

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

Aug 18 2023

APPEAL FROM GEORGETOWN COUNTY
COURT OF COMMON PLEAS

S.C. SUPREME COURT

JOE M. CROSBY, MASTER-IN-EQUITY

APPELLATE CASE NO.: 2023-001166

CRM OF THE CAROLINAS, LLC,

PETITIONER,

v.

TREVOR W. STEEL,

RESPONDENT.

RESPONDENT'S RETURN TO PETITIONER'S
PETITION FOR WRIT OF CERTIORARI

August 18, 2023

S/Roger P. Giardino
Roger P. Giardino (S.C. Bar 74478)
Post Office Box 4413
Pawleys Island, S.C. 29585
843-314-4321
Giardinolaw@gmail.com
Attorney for Respondent

INDEX

Introduction1

Counter-Statement of the questions presented2

Counter-Statement of Case2

Arguments

 I. PETITIONER DID NOT TIMELY SERVE RESPONDENT’S COUNSEL
 OF RECORD WITH NOTICE OF APPEAL VIA EMAIL.4

 II. ELECTRONIC SERVICE VIA EMAIL BY THE SOUTH CAROLINA
 COURT E-FILING SYSTEM DOES NOT SATISFY THE SCACR
 SERVICE REQUIREMENT8

 III. PETITIONER FAILED TO SERVE THE NOTICE OF APPEAL VIA
 FIRST CLASS U.S. MAIL IN ADDITION TO E-MAIL9

 IV. THE COURT OF APPEALS CORRECTLY DENIED PETITIONER’S
 MOTION TO SUPPLEMENT THE RECORD ON APPEAL11

Conclusion13

INTRODUCTION

Respondents submit this Return in Opposition to the Petition for Writ of Certiorari. The Petition should be denied.

Writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. In determining whether special reasons for review exist, this Court considers the following five criteria: (1) where there are novel questions of law; (2) where there is a dissent in the decision of the court of appeals; (3) where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court; (4) where substantial constitutional issues are directly involved; and (5) where a federal question is included and the decision of the court of appeals conflicts with a decision of the United States Supreme Court. Rule 242(b), SCACR.

Furthermore, the Supreme Court will only review errors of law, and factual findings will not be reviewed "unless wholly unsupported by the evidence." *Hollman v. Woolfson*, 384 S.C. 571, 577, 683 S.E.2d 495, 498 (2009); *Lewis v. Lewis*, 392 S.C. 381, 400, 709 S.E.2d 650, 660 (2001) (Pleicones, J., dissenting); *City of Columbia v. S.C. Pub. Serv. Comm'n*, 242 S.C. 528, 532, 131 S.E.2d 705, 707 (1963) ("The superior court, in considering the record of the inferior tribunal, must confine its review to the correction of errors of law only and not review findings of fact except when such findings are wholly unsupported by the evidence").

Petitioner does not identify any specific misapprehension of fact or law by the court of appeals. Instead, the Petition is a reargument of the same points asserted in: (a) the Petition for Rehearing, (b) the Motion to Supplement Record on Appeal, (c) the original Brief and (d) the October 14, 2019 trial before the Honorable Joe M. Crosby. None of the criteria of Rule 242(b) for special review are met.

CRM of the Carolinas, LLC seeks to reargue a case in which the trial court found for the Respondent, the Court of Appeals order which denied its appeal after oral arguments; as well as its Petition for Rehearing of that decision and its Motion to Supplement Record on Appeal, both of which the Court of Appeals properly denied. The Opinion of the Court of Appeals does not contain any error of law, nor include any unsupportable evidence. This Petition fails to not address a novel question of law. Furthermore, the Opinion did not contain a dissent, it did not conflict with a prior decision of this Court, and it did not include a federal question. Petitioner failed to present this Court with any ground that would justify a decision to grant the Petition.

COUNTER -STATEMENT OF THE QUESTIONS PRESENTED

1. Whether the Court of Appeals properly found the Appellant did not timely serve Respondent's Counsel of Record with the Notice of Appeal via Email.
2. Whether electronic service via Email by South Carolina Court e-filing system satisfied the service requirement.
3. Whether the Notice of Appeal was timely service via First Class US Mail in addition to email.
4. Whether the Court of Appeals properly denied Petitioner's Motion to Supplement the Record on Appeal.

COUNTER-STATEMENT OF THE CASE

CRM of the Carolinas, LLC (hereinafter "CRM") filed this action on October 11, 2017, via Verified Complaint, asserting causes of action against Trevor W. Steel (hereinafter "Steel") for Breach of Contract, Anticipatory Breach of Contract, Slander *Per Se* and Intentional Interference with Prospective Contractual Relations. CRM also filed a Motion for Temporary Restraining Order and a Motion for Temporary Injunction on the same date. The Honorable

Eugene C. Griffith, Jr. granted the Temporary Restraining Order on October 24, 2017 and the Honorable Larry B. Hyman, Jr. granted the Motion for Temporary Injunction on November 17, 2017.

Steel filed an Answer and Counterclaim on December 1, 2017 denying the allegations of the Verified Complaint and asserting a counterclaim for breach of contract and wrongful restraint of trade. On morning of October 11, 2019 Respondent's counsel contacted Petitioner's then lead counsel, William E. Hopkins, Jr. to advise a reply was beyond tardy for the Petitioner's Counterclaim. CRM filed a Reply to Counterclaim on October 11, 2019, the same day Steel filed an Affidavit of Default.

This action was referred to the Master-in-Equity by consent and tried non-jury on October 14, 2019. At the call of the case, the parties and court agreed that the Temporary Injunction issued by the Honorable Larry B. Hyman, Jr. expired on its terms and was moot. Steel abandoned his counterclaims and the case proceeded on CRM's claims. At the end of its case in chief, CRM agreed to waive any other damages but the claim for \$50,000.00 and attorney fees. The court issued an Order, dated October 18, 2019, that all Court Orders restraining Defendant from any and all types of business activities are hereby rescinded and/or terminated. Then court issued its Order finding in favor of Steel on March 12, 2020.

Petitioner filed its Notice of Appeal on April 3, 2020. Petitioner then served Respondent an envelope sent via US Mail, postmarked April 16, 2020 with prepaid US Postage stamped on April 15, 2020; containing a copy of the Petitioner's Letter to the Honorable Jenny Abbott Kitchings dated April 3, 2020, Notice of Appeal, a copy of the March 12, 2020 Order and a Certificate of Service dated April 3, 2020. Respondent received said mailing on, or about April 20, 2020.

The parties appeared before the Court of Appeals for oral argument on February 16, 2023. On May 11, 2023 the Court of Appeals dismissed the appeal for lack of appellate jurisdiction. CRM of the Carolinas, LLC v. Trevor W. Steel, Unpublished Op. No. 2023-UP-178 (S.C. Ct App. Filed May 11, 2023).

On May 11, 2023, Petitioner filed a Petition for Rehearing and its Motion to Supplement Record on Appeal. Petitioner submitted opposition to both reliefs sought by Petitioner. Thereafter, on June 22, 2023, the Court of Appeals issued two respective orders denying the Petition for Rehearing and the Motion to Supplement Record on Appeal.

ARGUMENT

I. PETITIONER DID NOT TIMELY SERVE RESPONDENT'S COUNSEL OF RECORD WITH NOTICE OF APPEAL VIA EMAIL.

Petitioner continues to repeat a false narrative and continues to insist mullettlaw@aol.com and mullettlaw@sc.rr.com are identical email addresses. Persistence of the former will not change the fact that assertion of the latter is erroneous.

It appears Petitioner either has a genuine mistake of fact, conflates and or is disingenuous in its contention that Petitioner timely served Respondent's counsel of record with the Notice of Appeal via email. Respondent initially engaged Attorney Robert J. Moran, Jr. to represent him in the underlying proceedings with Petitioner commenced on October 17, 2017. Attorney Moran filed a Notice of Appearance for Respondent electronically via the South Carolina's E-Filing System ("SCEF") on December 1, 2017; and subsequently filed Respondent's Answer and Counterclaim also by SCF, as well as First Class U.S. Mail. SCEF served electronically "Robert J. Moran, Jr. for Trevor W. Steel" and "William E. Hopkins, Jr., for CRM Of The Carolina LLC." Please see attached Exhibit B. The SCEF email was addressed to Attorney Moran's AIS authorized primary email: mullettlaw@aol.com. Attorney Moran's AIS authorized primary email was

always and only: mullettlaw@aol.com; and the email address mullettlaw@sc.rr.com, though similar, was never Attorney Moran's AIS authorized primary email address.

On October 10, 2018, Petitioner's counsel of record at that time drafted and sent a to the Georgetown County Clerk of Court addressing this matter as it appeared on the ADR Sanctions Roster scheduled for Thursday, October 11, 2018. Attorney Moran received electronic notification from SCEF to his AIS authorized primary email address: mullettlaw@aol.com; please see attached **Attachment A**.

During the pendency of litigation, but prior to trial, Robert J. Moran, Jr., Esq. passed away on December 23, 2018. On December 27, 2018, Cindy Howard, Family Court Supervisor, for the Office of the Georgetown County Clerk of Court, emailed the members of the Georgetown and Horry County Bars notifying Attorney Moran's colleagues of his passing. Attorney William E. Hopkins, Jr. is listed on the email distribution list as a recipient. Please see **Attachment B**.

On January 29, 2019, Petitioner's attorney of record at the time sent a letter to the Georgetown County Common Pleas Court Coordinator and Supervisor concerning the status of this lawsuit and advising of Attorney Moran's death. A copy of the letter was served electronically on Attorney Moran as per the SCEF notification sent to his AIS authorized primary email: mullettlaw@aol.com; please see **Attachment C**.

Thereafter, on May 3, 2019, Respondent retained his current counsel and Roger Philip Giardino, Jr., Esq., electronically entered a Notice of Appearance. SCEF sent a "Received Notice" and "Accept Notice" to Respondent counsel's AIS authorized primary email: giardinolaw@gmail.com; please see **Attachment D**. On the same day, Respondent's counsel also electronically filed a Proposed Order/Referred to Master of Special Referee; SCEF electronically served following people: Robert J. Moran, Jr., William E. Hopkins, Jr. and Roger

Philip Giardino, Jr. Respondent's counsel received the appropriate NEF sent by SCEF via email to giardinolaw@gmail.com; please see **Attachment E**.

On the day of trial, Master Crosby issued a partial order for this matter concerning an issue not before this Court on appeal. SCEF served the deceased Robert J. Moran, Jr., William E. Hopkins, Jr. and Roger Philip Giardino, Jr. Respondent's counsel received the appropriate NEF sent by SCEF via email to giardinolaw@gmail.com; please see **Attachment F**.

Then, on March 4, 2020, when Master Crosby issued his Order the SCEF again served the deceased Robert J. Moran, Jr., William E. Hopkins, Jr. and Roger Philip Giardino, Jr., Respondent's counsel received the appropriate NEF sent by SCEF via email to giardinolaw@gmail.com; please see **Attachment G**. Petitioner never utilized any of the available post judgment relief options afforded before the lower court after Master Crosby's issuance of his Final Order. Rather, Petitioner elected to file a Notice of Appeal but failed to properly serve Respondent. "A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment." Rule 203(b)(1), SCACR. "The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 14–15, 602 S.E.2d 772, 775 (2004).

Inexplicably, SCEF continued to serve documents pertaining to this lawsuit on Attorney Moran by way of email well after his passing on December 23, 2018, even after the Georgetown County Court System, and most importantly, Petitioner's counsel of record recognized Attorney Moran's death. However, Petitioner's counsel clearly misstates in the Petition for Rehearing that Respondent's counsel and the Clerk of Court failed to provide the proper AIS primary email for

Attorney Giardino. First, the Georgetown County Common Pleas Supervisor sent an email on June 3, 2019, one month after Attorney Giardino entered Notice of Appearance in this matter, to the AIS primary email addresses for the only two living attorneys of record for the parties, William E. Hopkins, Jr. and Roger Philip Giardino, Jr.; please see **Attachment H**. Then Respondent's counsel sent an email Petitioner's counsel of record at the time prior to trial on September 25, 2019, and then again post-trial on January 31, 2020, concerning review of the proposed Final Order; please see **Attachment I**.

By Petitioner's admission and omission, in its Petition for Writ of Certiorari and its previously denied Petition for Rehearing, Petitioner states that emails were sent to only mullettlaw@sc.rr.com; and not to mullettlaw@aol.com and/or giardinolaw@gmail.com the recognized AIS primary email addresses for the Respondent's attorneys of record over the pendency of this litigation. Petitioner even attempts to lay fault at Respondent for failure to move to relieve and/or remove Attorney Moran as counsel after his death; as if doing so would have removed any culpability, overcoming any conceivable clerical error of Petitioner and insulating Petitioner from any other possible intervening cause; ultimately ensuring timely service of the Notice of Appeal on the Respondent's counsel. Interestingly, Petitioner fails to cite any precedent placing the onus on the client of a deceased lawyer to move to have the dead attorney removed from the parties of an action. However, actual responsibility lays on the Petitioner; as Petitioner failed to properly timely serve Respondent's only living counsel through the prescribed and acceptable means delineated in the applicable rules and orders governing such service.

II. ELECTRONIC SERVICE VIA EMAIL BY THE SOUTH CAROLINA COURT E-FILING SYSTEM DOES NOT SATISFY THE SCACR SERVICE REQUIREMENT.

Petitioner relies on conjecture and surmise rather than evidence of compliance to incorrectly assert that electronic service via email by SCEF satisfied the service requirement to establish appellate jurisdiction. Petitioner reliance on the SCEF generated notifications fails to reconcile the controlling service of notice requirements. South Carolina Appellate Rules govern the filing and service of a notice of appeal, and the sole method of electronic service under these rules is by email. See *Wells Fargo Bank, N.A. v. Fallon Properties S.C., LLC*, 422 S.C. 211, 215, 810 S.E.2d 856, 858 (2018) (stating that the South Carolina Appellate Rules, rather than the South Carolina Rules of Civil Procedure, govern issues concerning appellate procedure). More importantly, Attorney Moran's AIS primary email address is a red herring in Petitioner's argument, as Petitioner's counsel knew, or should have known, the two most important facts about Respondent's attorneys of record at the time of filing and serving Petitioner's Notice of Appeal: 1. that Attorney Moran previously died December 23, 2018 well before October 14, 2019 trial, remaining deceased through April 2020 and beyond; and 2. the AIS primary email for Respondent's remaining/living attorney of record was, as still is, giardinolaw@gmail.com. Respondent counsel's primary email address is the linchpin of this matter as under South Carolina Appellate Court Rules, electronic service of a copy of the notice of appeal is effective only when it is sent to opposing counsel's primary e-mail address listed in AIS. See Section (g)(3), *RE: Operation of the Appellate Courts During the Coronavirus Emergency* (March 20, 2020) ("During the Coronavirus] emergency, this Court authorizes a lawyer admitted to practice law in this state to serve a document on another lawyer admitted to practice law in this state using the lawyer's primary e-mail address listed in the

[AIS]."). Since the SCACR govern service of notice of appeal, service on opposing counsel solely by adhering to the SCEF protocols is not effective to confer appellate jurisdiction on this Court.

Petitioner fails to put forth any evidence in its Petition for a writ of certiorari establishing Petitioner counsel complied with the SCACR concerning service of the Notice of Appeal. There is not a scintilla of evidence indicating Petitioner counsel sent any emails concerning the service of the Notice of Appeal to mullettlaw@aol.com and/or giardinolaw@gmail.com; the recognized AIS primary email addresses for Respondent's only attorneys of record over the pendency of this litigation.

Finally, the email address mullettlaw@sc.rr.com belongs to, and is solely utilized by Kimberly Pring (incorrectly referred to as "Pringle" by Petitioner), paralegal to Attorney Moran for over 15 years. Ms. Pring is not an attorney, nor has the email address mullettlaw@sc.rr.com ever been listed as the AIS primary email address for any attorney, let alone an attorney admitted to practice law within the State of South Carolina. Again, Petitioner fails to proffer any proof of compliance with the applicable rules requiring an email concerning service of the Notice of Appeal from a South Carolina licensed attorney to a recipient who is similarly a South Carolina licensed attorney. Ms. Pring retained her own email address when she came to work for Respondent's counsel after Attorney Moran's death.

III. PETITIONER FAILED TO SERVE THE NOTICE OF APPEAL VIA FIRST CLASS U.S. MAIL IN ADDITION TO E-MAIL.

Petitioner speciously argues that it properly and timely served the Notice of Appeal via First Class U.S. Mail in addition to properly e-mail said notice in compliance with the applicable rules and procedure. Not only is the Record on Appeal void of any evidence establishing that the Petitioner properly served the Respondent with the Notice of Appeal via First Class U.S. Mail, Petitioner, in its latest attempt, fails supplement its Petition for a writ of certiorari with any such

evidence. In fact, the Record on Appeal establishes conversely that the Petitioner failed to properly serve the Respondent with the Notice of the Appeal via First Class U.S. Mail as the only exhibit contained therein is a copy of an envelope purported to contain the Notice of Appeal properly addressed to Respondent's counsel postmarked by the U.S. Postal Service on April 16, 2020; three days after the period of time to effectuate proper service expired.

Petitioner fails to address in its reliance on *In re Estate of Deas*, Appellate Case No. 2013-000550, No. 2015-UP059 the key differences between the fact patterns of that case and this one before this Court. In *Deas*, the court distinguished between an error by the litigant and that of a possible unrelated third party. Here, the lack of service of the notice of appeal lays entirely on the Petitioner for mailing a letter to a wrong address. Petitioner erred, causing service not to be properly effectuated in a timely manner. There was not another possible intervening force from the outside that caused the mailing to go astray, the letter failed to reach its intended destination due to an incorrect address.

Interestingly, although Petitioner tries to equate a similar, but different email address (mullettlaw@sc.rr.com) belonging to, and associated with, a non-attorney to that of a deceased member of the South Carolina Bar AIS primary email address (mullettlaw@aol.com), Petitioner failed to attempt to effectuate service via First Class U.S. Mail by sending the Notice of Appeal to the address contained on the Answer with Counterclaim filed by Attorney Moran.

Based on the foregoing, Petitioner neither effected timely service by regular mail nor electronic service in the manner required by the rules binding the Court of Appeals. Therefore, the Court of Appeals correctly determined it lacked appellate jurisdiction over this matter and properly dismissed the Petitioner's Appeal. The dismissal must stand. See *Elam*, 361 S.C. at 14–15, 602 S.E.2d at 775 ("The requirement of service of the notice of appeal is jurisdictional, i.e., if a party

misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice.").

In addition, even in the event that Petitioner establishes the notice sent to a non-attorney email address of mulletlaw@sc.rr.com suffices the SCACR requirements, Respondent's counsel failed to locate and/or discover any rule, statute, precedent, or even dicta, establishing that service by court mandated acceptable email means and/or First-Class U.S. Mail on a known deceased counsel conferred appellate jurisdiction on the other remaining parties to a lawsuit.

IV. THE COURT OF APPEALS CORRECTLY DENIED PETITIONER'S MOTION TO SUPPLEMENT THE RECORD ON APPEAL.

Prior to filing its Motion to Supplement Record on Appeal, Petitioner failed to utilize relief readily available to allow said Petitioner the opportunity to supplement the Record on Appeal.

Pursuant to Rule 212(b) SCACR, that a party may:

With the written consent of all attorneys of record, a party may supplement the Record on Appeal at any time before argument commences. Without such consent or after argument commences, a party desiring to supplement the Record on Appeal must move the appellate court for leave to do so. In response to that motion, the other party(s) shall designate any supplemental materials which that party desires to add if the Court grants the motion.

Petitioner requested such relief in its Motion to Supplement Record on Appeal to counter the issue of timely, or in this matter more aptly described as untimely, service of the Notice of Appeal. In the basic motion Petitioner conceded that Respondent first raised the issue of timely service in brief, but then false-heartedly asserted this occurred after the compilation and filing of the Record on Appeal.

On May 18, 2020, Petitioner initially exchanged and filed the Designation of Matter— Designation of Matter Filed by Petitioner. On June 18, 2020, Respondent served the Initial Brief—

Respondent and Designation of Matter—Designation of Matter Filed by Respondent on the Petitioner, with identical documents filed with this Court on June 18, 2020. On July 1, 2020, the Petitioner filed its Initial Brief--Reply and augmented the Designation of Matter—Designation of Matter Filed by Petitioner with three exhibits: 1. Certificate of Service of Notice of Appeal dated April 3, 2020, 2. Notice of Electronic Filing from the Georgetown County Clerk of Court dated April 3, 2020, and 3. April 6, 2020 email exchange between Kimberly Pring and Kathy Roberts; specifically in response to Respondent's argument concerning Petitioner's untimely Notice of Appeal. A mere cursory review of the documents designated and proposed by Petitioner will illustrate that said documents spanned the time period of December 1, 2017 through October 14, 2019—the date of the underlying trial. Petitioner possessed all the proposed documentation during the process of perfecting this Appeal and should not be allowed to now Supplement the Record on Appeal with such readily earlier available information.

Petitioner filed the Record on Appeal on July 27, 2020. Although Respondent's Final Brief—Respondent was served on Petitioner's attorney of record and filed with this Court on August 13, 2020, Respondent served the Initial Brief—Respondent, on Petitioner's attorney of record by personal service and US Mail on June 18, 2020 while filing an exact duplicate of the Initial Brief—Respondent with this Court on June 19, 2020. In the Initial Brief—Respondent, Respondent originally and unambiguously asserts the notion of Petitioner's questionable timely service of the Notice of Appeal on page 5, within the first Argument presented with the subsection entitled, "THE APPELLANT'S APPEAL IS NOT TIMELY AND SHOULD BE DISMISSED."

Even if Petitioner's counsel genuinely failed to recognize the crux of Respondent's argument until after the filing of the Record on Appeal, the Petitioner had the opportunity to supplement the Record on Appeal from July 27, 2020 until 11:19AM on February 16, 2023 to do so with consent.

Here, Petitioner's attorney of record failed to demonstrate to this Court any instance during the 2 years, 6 months and 20 days in which an attempt to garner such consent for the relief to supplement the Record on Appeal was withheld or denied by Respondent's counsel. Now, after Petitioner's appeal was dismissed, it wishes to come back and augment the Record on Appeal. "Petitioner has the burden of providing this Court with a sufficient record upon which this Court can make its decision. *Wilson v. American Casualty Co.*, 252 S.C. 393, 166 S.E.2d 797 (1969)." *Germain v. Nichol*, 278 S.C. 508, 299 S.E.2d 335 (S.C. 1983). The court concluded in *Germain*, "the appellate court will not consider any fact which does not appear in the Record on Appeal," and "'Petitioner has the burden of providing this Court with a sufficient record upon which this Court can make its decision.'"; *Germain v. Nichol*, 278 S.C. 508, 509, 299 S.E.2d 335, 335 (1983), see also *Davidson v. City of Beaufort, et al*, Appellate Case No. 2010-163346, No. 2011-UP-199. Furthermore, Petitioner fails to rely on any caselaw precedent wherein parties requested identical relief from a South Carolina Court after oral arguments and ultimate dismissal by the tribunal for lack of appellate jurisdiction.

However, now in the Petition for a writ of certiorari, Petitioner puts forth a different reason to supplement the record—that service was conveyed on an entity and not the Respondent's counsel of record via the acceptable proscribed means under the rules. Therefore, this Court should affirm the Court of Appeals dismissal of the Petitioner's Motion to Supplement Record.

CONCLUSION

A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only when there are special and important reasons. Rule 242(b), SCRPC. Such reasons are absent in this case. Based on the arguments stated above and those in his brief, Respondent respectfully request this Court deny the petition for writ of certiorari.