

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Aug 13 2024

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

SC Court of Appeals

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 REPLY TO APPELLANT'S RETURN ON MOTION TO DISMISS

Pursuant to Rule 240 (f), SCACR, Respondent files its reply to Appellant's August 12th, 2024 return to Respondent's motion to dismiss.

Appellants fail to address or explain the main point here, which is that they failed to comply with Rule 221(a), SCACR by filing their Petition for rehearing four days late. They provide no explanation of why their Petition was late, or why the Court should excuse their noncompliance. Appellants in fact have admitted no error. Appellants simply missed the July 18, 2024, deadline. When the Clerk issued the remittitur on the afternoon of July 22nd Appellants realized their error, and rushed to file a Petition minutes later, neglecting to include a certificate of service. They argue that the Court can enlarge deadlines for filing, which is undoubtedly true. But the Court did not issue an order enlarging any deadline, and Appellants did not move to request leave to file a late Petition. They simply filed an untimely and defective Petition and now ask the Court to excuse their noncompliance after the fact, without any explanation whatsoever.

Making matters worse, Appellants filed after the remittitur was properly issued, and nothing in their return can excuse that. Their return argues that the Respondent must show prejudice, a requirement not found in the Rules.¹

The fact that the Petition was untimely filed justifies dismissal on its own. But the fact that the Petition was filed *after* the remittitur was properly issued and *without* a certificate of service are both dispositive as *Wise v. South Carolina Dept. of Corrections*, 642 S.E.2d 551 (S.C. 2007) is controlling, despite Appellants' claims to the contrary. Again, the Clerk did not issue the remittitur in error. It is undisputed that fifteen days had elapsed without the Court's receipt of a Petition for rehearing, and so the remittitur was proper. This should be a jurisdictional issue. Respondent understands the Clerk's action to withdraw the remittitur so that this issue could be resolved, but it must be resolved by dismissal of Appellant's Petition.

Appellants cannot excuse their noncompliance with Rules 221 (a), and 240, SCACR, which specifies "[t]he original certificate or affidavit of service must be filed *with* the original motion or petition." (emphasis added). On July 30th, 2024, Appellants made a late filing of a Certificate of Service which was dated July 30th and attached a copy of the cover email from when they filed their Petition on July 22nd, 2024. The Certificate states that they served counsel of record on July 22nd, 2024. In their return, they call this a "procedural defect" that has been "corrected." It has not been corrected because it cannot be corrected. By filing a Certificate of Service eight days after their Petition, Appellants admit they did not comply with the Rule.

¹ If it were necessary, Respondent submits that having to defend not one but two untimely filed appeals (first at the Administrative Law Court and here) is prejudicial to Respondent.

Appellants have made yet another error². Under Rule 240(d), SCACR, all motions and petitions must be accompanied by a filing fee. As of the date of this reply, CTRACK shows that Appellants never paid the \$50.00 filing fee for the Petition. One supposes that as Respondent has pointed out this error, Appellants will “correct” it and claim it is another mere “procedural defect” that the Court should excuse as well. How many fundamental procedural errors should this Court excuse in the absence of any explanation, excuse, or request for leave?

The Petition STILL has not been “properly” filed within the meaning of the Supreme Court in *Wise*, forty days after the Court of Appeals issued its opinion.³ Respondent is entitled to the relief requested in its July 29th, 2024, Motion to dismiss. At this point their Petition needs to be put out of its misery.

/s Alexander G. Shissias

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August 13, 2024

² Respondent could not have been sure of this error when it filed its July 29th, 2024 Motion. Litigants file via email and separately mail the fee to the Court. As a result, a check might not show up on CTRACK for several days. The fact that it hasn’t shown up by now means Appellants forgot to pay it, just as they forgot to file before the deadline and to include a Certificate of Service. The Court should dismiss the Petition AND require Appellants to pay the \$50.00 filing fee.

³ Again, the Supreme Court found *Wise*’s Petition was not *properly* filed simply because it lacked a Certificate of Service. *Wise*’s Petition was timely. The Petition filed by the Appellants is untimely *and* was filed without a Certificate. The only other difference between the instant case and *Wise* is that when *Wise*’s appeal was dismissed, he sought relief with the Supreme Court after the remittitur was issued. In the instant case Appellants belatedly attempted to “correct” their errors with the Court of Appeals after the remittitur was issued and argue that their many defects should be excused.

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PROOF OF SERVICE

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 Reply to Appellants' Return on the Motion to Dismiss** 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:

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⁴ 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.