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Mar 13 2023

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

EXHIBIT 1

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Feb 21 2023

SC 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), SCRCP, 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](mailto:attorneydonaldsmith@gmail.com)

*Attorney for Appellants*

Anderson, South Carolina

February 21, 2023.

**RECEIVED**

**Feb 21 2023**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

J. Derham Cole, Judge

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

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Luther Harris, Donna Harris and Bobby Leopard,

Appellants,

v.

Perry W. Barbour and Southland Transportation, Co.,

Respondents.

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**AFFIDAVIT OF KIRSTEN SMITH**


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**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 21<sup>st</sup>  
Day of February, 2023.

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

**RECEIVED**

**Feb 21 2023**

**SC Court of Appeals**

**FORM 7  
PROOF OF SERVICE**

THE STATE OF SOUTH CAROLINA  
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](mailto:ctappfilings@sccourts.org)  
[DMoore@turnerpadget.com](mailto: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](mailto:attorneydonaldsmith@gmail.com)  
*Attorney for Appellants*

Anderson, South Carolina  
February 21, 2023.



**EXHIBIT 2**

## The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS  
CLERK

V. CLAIRE ALLEN  
CHIEF 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](http://www.sccourts.org)

November 22, 2022

Mr. Donald Loren Smith, Esquire  
2722 W, Whitner St.  
Anderson SC 29626

Re: Luther Harris v. Perry Barbour  
Appellate Case No. 2020-001110

Dear Counsel:

Upon reviewing your petition for rehearing, the following deficiency has been noted under the South Carolina Appellate Court Rules (SCACR), and this deficiency must be corrected within ten (10) days of the date of this letter or your petition for rehearing will not be considered:

- The required filing fee has not been submitted. The correct filing fee is \$50.00.

Very truly yours,

A handwritten signature in black ink that reads "V. Claire Allen".

CLERK

cc: David L. Moore, Jr., Esquire



EXHIBIT 3

## The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS  
CLERK

V. CLAIRE ALLEN  
CHIEF 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](http://www.sccourts.org)

December 12, 2022

Mr. Donald Loren Smith, Esquire  
2722 W, Whitner St.  
Anderson SC 29626

Re: Luther Harris v. Perry Barbour  
Appellate Case No. 2020-001110

Dear Counsel:

As of the date of this letter the deficiency for the petition for rehearing has not been cured per the court's letter of November 22, 2022, therefore the petition will not be acted upon. Furthermore, no action will be taken on the motion to allow late filing and the filing fee for that motion will be returned.

Very truly yours,

A handwritten signature in blue ink that reads "V. Claire Allen".

CLERK

cc: David L. Moore, Jr., Esquire

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

J. Derham Cole, Judge

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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.

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**AFFIDAVIT OF KIRSTEN SMITH**

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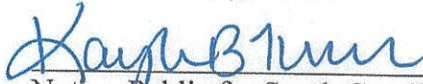
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Kirsten Smith

SWORN to before me this 21<sup>st</sup>  
Day of February, 2023.

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

**Mar 11 2021**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM CHEROKEE COUNTY  
Court of Common Pleas

Letitia H. Verdin, Judge

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Case No. 2020-CP-1100632

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Bobby E. Leopard, Donna and Luther Harris,

Appellants,

v.

Perry W. Barbour,

Respondent.

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**MOTION TO CONSOLIDATE RELATED APPEALS**

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Appellants hereby moves for an Order consolidating the pending appealed case *Luther Harris, Donna Harris and Bobby E. Leopard vs. Perry Barbour and Southland Transportation, Appellate Case No. 2020-001110* and the present case, Bobby E. Leopard, Donna Harris and Luther Harris v. Perry Barbour, Case No 2020-CP-11-00632 which is being initiated by the contemporaneous filing of Notice of Appeal. Appellants states that:

1. On August 27, 2020, Appellants filed a Complaint against Respondent Perry Barbour.
2. On November 11, 2020, Appellants filed an Affidavit of Default against herein Respondent for failure to file an Answer or any responsive pleading or motion within thirty-days from filing of the Complaint.
3. On November 12, 2020, the Circuit Court entered an Order of Default.
4. Based on the Affidavit of Default and Order of Default, Appellants moved for Entry of Default, which was issued on December 16, 2020.
5. On February 11, 2021, Mr. David L. Moore, Esquire, without providing for any authority, filed several pleadings on behalf of Respondent Barbour.

6. Mr. Moore served Respondents' Motion to Vacate the Default, an Answer and a Motion to Dismiss.
7. On February 16, 2021, a hearing was conducted on the parties' motions.
8. On the same date, the Circuit Court issued a Form 4, granting Respondent's Motion to Vacate Default and Motion to Dismiss, and Denying Appellants' Motion for Entry of Default.
9. On February 26, 2021, Appellants moved for Reconsideration, which the Circuit Court denied in its Order, dated March 9, 2021.
10. On March 10, 2021, Appellants filed their Notice of Appeal, challenging Judge Verdin's Orders, dated February 16, 2021 and March 9, 2021.
11. Rule 214 of the SC Appellate Court Rules (SCACR) governs the procedure to consolidate appeals and proceedings. Rule 214 SCACR provides:

Where there is more than one appeal from the same order, judgment, decision or decree, or where the same question is involved in two or more appeals in different cases, the appellate court may, in its discretion, order the appeal to be consolidated.
12. This present matter, subject of the Notice of Appeal, involves related issues and presents common questions of fact and law as the pending appealed case. Consolidation will not delay the disposition of this case. It will, in fact, minimize delays and eliminate confusion.

### CONCLUSION

WHEREFORE, because consolidation of this matter to a pending appealed case (*Luther Harris, Donna Harris and Bobby E. Leopard vs. Perry Barbour and Southland Transportation, Appellate Case No. 2020-001110*) will promote efficiency and judicial economy, and will not prejudice any party, Appellants respectfully request this Honorable Court to enter an Order consolidating all further proceedings in these actions.

Anderson, South Carolina  
March 10, 2021.

Respectfully submitted:  
**s/Donald L. Smith**  
Donald L. Smith (Bar No. 6699)  
122 N. Main Street  
Anderson, SC 29621  
Telephone: (864) 642-9284  
Facsimile: (864) 642-9285  
[attorneydonaldsmith@gmail.com](mailto:attorneydonaldsmith@gmail.com)  
*Attorney for Appellants*

The South Carolina Court of Appeals

Bobby E. Leopard, Luther Harris, and Donna Harris,  
Appellants,

v.

Perry W. Barbour, Respondents.

Appellate Case No. 2021-000269

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ORDER

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Appellants have filed a motion to consolidate this appeal with the appeal in Appellate Case No. 2020-001110. Because the cases are in different stages of the briefing process, the motion to consolidate is denied.



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FOR THE COURT

Columbia, South Carolina

cc:  
David L. Moore, Jr., Esquire  
Donald Loren Smith, Esquire

**FILED**  
**Apr 13 2021**

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**EXHIBIT** RECEIVED  
Mar 18 2021

SC Court of Appeals

**From:** [Moore Jr., David L](#)  
**To:** [Court Of Appeals Filings](#)  
**Cc:** [Don Smith \(attorneydonaldsmith@gmail.com\)](#)  
**Subject:** Bobby E. Leopard, Donna and Luther Harris v. Perry W. Barbour (2020CP-11.00632)  
**Date:** Thursday, March 18, 2021 4:07:57 PM

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Dear Ms. Kitchings:

I represent the respondent Perry W. Barbour in the appeal filed in the above matter. Don Smith, the attorney for the appellants, has filed a motion seeking a consolidation of this appeal with the appeal in Luther Harris, et al. v. Perry Barbour and Southland Transportation, Appellate Case No. 2020-001110. Please be advised that we have no opposition to that motion. If you should require a more formal response, please advise me and I will be more than happy to provide one.

Thank you for your help,

David L. Moore (Bar No. 4050)



[David L. Moore Jr.](#)  
Shareholder  
PO Box 1509 | Greenville, SC 29602  
200 East Broad Street, Suite 250 | Greenville, SC 29601  
864-552-4625 | Fax 864-282-5966  
[dmoore@turnerpadget.com](mailto:dmoore@turnerpadget.com)  
[Bio](#) | [vCard](#) | [Location](#)