

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM THE ADMINISTRATIVE LAW COURT

Milton G. Kimpson, Administrative Law Judge

Trial Court Case No. 22-ALJ-07-0010-CC

Appellate Case No. 2022-001792

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T. Tree Farms RV Park (Blue Sky Associates, LLC), Respondents,

v.

South Carolina Department of Health and Environmental Control, Enclave at Fairview Homeowners' Association, Inc., Golden Hills of Fairview Homeowner's Association, Inc., Greenspace of Fairview, LLC, and North Pacolet Association, Inc.,

of which Enclave at Fairview Homeowners' Association, Inc., Greenspace of Fairview, LLC, North Pacolet Association, Inc. and Golden Hills of Fairview Homeowner's Association, Inc., are the Appellants and South Carolina Department of Health and Environmental Control is a Respondent.

**RESPONDENT'S MOTION TO DISMISS**

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Respondent T. Tree Farms RV Park (Blue Sky Associates, LLC) hereby moves that Appellants' July 22<sup>nd</sup>, 2024 Petition for rehearing be dismissed, and that the Court hold the request for Respondent to file a return be held in abeyance.

**INTRODUCTION**

The Court of Appeals issued its final opinion in this case on July 3<sup>rd</sup>, 2024. Appellants did not file a Petition for rehearing by July 18<sup>th</sup>, 2024. On July 22<sup>nd</sup>, 2024, at 1:59 pm, the Clerk issued the remittitur. Appellants filed a Petition on July 22<sup>nd</sup>, 2024, at 2:02 pm. Appellants neglected to file a certificate or affidavit of service with the Petition. Later that day, Respondent filed its motion for costs under Rule 222(d), SCACR as the remittitur had been issued. On July 26<sup>th</sup>, 2024, the Clerk issued a notice recalling the remittitur, accepting Appellant's Petition, and instructed Respondent to file a return to the Petition within ten days.

**1. The Petition does not comply with Rule 221, SCACR as it is untimely**

The Court of Appeals issued the opinion in this case on July 3<sup>rd</sup>, 2024. Pursuant to Rule 221 (a), SCACR, “Petitions for rehearing must be actually received by the appellate court no later than fifteen (15) days after the filing of the opinion, order, judgment, or decree of the court.” Under Rule 263 (a), SCACR, “[i]n computing any period of time prescribed or allowed by these Rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included.” The fifteen days started on July 4<sup>th</sup>, 2024, the day after the opinion was issued. Appellants were required to file their Petition for rehearing on Thursday, July 18<sup>th</sup>, 2024. The Court did not receive a Petition until Monday, July 22<sup>nd</sup>, 2024. Rule 263 (a) does state that “[t]he last day of the period so computed is to be included, unless it is a Saturday, Sunday or a state or federal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor such holiday.” However, this does not apply in this case; the only way the 15<sup>th</sup> day could fall on a weekend would be if the Court had issued its opinion on July 5<sup>th</sup>. And Rule 263(a) does not specify any special treatment if the first day after the order is issued falls on a holiday. The Petition is untimely.

**2. The Petition does not comply with Rules 221 (a) and 240, SCACR and is defective**

Under Rule 221 (a), SCACR, a Petition for rehearing must comply with Rule 240, SCACR. Rule 240 (c)(1) requires that the Petition include “[a] certificate or affidavit of service reflecting the date of service upon all parties. The original certificate or affidavit of service must be filed with the original motion or petition.” Appellants neglected to include a certificate or affidavit of service with their Petition.

In *Wise v. South Carolina Dept. of Corrections*, 642 S.E.2d 551 (S.C. 2007), the appellant filed a *timely* Petition for reinstatement but failed to include a proof of service, and his case was

dismissed for this failure alone. The Supreme Court explained: “[b]y order dated October 12, 2006, [Wise’s] appeal was dismissed by the Court of Appeals. On October 27, 2006, the Court of Appeals received a petition to reinstate from appellant; however, he failed to provide proof of service.” (*Id.*) The Clerk subsequently issued a remittitur as the Petition was defective. After Wise sought review with the Supreme Court, the Court dismissed his case for his failure to comply with Rule 240, SCACR. This Petition must be dismissed for the same reason.

**3. The Remittitur was properly sent before Appellants filed their Petition and the Court has no jurisdiction to consider it**

In *Wise*, the Court of Appeals dismissed Wise’s appeal on October 12<sup>th</sup>, 2006. As discussed above, Wise filed a timely petition to reinstate on October 27<sup>th</sup>, 2006 (the fifteenth day), but he failed to provide proof of service with his petition. As a routine matter, the Court of Appeals issued the remittitur on October 30<sup>th</sup>, 2006. Thereafter Wise filed a motion for enlargement of time with the Supreme Court (which denied that motion) and then Wise filed a “59(e) Motion to Alter or Amend a Judgement [*sic*]” which the Supreme Court rejected in its published opinion, stating:

Whenever it appears that an appellant has failed to comply with the requirements of the SCACR, an order of dismissal shall be issued. Rule 231(a), SCACR. The Clerk of Court shall remit the case to the lower court in accordance with Rule 221, SCACR, unless a motion to reinstate the appeal has been actually received by the court within fifteen days of filing of the order of dismissal. *Id.*

When the remittitur has been properly sent, the appellate court no longer has jurisdiction over the matter and no motion can be heard thereafter. *Mickle v. Blackmon*, 255 S.C. 136, 177 S.E.2d 548 (1970); *Thomas v. Lynch*, 87 S.C. 44, 68 S.E. 817 (1910); *Carpenter v. Lewis*, 65 S.C. 400, 43 S.E. 881 (1903); *State v. Keels*, 39 S.C. 553, 17 S.E. 802 (1893). The only exception to this rule is when the remittitur is sent down by mistake, error or inadvertence of the Court. *Keels supra*.

The remittitur in this case was not sent down by mistake, error or inadvertence of the Court of Appeals. Instead, it was correctly sent after fifteen days had elapsed

from the date of the order dismissing the appeal without the *proper* filing of a petition for reinstatement. See Rule 224, SCACR (certificate of service shall be filed with all motions and petitions). Accordingly, this Court does not have jurisdiction to act in this matter. The documents filed by appellant are hereby dismissed. (emphasis in original)

*Wise*, 642 S.E.2d at 551

Here the Court of Appeals did not send down the remittitur by “mistake, error or inadvertence” on its part. It correctly sent the remittitur after fifteen days had elapsed from the filing of the opinion and the Court had not received a Petition for rehearing. The Clerk issued the remittitur on July 22, 2024, at 1:59 pm. Appellants filed their Petition on July 22, 2024 at 2:02 pm. Whether an untimely Petition is filed three days or three minutes after the correct issuance of a remittitur, the result is the same. Respondent would stress that no *proper* Petition for rehearing (as defined by the Supreme Court in *Wise*) has ever been filed in this case. Appellants have not corrected their failure to file a proof of service, and as of the date of filing this motion, a full twenty six days have elapsed since the Court of Appeals issued its opinion.

Respondent requests that the Court dismiss Appellants’ Petition for rehearing on the grounds of untimeliness, failure to comply with Rules 221 (a) and 240, SCACR, and lack of jurisdiction, and direct the Clerk to reissue the remittitur with immediate effect. Respondent requests that during the pendency of this motion the Court hold all timelines for its return in abeyance.

/S Alexander G. Shissias

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July 29, 2024

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of which Enclave at Fairview Homeowners' Association, Inc., Greenspace of Fairview, LLC, North Pacolet Association, Inc. and Golden Hills of Fairview Homeowner's Association, Inc., are the Appellants and South Carolina Department of Health and Environmental Control is a Respondent.

**PROOF OF SERVICE**

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This is to certify that I, Alexander G. Shissias, have this day caused to be served upon the person(s) named below the **Respondent's Motion to Dismiss Appellants' Petition for rehearing** in the foregoing matter by emailing a copy of same to the Attorney Information System provided email addresses below, and in the case of pro hac vice counsel per Supreme Court Order:

Sara V. Martinez, Esq. <a href="mailto:martinsv@dhec.sc.gov">martinsv@dhec.sc.gov</a>	Carl Muller <a href="mailto:carl@carlmullerlaw.com">carl@carlmullerlaw.com</a>
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*/s Alexander G. Shissias*  
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July 29, 2024

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<sup>1</sup> See Supreme Court Order on Electronic Service dated April 24, 2024 Section (d)(3). Service on local counsel is service on *Pro Hac Vice* counsel.