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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY  
In the Court of Common Pleas for the Ninth Circuit

J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2020-001231

Shon Turner, as Personal Representative of the Estate of Charles  
Mikell, Deceased.....Respondent

v.

The Medical University of South Carolina.....Petitioner

PETITIONER THE MEDICAL UNIVERSITY OF SOUTH CAROLINA'S  
RETURN TO MOTION FOR COSTS ON APPEAL

M. Dawes Cooke, Jr., Esq.  
John W. Fletcher, Esq.  
Barnwell, Whaley, Patterson & Helms, LLC  
211 King Street, Suite 300 (29401)  
P. O. Drawer H  
Charleston, SC 29402  
(843) 577-7700 Fax: (843) 577-7708  
[mdc@barnwell-whaley.com](mailto:mdc@barnwell-whaley.com)  
[jfletcher@barwnwell-whaley.com](mailto:jfletcher@barwnwell-whaley.com)  
*Attorneys for Petitioner The Medical University  
of South Carolina*

AND NOW COMES Petitioner Medical University of South Carolina ("MUSC"), by and through its undersigned counsel, and files the following Return to Motion for Costs on Appeal. MUSC opposes the award of costs to Respondent Turner because he prevailed on fewer issues on appeal than MUSC did. It is respectfully submitted that each party should bear its own costs.

### INTRODUCTION

Plaintiff Shon Turner ("Plaintiff"), as Personal Representative of the Estate of Charles Mikell ("Mr. Mikell"), brought this medical malpractice lawsuit asserting survival and wrongful death claims against Defendant The Medical University of South Carolina ("MUSC"). The parties tried this case to a jury from April 18, 2016 to April 26, 2016, resulting in a verdict in favor of MUSC. Before the verdict, the trial judge granted MUSC a partial directed verdict, to the extent that Plaintiff alleged that Dr. Eric Nelson ("Dr. Nelson") — who was not a named Defendant — engaged in professional negligence. On May 9, 2016, Plaintiff filed a Motion for a New Trial arguing, *inter alia*, that the trial judge improperly granted a partial directed verdict as to Dr. Nelson. (*See generally* App. pp. 204-14). Plaintiff then appealed from the denial of his post-trial motions.<sup>1</sup> (*See* App. p. 201).

After the parties fully briefed and argued the appeal, on May 6, 2020, the South Carolina Court of Appeals filed a published Opinion ("Opinion") affirming *in part* and reversing *in part* the trial court's rulings.<sup>2</sup> *See Turner v. Medical Univ. of S.C.*, 846 S.E.2d 1 (S.C. Ct. App. 2020), reh'g denied (Aug. 13, 2020). Of relevance to the issues before the Court, the Opinion reversed the partial directed verdict as to Plaintiff's claims that Dr. Nelson was negligent. Specifically, the court held that there was evidence that Dr. Nelson breached a duty of care because he "failed to adequately attend to Mikell—a known tenuous patient—because he (1) only made a brief stop in Mikell's room and (2) left the room even though Mikell's saturation levels were consistently

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<sup>1</sup> There was a separate appeal from the imposition of discovery sanctions on MUSC that did not involve the trial of the merits of this matter. The parties amicably resolved that appeal.

<sup>2</sup> Specifically, the Court of Appeals affirmed in MUSC's favor as to evidentiary and jury instruction issues. Neither party sought rehearing or certiorari for this Court to review any of those rulings.

low." (*See id.*, 846 S.E.2d at 9). Additionally, the Court of Appeals held that evidence that, if believed, could support that Dr. Nelson's negligence proximately caused Mr. Mikell's injuries. (*See id.* at 10-11).

MUSC filed a timely Petition for Rehearing. The Court of Appeals denied MUSC's Petition for Rehearing on August 13, 2020. MUSC filed a Petition for Writ of *Certiorari* seeking the Supreme Court's review of the Court of Appeals' reversal of the trial judge's grant of a partial directed verdict (as to Dr. Nelson's alleged negligence). On March 9, 2021, the Court granted MUSC's Petition for Writ of *Certiorari* and granted review of all issues that MUSC raised in its Petition. The parties fully briefed the issues in this Court and participated in oral argument. On December 15, 2021, the Supreme Court dismissed the writ of *certiorari* as improvidently granted and remitted the case back to the Circuit Court.

On or about December 28, 2021, Plaintiff filed the instant Motion for Costs on Appeal ("Motion for Costs") in the South Carolina Supreme Court,<sup>3</sup> pursuant to S.C.A.C.R., Rules 222 and 242(j), seeking the recovery of costs on the following grounds:

- (1) Mr. Turner was the Appellant before the Court of Appeals, which ruled in his favor by reversing the circuit court's partial directed verdict and remanding his case for a new trial; and
- (2) the Petitioner/Respondent Medical University of South Carolina obtained a writ of *certiorari* to the Court of Appeals which, following oral argument, the Supreme Court dismissed as improvidently granted

(*See Pl.'s Mot.*, at 1). Plaintiff seeks the imposition of costs in the amount of \$10,378.90. (*See id.*). In his Itemized Statement of Costs, Plaintiff specifically seeks the following:

<u>ITEM</u>	<u>AMOUNT</u>
<i>(Pursuant to Rule 222)</i> Filing Fee under Rule 203(d)	\$100.00
<i>(Pursuant to Rule 222)</i> Cost of Court Reporter Transcript	\$4,100.10
<i>(Pursuant to Rule 222)</i> Cost of Printing Final Appellant's Reply Brief	\$93.92

<sup>3</sup> Plaintiff has not filed a Motion for Costs in the South Carolina Court of Appeals. *See* S.C.A.C.R., Rule 222(e) ("In all cases in which a writ of *certiorari* is granted, costs shall be awarded in the manner provided by Rule 242(j).").

<u>ITEM</u>	<u>AMOUNT</u>
<i>(Pursuant to Rule 222)</i> Cost of Printing Final Appellant's Brief	\$86.57
<i>(Pursuant to Rule 222)</i> Cost of Printing Record on Appeal	\$826.91
<i>(Pursuant to Rule 222)</i> Attorneys' Fees Under Rule 222(b)	\$2,500.00
<i>(Pursuant to Rule 242(j))</i> Cost of Printing Respondent's Brief	\$171.40
<i>(Pursuant to Rule 242(j))</i> Attorneys' Fee Under Rule 242(j)(2)	\$2,500.00
<b><u>TOTAL</u></b>	\$10,378.90

For the reasons that follow, the Court should deny Plaintiff's Motion for Costs and should not tax any costs against MUSC.

### ARGUMENTS

#### A. General Legal Standards Governing Costs

South Carolina Appellate Court Rule 222 provides, in relevant part, for the award of costs for appeal:

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.**

*See* S.C.A.C.R., Rule 222(a) (emphasis added).

"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)." *See* S.C.A.C.R., Rule 222(e). The award of costs by this Court is governed by Rule 242(j):

Unless otherwise ordered by the Supreme Court or agreed to by the parties, costs shall be assessed against the appellant if the decision of the Supreme Court has the effect of affirming the judgment of the lower court or tribunal which was reviewed by the Court of Appeals. When the decision of the Supreme Court has

the effect of reversing the judgment of the lower court or tribunal which was on appeal, costs shall be assessed against the respondent before the Court of Appeals. When the decision of the Supreme Court has the effect of affirming or reversing in part or vacating the judgment of the lower court or tribunal which was on appeal, costs shall be allowed only as ordered by the Supreme Court.

See S.C.A.C.R., Rule 242(j)(1). "Costs under this Rule shall be taxed by the Supreme Court."

See S.C.A.C.R., Rule 242(j)(5). It is within this Court's discretion whether to grant a motion for costs. *Austin v. Stokes-Craven Holding Corp.*, 406 S.C. 187, 199, 750 S.E.2d 78, 84 (2013). For the following reasons, the Court should deny Plaintiff's Motion for Costs.

**B. This Court's Dismissal of *Certiorari* As Improvidently Granted Does Not Support the Award of Costs Connected to Proceedings in the Supreme Court Pursuant to Rule 242(j).**

As set forth in his Itemized Statement of Costs, Plaintiff seeks — pursuant to Rule 242(j), S.C.A.C.R. — costs in the amount of \$2,671.40 for attorneys' fees and for the costs of printing its Respondent's Brief in this Court. However, the Court should not tax those costs on MUSC because the Court did not rule on the substance of this appeal, but rather dismissed *certiorari* as improvidently granted.

Under Rule 242, "[w]hen the decision of the Supreme Court has the effect of affirming or reversing in part or vacating the judgment of the lower court or tribunal which was on appeal, costs shall be allowed only as ordered by the Supreme Court." See S.C.A.C.R., Rule 242(j)(1). The Court's dismissal of the writ of *certiorari* did not have the effect of affirming the Court of Appeals' opinion. It did not adjudicate the merits of MUSC's arguments. It did not reject MUSC's arguments or affirmatively decide that the Court of Appeals' decision was proper. It merely dismissed the writ of *certiorari*. Under such circumstances, this is not an appropriate case for costs under Rule 242(j).

Moreover, even if the dismissal of the writ of *certiorari* had "the effect of affirming or reversing in part or vacating the judgment of the lower court or tribunal which was on appeal," the Court should exercise its discretion and not award costs to Plaintiff. As set forth above, the

Court did not make any substantive ruling in this case. It merely determined that, for whatever reason, it did not wish to decide this case.

C. **The Court of Appeals' Opinion Does Not Support the Award of Costs Pursuant to Rule 222.**

In addition to costs under Rule 242(j), Plaintiff also seeks to recover costs incurred in the Court of Appeals. For the reasons that follow, the Court should deny this request as well.

As set forth above, "[w]hen an appeal is affirmed or reversed in part . . . costs shall be allowed only as ordered by the appellate court." *See* S.C.A.C.R., Rule 222(a). Plaintiff's Final Brief of Appellant identified eight Issues on Appeal, most of which did *not* concern the propriety of the grant of a partial directed verdict to MUSC. (*See* App., at 72). Although the Court of Appeals reversed the grant of a directed verdict to MUSC (solely on the issue of MUSC's liability for Dr. Nelson's claimed negligence), it affirmed numerous rulings of the trial court in MUSC's favor:

- The Court of Appeals held that Plaintiff had not properly preserved the issue of whether "the circuit court erred in failing to instruct the jury that his physician negligence claim was removed from its consideration as a result of the partial directed verdict." (*See* App., at 12).
- The Court of Appeals rejected Plaintiff's argument that "the circuit court erred in admitting a large volume of medical records without finding that the records would assist the jury and not lead to confusion." (*See* App., at 13).
- The Court of Appeals rejected Plaintiff's argument that "the circuit court erred in admitting Dr. Zile's testimony regarding (1) Mikell's chances of hospitalization and death and (2) certain medications Mikell stopped taking after the cardiac arrest." (*See* App., at 15).
- The Court of Appeals rejected Plaintiff's argument that "the circuit court erred in admitting a blank copy of a Mayday record and in allowing a witness to provide testimony about the contents of Mayday records." (*See* App., at 16).

In light of these numerous issues that the Court of Appeals resolved in MUSC's favor, MUSC respectfully submits that this Court should not grant costs to Plaintiff under Rule 222. Plaintiff has not shown that MUSC's positions were unreasonable or improper. It would not be fair to

impose sanctions on MUSC where it was successful on *most* of the issues presented to the Court of Appeals.

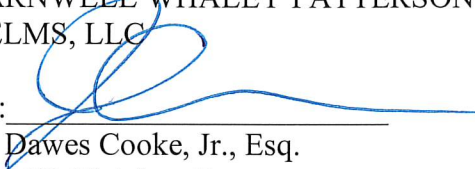
Moreover, many of the costs incurred in connection with the Court of Appeals' proceedings were related only to the issues upon which MUSC was successful. Much of the briefing was devoted to those issues. Many of the citations to the Record on Appeal and trial transcript related to those issues. It would be fundamentally unfair to force MUSC to shoulder the burden of Plaintiff's costs where MUSC, in fact, was successful as to several appellate issues.

For the foregoing reasons, the Court should deny Plaintiff's Motion for Costs as to costs pursuant to Rule 222 relating to proceedings before the Court of Appeals.

**CONCLUSION**

For the foregoing reasons, Petitioner MUSC respectfully requests that this Court deny Respondent Plaintiff's Motion for Costs on Appeal.

BARNWELL WHALEY PATTERSON &  
HELMS, LLC

By: 

M. Dawes Cooke, Jr., Esq.

John W. Fletcher, Esq.

211 King Street, Suite 300 (29401)

P. O. Drawer H

Charleston, SC 29402

(843) 577-7700 Fax: (843) 577-7708

[mdc@barnwell-whaley.com](mailto:mdc@barnwell-whaley.com)

[jfletcher@barwnwell-whaley.com](mailto:jfletcher@barwnwell-whaley.com)

*Attorneys for Petitioner The Medical University  
of South Carolina*

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