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Feb 21 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Judge

Opinion No. 2022-UP-397 (Filed November 2, 2022)
Appellate Case No. 2020-001110
Case No. 2019-CP-42-02092

Luther Harris, Donna Harris,
Bobby Leopard and Jerry White,

Appellants,

v.

Perry W. Barbour and Southland Transportation, Co.,

Respondents.

PETITION TO RECALL REMITTITUR

**MOTION TO RECALL THE REMITTITUR TO THE HONORABLE H.
BRUCE WILLIAMS, CHIEF JUSTICE, AND TO THE ASSOCIATE JUSTICES OF
THE COURT OF APPEALS:**

Appellants/petitioners, Luther Harris, Donna Harris, and Bobby Leopard, respectfully petition this court for an order recalling the remittitur and permitting them to reinstate their appeal in this case. Remittitur was sent due to the Clerk having not received a check for the Petition for Rehearing. Petitioners pray for the recall to avoid a grave miscarriage of justice. Petitioners offer the following in support of their petition.

RELEVANT PROCEDURAL HISTORY

The above-captioned appeal has a sister appeal (Appellate Case No.: 2021-000269).

Upon filing the appeal in that case, Petitioners moved to have the cases consolidated because the facts and questions raised in the respective appeals were virtually the same. Said motion was filed on March 11, 2021. Opposing counsel announced his lack of opposition to the motion on March 18, 2021. The motion was denied because the appeals were in different stages on April 13, 2021. Decisions had yet to be made in either. The appeals proceeded from there.

The Court affirmed the lower court's decision (2022-UP-429). Petitioners filed a Motion to File Out of Time for the purpose of filing their Petition for Rehearing on Friday, November 18, 2022. Petitioners filed their Petition for Rehearing on Monday, November 21, 2022. The Court sent a deficiency letter due to lack of payment on Tuesday, November 22, 2022. Upon inquiry, the bookkeeper said a \$50.00 check was sent for the Petition. It was believed the deficiency related to the fact the payment was not associated with the email filing; and the check would get there when the petition arrived in Columbia.

On December 12, 2022, it was learned the Court of Appeals received the Monday mailing of the petition from Anderson on Tuesday in Columbia. The Petitioners learned the payment had never been received by the Court for the petition. Petitioners immediately sent a Motion to File Out of Time, along with two checks (one for the motion, #2093, and one for the petition, #2094).

On February 3, 2023, the Clerk cc'd the undersigned with a letter to the Finance and Personell Department which read, in part: "The appellant's (sic) counsel provided this office with a fifty dollar (\$50.00) filing fee in the form of a check, number 2093, which was deposited on December 15, 2022. This motion is not being acted on." It was at this point

Petitioners knew their case had been dismissed for the failure to provide a \$50.00 check, though the Court of Appeals retained the check earmarked for the petition, #2094.

ARGUMENTS

1. THE FAILURE TO INCORPORATE ELECTRONIC FILING IN THE APPELLATE SYSTEM AS IT RELATES TO FEES PROVIDES FOR UNFAIR RESULTS.

Electronic Filing (EF) began as a pilot program in 2015. All Circuit Courts in the State of South Carolina were participants in EF by September 18, 2019. The EF conducted in the forty-six (46) counties provides the filer with a manner in which to pay for the filing with a credit card. The system ensures payment is made simultaneously with the filing. The manual system in place prior to EF required payment prior to the clerk accepting the filing. Both systems required payment before the matter would be considered filed.

As of February 9, 2023, the Appellate Court System in South Carolina remains the only the aspect of the state's court system which does not require simultaneous payment due to the fact it has yet to incorporate a method of payment to work in conjunction with electronic filing. The appellate courts' lack of consistency as it relates to filing has created a situation wherein litigants can lose their cases because of things not related to the cases themselves. This is the antithesis to the goal of any court system. The goal of the courts is to provide the litigants, and the causes of which they are pursuing, with finality which is related to the merits of their cases. The courts do not wish for cases to be determined on technicalities. Seemingly, the Courts don't wish for the litigants to lose based on the misplacement of a check for the filing fee.

This matter was dismissed by the Clerk of Court because a check for the Petition for Rehearing had not been received by December 12, 2022. There was no "good cause" allowed

to be argued to prevent such an injustice. The Petition for Rehearing had already been clocked so the check, while necessary, was ministerial in nature. The litigants filed the documentation necessary to allow the Court to review anything it may have overlooked in arriving at its decision.

The deficiency letter which was emailed on November 22, 2022. It said the following: “Upon reviewing your petition for rehearing, the following deficiency has been noted...” Upon reviewing your petition means reviewing the actual document. The Petition for Rehearing was a document that had been emailed and mailed to the Court the day before. Based on the fact it was understood a payment had not been made when petition was electronically filed, the deficiency letter received via email the next day was considered protocol based on the payment not accompanying the electronic filing. This thought was corroborated by the bookkeeper’s affirmation she had written the check. (Exhibit 1, Affidavit).

If the Court’s deficiency letter had said, “Upon receiving Petitioners’ Petition for Rehearing, the Court was unable to locate the \$50.00 payment for the Petition. If this deficiency is not addressed within the next ten days...”, it would have been understood the money had not been in the envelope with the petition. Very simply, Petitioners were unaware payment had not been received once the petition was physically received. This mistake was based on the review of the petition, not receipt of the petition, language. Having Petitioners’ petition be dismissed, when it had been filed and clocked, because of the inadvertent reading of the deficiency letter is an inequitable result. Petitioners believe that based on the circumstances they are deserving of having their appeal reheard.

2. THE COURTS IN SOUTH CAROLINA WISH FOR CASES TO BE DECIDED ON THEIR MERITS.

The purpose of the court system is to bring a peaceful resolution to a state’s

constituents by way of the trial process, whether by a jury or by the bench. “Rule 55(c) should be liberally construed so as to promote justice and dispose of cases on the merits.” Dixon v. Besco Eng'g, 320 S.C. 174, 463 S.E.2d 636 (Ct.App.1995). “There is no indication that the failure to transmit a copy of the [Rule 59(e), SCRCF, motion] to the circuit court affects the tolling provision of Rule 203(b)(1), SCACR.” Gallagher v. Evert, 353 S.C. 59, 63, 577 S.E.2d 217, 219 (Ct. App. 2002).

3. RESPONDENTS’ COUNSEL DID NOT OPPOSE THE MOTION TO FILE OUT OF TIME, THEREBY IMPLICITLY CONSENTING TO THE PETITION FOR REHEARING.

Respondents’ Counsel did not file an objection to Petitioners’ Motion to File Out of Time, and subsequent Petition for Rehearing. Respondents’ silence is tantamount to waiving their option to object to Petitioners’ motion and petition.

Waiver of [the statute of] limitations may be shown by words or conduct. Thus, waiver may result from express agreement, ... from failure to claim the defense, or by any action or inaction manifestly inconsistent with an intention to insist on the statute." (emphasis added) 54 C.J.S. Limitation of Actions § 22 at 52 (1987).

Mende v. Conway Hospital, Inc., 404 S.E.2d 33 (S.C. 1991). Based on Respondents’ waiver of their right to object, they will not be prejudiced by the Court granting the prayer of the Petitioners.

CONCLUSION

Petitioners respectfully pray for the Court to recall the Remittitur so that they may pursue having the case adjudicated on the merits as opposed to technicality. The Court previously received and clocked the subject Petition for Rehearing. Since the acts were done to submit the petition; and it was received, it is ripe for the Court's consideration.

s/Donald L. Smith
Donald L. Smith (SC Bar#6699)
2722 W. Whitner Street
Anderson, SC 29626
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com
Attorney for Appellants

Anderson, South Carolina
February 21, 2023.

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Case No. 2019-CP-42-02092
Appellate Case No. 2020-001110

Luther Harris, Donna Harris and Bobby Leopard,

Appellants,

v.

Perry W. Barbour and Southland Transportation, Co.,

Respondents.

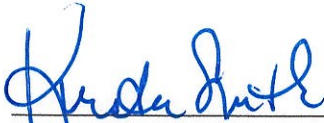
AFFIDAVIT OF KIRSTEN SMITH

PERSONALLY, appeared before me, Kirsten Smith, who being duly sworn and states: On Friday, November 18, 2022, Mr. Smith asked me to write a \$50 check for a filing fee related to the Petition for Rehearing he was preparing in Appellate Case No.: 2020-001110, before I left for the day. Knowing he had been working on the Petition for Rehearing, I surmised the check was being sent with the Petition in the afternoon mail.

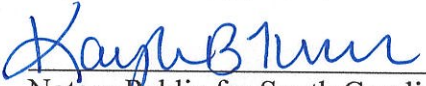
On Tuesday, November 22, 2022, a letter was received from the Court stating payment had not been received for the Petition and we had ten (10) days to correct the deficiency. Knowing that I had prepared the check on Friday for the Petition, I assured Mr. Smith that the filing fee had been sent. Given that information, there was no reason to believe any deficiency that may have existed hadn't been corrected.

I learned on December 12, 2022 that the \$50 check I thought had been sent for the Petition was, in fact, applied to a Motion to Extend time. Mr. Smith immediately informed the Court of the mistake; and two (2) additional \$50 checks were sent to the Court to cover another Motion to File Out of Time (#2093) and for the Petition for Rehearing (#2094).

On February 3, 2023, a letter was received from the Court stating that the \$50 filing fee which had been received on December 15, 2022 and deposited on the same date was not going to be accepted. To date, all motions and briefs have been filed and corresponding payments for each have been received and deposited by the Court.


Kirsten Smith

SWORN to before me this 21st
Day of February, 2023.


Notary Public for South Carolina
My Commission Expires: 7/19/27

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SC Court of Appeals

FORM 7
PROOF OF SERVICE

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In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Judge

Case No. 2019-CP-42-02092
Appellate Case No. 2020-001110 (2022-UP-397)

Luther Harris, Donna Harris and Bobby Leopard,

Appellants,

v.

Perry W. Barbour and Southland Transportation, Co.,

Respondents.

PROOF OF SERVICE

Pursuant to Supreme Court of South Carolina's Amended Order 2020-05-29-02, I am serving a Petition to Recall the Remittitur and a Proof of Service for same, to the Honorable Jenny Abbott-Kitchings, Clerk of Court of South Carolina Court of Appeals, and serving a copy of the same upon Respondents, by and through Mr. David L. Moore, Esquire, by email through the following addresses:

Ms. Jenny Abbott-Kitchings
Mr. David L. Moore, Esquire

ctappfilings@sccourts.org
DMoore@turnerpadget.com

s/Donald L. Smith
Donald L. Smith, (Bar No.: 6699)
2722 W. Whitner Street
Anderson SC 29626
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com
Attorney for Appellants

Anderson, South Carolina
February 21, 2023.

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FORM 8
LETTER TO THE APPEALS COURT CLERK
PETITION TO RECALL REMITTITUR

February 21, 2023

The Honorable Jenny Abbott Kitchings
Clerk of Court South Carolina Court of Appeals
Post Office Box 11629
Columbia SC 29211

**RE: Luther Harris, Donna Harris and Bobby Leopard vs.
Perry Wendell Barbour and Southland Transportation Co.
C.A. No.: 2019-CP4202092
Appellate Case No. 2020-001110 (2022-UP-397)**

Dear Ms. Kitchings:

Please find enclosed the following documents for filing in the above-captioned, appealed case:

1. Petition to Recall Remittitur;
2. Affidavit;
3. Check for \$50.00; and,
4. Proof of Service of same.

Sincerely,

s/Donald L. Smith

Donald L. Smith, (Bar No. 6699)

Attorney for Appellant

2722 W. Whitner Street

Anderson SC 29626

Telephone: (864) 642-9284

Facsimile: (864) 642-9285

attorneydonaldsmith@gmail.com

Attorney for Appellants

cc:

Mr. David L. Moore, Jr., Esquire