

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SALUDA COUNTY
Court of Common Pleas
Kathy O. Rushton, Special Referee

Case No. 2008-CP-41-00099
Appellate Case No. 2012-208166

Bobby Jo Clark, as personal representative of
the Estate of Richard Clark,

Respondent

v.

Fairy Bell Irving, Andrew Irving, A/K/A Andrew Erving, Alfonzo Irving, A/K/A Alfonzo Erving, John D. Irving, A/K/A John D. Erving, William T. Irving, A/K/A William T. Erving, Robert Irving, Sr., A/K/A Robert Erving, Sr., Sally May Morgan, F/K/A Sally May Irving, Minnie Lee Butler, F/K/A Minnie Lee Irving, Joyce Thelma Taylor, F/K/A Joyce Thelma Irving, Mary Irving, A/K/A Mary Erving, Mamie Irving A/K/A Mamie Erving, Jessie Ina Irving, A/K/A Jessie Ina Erving, Julious Irving, A/K/A Julious Erving, Rashell Irving, Fairy May Irving, Thelma Irving, Annell I. Ray, Julious Irving, Jr., Alfreda Irving, Thelma Cartlele, Bennie Warren Butler and persons claiming any right, title estate, interest in or lien upon the real estate described in the complaint herein, any unknown adults being a class designated as John Doe; and any unknown minors or other persons under legal disability being a class designated as Richard Roe, Defendants,

Of whom Joyce Thelma Irving is the Appellant

RETURN IN OPPOSITION TO MOTION TO REINSTATE APPEAL

Counsel for the respondent, Bobby Jo Clark, as personal representative of the Estate of Richard Clark, hereby respectfully submits this return in opposition to the motion to reinstate this

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SC COURT OF APPEALS

appeal filed by counsel for the appellant, Joyce Thelma Irving. For the reasons set forth below, this Court should deny the motion to reinstate.

Appellant brought this appeal from an order of the Saluda County Court of Common Pleas, Kathy Ouzts Rushton, Special Referee, dated December 9, 2011.

Both parties filed initial briefs. Respondent's initial brief was served and filed August 19, 2013. Appellant did not serve or file an initial reply brief, therefore the record on appeal was due to be served and a certificate of service of the record on appeal was due to be filed in the Court of Appeals on or before September 18, 2013. *See* Rule 210(a), SCACR.

The record on appeal was not served by the September 18 deadline, and no certificate of service was filed in the Court of Appeals by that deadline. By order filed September 26, 2013, the Court of Appeals dismissed the appeal, based on appellant's failure to provide proof of service of the record on appeal in accordance with Rule 210 of the South Carolina Appellate Court Rules. No petition for rehearing or motion to reinstate the appeal was filed within 15 days, and the remittitur was issued on October 17, 2013, in accordance with Rule 221 of the South Carolina Appellate Court Rules.

On November 1, 2013, counsel for respondent timely served and filed a motion for costs.

On November 5, 2013, both attorneys for respondent received from counsel for appellant packages containing a "motion to reinstate," a document entitled "proof of service," and what purports to be the record on appeal. The proof of service filed in the Court of Appeals and signed by counsel for appellant states that the documents were served by mail on November 1, 2013. However, the postage labels and USPS tracking numbers on the packages received by both attorneys for respondent reflect that the packages were not mailed until November 4, 2013. *See* Exhibits attached hereto (copies of packages and USPS tracking information). It appears counsel for appellant has misrepresented to the Court the actual date of mailing.

The Court of Appeals is without jurisdiction over this matter and cannot entertain the motion to reinstate, because the remittitur was properly sent. *See Wise v. South Carolina Dep't of Corrections*, 372 S.C. 173, 174, 642 S.E.2d 551, 551 (2007). *Wise* presented a similar situation as that presented here, and the Supreme Court's treatment of a motion filed in the appellate court after the issuance of the remittitur is instructive:

When the remittitur has been properly sent, the appellate court no longer has jurisdiction over the matter and no motion can be heard thereafter. The only exception to this rule is when the remittitur is sent down by mistake, error or inadvertence of the Court.

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. Accordingly, this Court does not have jurisdiction to act in this matter. The documents filed by appellant are hereby dismissed.

Id. (citations and emphasis omitted). In this case, appellant did not file a petition for reinstatement within 15 days of the issuance of the remittitur, and the remittitur was not issued by mistake, error, or inadvertence. The Court of Appeals does not have jurisdiction to hear appellant's untimely motion to reinstate the appeal.

The motion to reinstate is accompanied by a Charleston Police Department Incident/Investigation Report pertaining to an alleged "burglary / breaking and entering" of the office of counsel for appellant on September 20, 2013. Numbered paragraph 1 of the motion to reinstate states:

"On September 20, 2013 my Law Office was burglarized and vandalized. This resulted in missing mail and damage to my office computers, as the intruders attempted to access information in my office. As a result of these third-party acts I have missed the deadline for submitting the Certificate of Service for the Record on Appeal and the service of the Record on Appeal upon opposing counsel in this matter."

(emphasis added). Contrary to counsel's assertion, the burglary and vandalism at counsel's office on September 20, 2013, could not and did not cause counsel to miss the deadline for

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serving the record on appeal and for filing proof of service in the Court of Appeals, a deadline that was two days earlier, on September 18, 2013. It appears counsel for appellant is attempting to mislead the Court concerning the reason the September 18, 2013, deadline was missed.

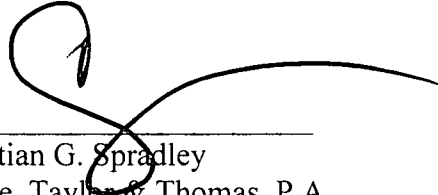
Paragraph 3 of the motion to reinstate asserts that the failure to serve the record on appeal and to file the required proof of service “was harmless and without prejudice to the Respondent.” To the contrary, the failure is not harmless. This appeal stemmed from an action for partition and sale of a tract of real property. Respondent and the other owners of the subject property, including appellant, will suffer prejudice under the circumstances of this case if the appeal is reinstated. The order on appeal, dated December 9, 2011, denied appellant’s motion to set aside a 2010 order of sale of the subject property. The sale did not proceed following either of these orders because of this appeal and an earlier appeal appellant attempted but failed to perfect. Upon the issuance of the remittitur by the Court of Appeals on October 17, 2013, the lower court was vested with jurisdiction to hear further matters in the action and to issue further orders to effect the sale of the property. *See Austin v. Stokes-Craven Holding Corp.*, Op. No. 27324 (S.C.Sup.Ct. filed Oct. 23, 2013) (Shearouse Adv. Sh. No. 45 at 25), at 34. Respondent’s trial counsel resumed the process in the lower court of bringing about a sale of the subject property. An order authorizing private sale of the property has been submitted to and signed by the special referee. One sealed bid has already been received from a prospective buyer of the property. If this appeal is reinstated, the sale will again have to be postponed, with the potential of losing this and any other prospective buyers. All of the owners of the property, including appellant, will be harmed by the delay of the sale that will result if appellant’s appeal is reinstated.

Counsel for appellant has now untimely served what purports to be the record on appeal. The last page of the record contains counsel’s statement that he “certifies that the Record of Appeal contains all material proposed to be included by any of the parties and not any other

material.” This statement is not correct. In fact, the record on appeal prepared by counsel omits many items designated by both parties, in violation of Rule 210 of the South Carolina Appellate Court Rules. Specifically, it omits appellant’s designated items 4, 10, 12, 13, 14, and 15, and respondent’s designated items 3, 4, 6, 7, 10, 11, 12, 13, 14, 17, 18, 19, and the memorandum designated in item 20. It also includes two items not designated by either party – a copy of a court decision (at pages 46-52), a notice of motion and motion to dismiss appeal (at pages 72-73), and an amended notice of appeal (at pages 75-76). The record on appeal also does not comply with the requirements of Rule 210 regarding the order of the contents and the numbering of pages of the record on appeal. The Court should not accept this record on appeal, which does not comply with the requirements of Rule 210.

Contrary to counsel’s assertion, the failure to timely comply with the requirements of Rule 210 were not attributable to the burglary at counsel’s law office, which occurred after the deadline for service of the record on appeal had already passed. Counsel did not timely file a petition for rehearing or motion to reinstate following the dismissal of the appeal on September 26, 2013. The remittitur was not issued in error. Counsel did not promptly file a motion to recall the remittitur after it was issued on October 17, 2013, instead waiting until November 4, 2013, to submit the motion to reinstate and the purported record on appeal. In the documents recently filed, appellant’s counsel has made misrepresentations to the Court. Following the issuance of the remittitur, the proceedings in the lower court have been resumed, and great prejudice will result to both appellant and respondent and to the other owners of the property if the appeal is reinstated. The record on appeal that has now been submitted by appellant is still not in compliance with Rule 210. For all these reasons, respondent respectfully asks the Court to deny the motion to reinstate this appeal.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Christian G. Spradley', written over a horizontal line.

Christian G. Spradley
Moore, Taylor & Thomas, P.A.
110 South Main Street
Saluda, South Carolina 29138
Telephone: 864-445-4544

Katherine Carruth Goode
P.O. Box 1175
229 South Congress Street
Winnsboro, South Carolina 29180
Telephone: 803-799-4440

Attorneys for Respondent

THE STATE OF SOUTH CAROLINA
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APPEAL FROM SALUDA COUNTY
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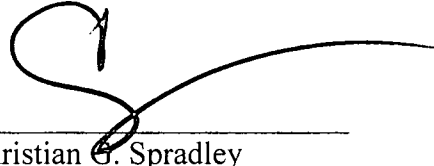
Of whom Joyce Thelma Irving is the Appellant

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I certify that I served the respondent's Return in Opposition to Motion to Reinstate Appeal upon appellant, by mail to appellant's attorney, Willie B. Heyward, Heirs' Property Law

Center, LLC, 27 Gamecock Avenue, Suite 200, Charleston, South Carolina 29407, on November 7th, 2013.

A handwritten signature in black ink, appearing to be 'Christian G. Spradley', written over a horizontal line.

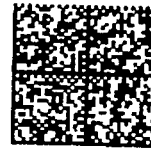
Christian G. Spradley
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Attorney for Respondent

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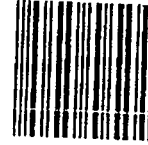
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Postal Product:
Priority Mail 2-Day™

Features:
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Available Options

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DATE & TIME	STATUS OF ITEM	LOCATION
November 5, 2013, 8:20 am	Out for Delivery	WINNSBORO, SC 29180
November 5, 2013, 8:10 am	Sorting Complete	WINNSBORO, SC 29180
November 5, 2013, 8:05 am	Arrival at Post Office	WINNSBORO, SC 29180
November 5, 2013	Depart USPS Sort Facility	CHARLESTON, SC 29423
November 4, 2013, 10:15 pm	Processed at USPS Origin Sort Facility	CHARLESTON, SC 29423
November 4, 2013, 5:15 pm	Dispatched to Sort Facility	CHARLESTON, SC 29407
November 4, 2013, 5:01 pm	Acceptance	CHARLESTON, SC 29407

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Email Updates

DATE & TIME	STATUS OF ITEM	LOCATION
November 5, 2013, 8:45 am	Out for Delivery	SALUDA, SC 29138
November 5, 2013, 8:35 am	Sorting Complete	SALUDA, SC 29138
November 5, 2013, 8:07 am	Arrival at Post Office	SALUDA, SC 29138
November 5, 2013	Depart USPS Sort Facility	COLUMBIA, SC 29201
November 5, 2013, 3:30 am	Processed at USPS Origin Sort Facility	COLUMBIA, SC 29201
November 4, 2013, 10:06 pm	Processed at USPS Origin Sort Facility	CHARLESTON, SC 29423
November 4, 2013, 5:15 pm	Dispatched to Sort Facility	CHARLESTON, SC 29407
November 4, 2013, 5:02 pm	Acceptance	CHARLESTON, SC 29407

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November 7, 2013

South Carolina Court of Appeals
Clerk of Court
Post Office Box 11629
Columbia, South Carolina 29211

Re: Bobby Jo Clark v. Fairy Bell Irving et al.
Case no. 2008-CP-41-099
Appellate case no. 2012-208166

Dear Clerk:

Please find enclosed the original and six copies of RETURN IN OPPOSITION TO MOTION TO REINSTATE APPEAL along with PROOF OF SERVICE for the same. By copy of this correspondence I am serving these documents upon Willie B. Heyward, Heirs' Property Law Center, LLC, counsel for the Appellant. Please return a filed copy to me in the envelope provided.

Thanking you in advance for your assistance, I am

Very truly yours,

A handwritten signature in black ink, appearing to be "Christian G. Spradley", with a long horizontal flourish extending to the right.

Christian G. Spradley

Enclosure

cc: Willie B. Heyward, Esquire
Katherine C. Goode, Esquire

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