion expired on March 13, 2019. Respondents did not file their motion until March 15, 2019, which was two days too late.

Prior to the present motion, Appellant had made Respondents’ aware that they had improperly moved the Supreme Court for an award of costs under Rule 242(j)(2) because that rule applies only when a Petition for a Writ of Certiorari has been granted, which did not occur in this case. See Exhibit 1 attached hereto. In response to that filing, Respondents filed the present motion in this Court even though the motion clearly is not allowed under the Court’s rules.

Respondents’ motion does not attempt to cite any law allowing them to file their motion in this Court more than fifteen days after the remittitur was issued. Instead, Respondents feebly argue this Court should treat their motion as timely made because they improperly moved for an award of

costs in the South Carolina Supreme Court. However, they cite absolutely no law whatsoever holding that the filing of a motion for costs in the Supreme Court is equivalent to filing such a motion in this Court. Although the appellate rules allow for the transfer *of the entire appeal* to the appropriate appellate court “[i]n the event that the notice of appeal is filed in the wrong appellate court . . . ,” the rules nowhere allow one appellate court to transfer a motion for taxation of costs to another appellate court because a party improperly filed it in the wrong appellate court. See SCACR 204(a). In any event, the fact is that the Supreme Court has not transferred any motion or other matter to this Court, thus this Court cannot rule on a motion filed in the Supreme Court.

When the remittitur has been properly sent, the appellate court no longer has jurisdiction over the matter and no motion can be heard thereafter. Wise v. S.C. Dep't of Corr., 372 S.C. 173, 174, 642 S.E.2d 551, 551 (2007) (citing cases); State v. Keels, 39 S.C. 553, 17 S.E. 802, 803 (1893). “After the remittitur . . . is sent down, the case passes beyond the reach of the court, and its jurisdiction is lost, and no motion can be heard by this court on the matter thereafter.” Carpenter v. Lewis, 65 S.C. 400, 43 S.E. 881, 882 (1903) (quoting Sullivan v. Speights, 14 S.C. 358, 360 (1880)). The only exception to this rule is when the remittitur is sent down by mistake, error, or inadvertence of the appellate court. Wise, 372 S.C. at 174, 642 S.E.2d at 551; Keels, 17 S.E. at 803 (party’s excusable neglect in perfecting appeal did not justify recalling the remittitur after it was sent down). There is no authority “permit[ting] the remittitur to be recalled, not because of an error or inadvertence on the part of the [appellate court], but rather because of post-remittitur conduct by a party.” State v. Barnes, 413 S.C. 1, 4, 774 S.E.2d 454, 456 (2015).

Respondents in this case do not claim the remittitur was sent down by mistake, error, or inadvertence of this Court, thus this Court lacks jurisdiction to consider Respondents’ untimely

motion or to tax costs that have the effect of becoming part of the Court's judgment. The motion must be denied on that ground alone.

Furthermore, even assuming the Court disregards the provisions of Rule 222 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). By Order dated January 17, 2018, the Supreme Court increased the amount of the attorneys' fees authorized under Rule 222(b) from \$1,000.00 to \$2,500.00. See Order filed 1.17.18. 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, 2018.¹

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

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

(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.^[2] The allowance of additional costs will generally not be allowed except in the most extraordinary circumstances.

See SCACR 242(j)(2). The Supreme 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 Order filed 1.17.18.

Respondents' motion ignores the fact that Rule 242(j) applies to the taxation of costs when a Petition for a Writ of Certiorari has been granted, which did not occur in this case. See SCACR 242(j) (entitled "Costs When a Writ of Certiorari Has Been Granted"); see also JEAN H. TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 397 (3rd 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)). When a Petition for a Writ of Certiorari has been granted and the Supreme 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." See SCACR 242(j)(2). Additionally, Rule 242(j)(5) makes clear that "[c]osts under this Rule shall be taxed by the Supreme Court," not by the Court of Appeals. Id. 242(j)(5).

In the case at bar, the Supreme Court denied Appellant's Petition for a Writ of Certiorari by Order issued on February 20, 2019. The Supreme Court never accepted jurisdiction over this case. Nothing in Rule 242 authorizes this Court (or the Supreme Court) to award fees or costs when a Petition for a Writ of Certiorari is denied. Neither the Supreme Court nor this Court rendered a

decision which gives rise to the right to seek costs under Rule 242(j), thus the attorneys' fee referenced in the Supreme Court's January 17, 2018 Order is inapplicable.

In sum, 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 Appellant's Petition for a Writ of Certiorari was denied in this case, even assuming for argument's sake that Respondents timely filed their motion in this Court, Respondents still are improperly seeking to double-bill or recover twice the permissible amount of attorneys' fees allowed by the rules.²

Respondents' motion also seeks particular costs that are not allowed under the appellate rules. For example, for the proceedings in the Supreme 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 that 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 the Supreme Court under Rule 242(e) or (i). Instead, Appellant was the "petitioner" in the Supreme 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

² 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. 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 the Supreme Court did not 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.

Appendix, but such costs are not recoverable under the rules.³

As another example, Respondents seek \$22.61 for the costs of printing or copying their brief filed in the Supreme Court. However, Rule 242(j)(2) only permits “the cost of printing the party’s brief(s) under Rule 242(i).” Because the Supreme Court denied Appellant’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 Appellant’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 this Court. For example, Respondents seek \$63.24 for the costs of printing or copying the Record on Appeal filed in this Court. 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 this

³ 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).

Court under Rules 209 or 210. Instead, as the appellant in this Court, Appellant 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). As reflected in the Court's file, because Petitioner was the appellant in this Court, he sent letters to the court reporter on January 17, 2017 and March 23, 2017 ordering the transcript of the proceedings in the lower court for inclusion in the Record on Appeal. Appellant (not Respondents) ordered and filed the court reporter's transcript as part of the Record on Appeal. 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 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 this Court. 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.

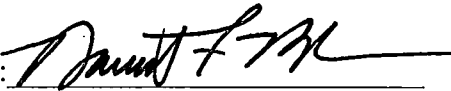
SCACR 269 provides in pertinent part that “[w]here an appeal, petition, motion or return is frivolous or taken solely for the purposes of delay, or is not in compliance with these Rules, the

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.” See SCACR 269. As shown above, Respondents’ motion clearly is untimely. Respondents knew or should have known their motion was untimely when it was submitted to this Court. The frivolous motion has required that Appellant incur additional legal fees in responding to it. An affidavit of counsel’s fees is attached to this return. See Exhibit 2 attached hereto. Appellant respectfully requests the Court to find that Respondents’ motion is frivolous under SCACR 269 and to award him \$840.00 in attorneys’ fees incurred in responding to the motion as a sanction.

For the reasons stated, the Appellant respectfully requests the Court to deny Respondents’ Motion for Costs and Fees on Appeal, to find the motion to be frivolous under SCACR 269, and to award Appellant \$840.00 in attorneys’ fees as a sanction for having to respond to the motion.

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 APPELLANT

March 19, 2019.

ROSEN | HAGOOD

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

March 14, 2019

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

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:

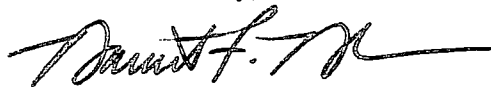
Enclosed for filing in the above-referenced case are:

- [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

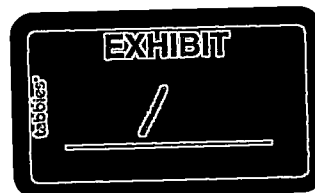
Sincerely,



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.)



THE STATE OF SOUTH CAROLINA
IN THE 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.¹ 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.

¹ 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, 2018.²

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.^[2] 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 (3rd 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,

² 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.³

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

³ 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.⁴

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

⁴ 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
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
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.

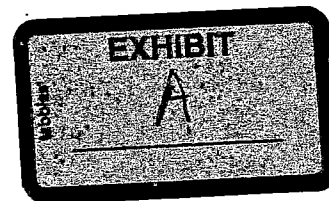
Very truly yours,

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.

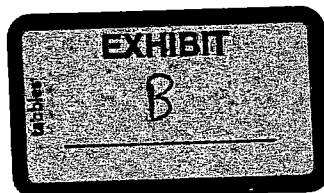
s/John W. Kittredge J.

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

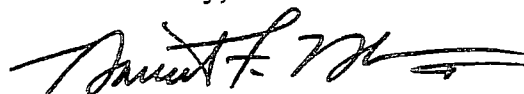
Re: *In re: Trust EIP Created Under the Last Will and Testament of Eunice I. Page dated October 14, 1992*
Richard S. Henson and Vann Kenneth Henson v. Albert T. Henson, Jr. and Julian Reid Henson,
Case No. 2016-CP-18-1849

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.

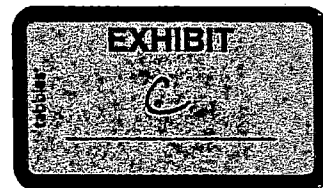
If you have any questions, please contact my assistant, Deborah Wooten at (843) 266-8236 or by email at dwooten@rrhlawfirm.com. Thank you for your assistance in this matter.

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

March 23, 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:

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. 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

THE STATE OF SOUTH CAROLINA
IN THE 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.

PROOF OF SERVICE

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

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 STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Appellate Case No. 2017-000095
Court of Common Pleas Case No. 2016-CP-18-1849

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 Appellant.

AFFIDAVIT OF COUNSEL



PERSONALLY APPEARED BEFORE ME, DANIEL F. BLANCHARD, III, who, first
being duly sworn, deposes and says as follows:

1. I am an attorney admitted to practice before the South Carolina bar and am an equity member of the law firm known as Rosen Hagood, LLC. I am attorney of record for the Appellant Albert T. Henson, Jr. in the above-captioned action.

2. I am charging the Appellant an hourly rate of \$300.00 in this matter, which is below my normal or customary hourly rate of \$375.00 for civil litigation of this type.

3. As a result of the Respondents' motion for taxation of costs filed in this Court, I have

been required to spend the following time on this matter:

3/18/19	Review motion for costs and fees on appeal (.1); Legal research re effect of untimely motion for costs (.3); Prepare return to motion (1.8); Prepare LT SC Court of Appeals (.1); Prepare affidavit in support request for attorneys' fees (.5)	<u>2.8 hours</u>
	Total:	2.8 hours

4. Accordingly, the Petitioner seeks an award of \$840.00 (2.8 x \$300.00 = \$840.00) in attorney's fees incurred as a result of the Respondents' frivolous motion in this matter.

5. I am providing the information below in accordance with the factors enumerated in Baron Data Systems, Inc. v. Loter, 297 S.C. 382, 377 S.E.2d 296 (1989) and Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750 (1997).

6. I received my B.A. degree in Political Science from Furman University in 1989 and graduated with honors from the University of South Carolina School of Law in 1992. I was named to the Order of the Coif, the Order of the Wig & Robe, and the John Belton O'Neill Inn of Court. I was awarded the American Jurisprudence Award in Evidence. I also served as Associate Editor-in-Chief of the American Bar Association's Real Property, Probate & Trust Journal and was awarded the Journal's distinguished service award for the 1990-91 academic year.

7. I have been practicing law with Rosen Hagood, LLC since my admission to the South Carolina Bar in 1992. I was admitted to practice before the U. S. District Court for the District of South Carolina in 1995, the United States Court of Appeals for the Fourth Circuit in 1996, the United States Supreme Court in 1996, the United States Court of Appeals for the Eleventh Circuit in 1998, and the U. S. District Court for the Eastern District of Michigan in 2011.

8. I have been actively involved in civil litigation and have argued several cases in the

South Carolina appellate courts and before the United States Court of Appeals for the Fourth Circuit. My practice areas involve civil litigation with emphasis in business litigation, commercial litigation, probate, trust, and estate litigation, employment litigation, and general tort litigation.

9. I have received the highest professional rating of “AV” in the MARTINDALE-HUBBELL LAW DIRECTORY.

10. I was selected by my peers for inclusion in *The Best Lawyers in America*® for 2015-2019 and have been selected for inclusion in the 2019 *South Carolina Super Lawyers* publication. I was selected for inclusion in the 2018 edition of the *Best Lawyers in America* for my work in the practice areas of Litigation—Trusts and Estates and Employment Law—Individuals. I was also recognized as 2017 “Lawyer of the Year” in Charleston, South Carolina, in the practice area of “Litigation – Trusts and Estates,” by *The Best Lawyers in America*® and as 2018 “Lawyer of the Year” in Charleston, South Carolina, in the practice area of “Employment Law – Individuals,” by *The Best Lawyers in America*.®

11. I am a member of numerous local, state, and national legal associations including the Charleston County Bar Association, the South Carolina Bar Association, the American Bar Association, and Primerus. I am a member of the ABA’s Real Property, Trust & Estate Law Section. I was formerly a member of the South Carolina Trial Lawyers Association and the American Trial Lawyers Association. I previously served on and/or chaired several committees of the South Carolina Bar Association Young Lawyers’ Division. I previously served as a delegate for the Ninth Circuit to the South Carolina Bar’s House of Delegates.

12. I authored the legal articles entitled “Supervisor Liability for Sexual Harassment Under Title VII in the Fourth Circuit: Continued Uncertainty After *Lissau v. Southern Food Service*,

Inc.,” 13 S.C. LAW. 36 (Nov./Dec. 2001); “South Carolina Evidence Rule 703: A Backdoor Exception to the Hearsay Rule?,” 13 S.C. LAW. 14 (May/June 2002); and “The Faragher-Ellerth Affirmative Defense as Implied Waiver of Privileges: Is the Defense a Shield or Double-Edged Sword?,” 14 S.C. LAW. 38 (May 2003). I also co-authored the law review article entitled “Controlling Person Liability for Motor Vehicle Dealer Violations of the South Carolina Motor Vehicle Unfair Trade Practices Act: A Proposal for Reform,” 47 S.C. L. REV. 349 (1996) and co-authored a chapter entitled “Interference with Contractual and Business Relations” published by the S.C. Bar’s Continuing Legal Education Division as part of its treatise on South Carolina Damages (2nd ed. 2009). I co-authored seminar materials with Susan C. Rosen entitled “South Carolina Automobile Dealers Law,” published by the S.C. Bar’s Continuing Legal Education Division in 1994.

13. I have participated as a speaker or lecturer at numerous continuing legal education programs involving topics such as interference with contractual and business relations, Rule 30(b)(6) depositions, employment law, workplace violence issues, the South Carolina “Lemon Law,” motor vehicle warranties, legal writing, medical malpractice, and legal aspects of apartment management.

FURTHER AFFIANT SAYETH NOT.



Daniel F. Blanchard, III

SWORN to and subscribed before me
this 19 day of March, 2019.

Alisa L. Hill (L.S.)
Notary Public for South Carolina

My Commission Expires: 9-8-2020

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Appellate Case No. 2017-000095
Court of Common Pleas Case No. 2016-CP-18-1849

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 Appellant.

PROOF OF SERVICE

I certify that I have served the Return to Motion for Costs and Fees on Appeal and Affidavit of Counsel on the Respondents by mailing a copy to their attorneys of record on March 19, 2019, via first-class mail, postage prepaid, and addressed as follows:

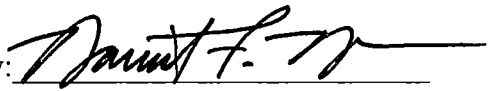
Trudy H. Robertson, Esquire
Paul Lynch, Esquire
E. Brandon Gaskins, Esquire
Moore & Van Allen, PLLC
78 Wentworth Street
Charleston, SC 29401

RECEIVED

MAR 25 2019

SC Court of Appeals

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 APPELLANT

March 19, 2019.

ROSEN | HAGOOD

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

RECEIVED
MAR 25 2019
SC Court of Appeals

March 19, 2019

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

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. 2017-000095

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced case are:

- [1] The original and seven copies of the Appellant's Return to Motion for Costs and Fees on Appeal and Motion for Sanctions under SCACR 269, and
- [2] The original and one copy of the Proof of Service.

We would greatly appreciate your filing these documents and returning date-stamped copies to us in the self-addressed return envelope enclosed herewith. Under copy of this cover letter, we are hereby serving copies of these documents on other counsel of record. Thank you for your assistance with this matter.

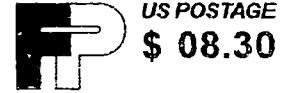
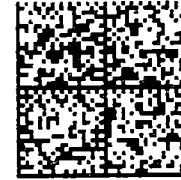
Sincerely,



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/ encl.)



US POSTAGE

\$ 08.30

Mailed From 29401

03/19/2019

031A 0004193481

9634.000 DFB

ROSEN | HAGOOD

151 Meeting Street, Suite 400
Charleston, South Carolina 29401

RECEIVED

MAR 25 2019

SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211