

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal from Charleston County
Court of Common Pleas

SC Court of Appeals

Roger M. Young, Sr., Circuit Court Judge

Case No. 2010-CP-10-9672

Hayden Jeffords, individually, and on behalf of All Others Similarly Situated, Titus Gudel, Harold S. McEwan, D. Everett Walker, Paul Kane, Jeanne Debosh, Margarita Staudt, Leslie Anne O'Neal, Trivette C. Hatcher, William Scanlon, Delia Scanlon, Christy C. Parish, Joseph LaDue, Deborah LaDue, Pamela Snyder, Steven Goldberg, Brent McClaine, Brian Rasmussen, McKenzie Hutaff, Brian Kavanagh, Lynn Harris, and Kenneth A. Brown, Plaintiffs,

Of Whom Titus Gudel, Harold S. McEwan, William Scanlon, Delia Scanlon, Steven Goldberg, Brent McClaine, McKenzie Hutaff, Lynn Harris, and Kenneth A. Brown are the Secondary Appellants,

and

Of Whom John Zohlen, Mary Zohlen, Leslie Anne O'Neal, and Trivette C. Hatcher are the Respondents.

v.

East Bridge Town Lofts, LLC, a/k/a East Bridge, LLC, a/k/a East Ridge Homes, LLC a/k/a East Bridge Lofts, LLC; Central 3, LLC; Creekstone East Bridge, LLC; Creekstone SC I, LLC; Alexandra Road Investors, LLC; Creekstone Management, LLC; Creekstone Management, Inc.; Donald K. Henry; Everett Jackson; Steve Keller; Edward Michael Washburn; Kevin Ball; East Coast Carpentry a/k/a ECC Contracting, LLC; Fuller Drywall & Paint, Ltd.; Delta Mechanical, Inc. a/k/a Carolina Delta Mechanical; Wasson Electric Heating & Air; Bay Club Homes, LLC; Terracon Consultants, Inc.; Salvador Rubalcaba d/b/a Rubalcaba Construction, Defendants,

Of Whom East Bridge Town Lofts, LLC, a/k/a East Bridge, LLC, a/k/a East Ridge Homes, LLC, a/k/a East Bridge Lofts, LLC; Central 3, LLC; Creekstone East Bridge, LLC; Creekstone SC I, LLC; Alexandra Road Investors, LLC; Creekstone Management, LLC; Creekstone Management, Inc.; Donald K. Henry; Everett Jackson; Steve Keller; Edward Michael Washburn; and Kevin Ball are the Primary Appellants,

v.

East Bridge Lofts, LLC; Central 3, LLC; Creekstone Eastbridge, LLC; and Creekstone SC I, LLC; Alexandra Road Investors, LLC; Creekstone Management, LLC; Donald K. Henry; Everett Jackson; Steve Keller; Edward Michael Washburn; Kevin Ball; and Bay Club Homes, LLC; Third-Party Plaintiffs,

v.

Robert Wasson and Barbara Wasson, individually and d/b/a Wasson Electric Heating & Air; and Charleston Chimney Services, Inc., Third-Party Defendants.

**RESPONDENTS' RETURN TO
APPELLANTS' MOTION FOR REHEARING**

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***Attorneys for Respondents John Zohlen,
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Trivette C. Hatcher***

TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT OF APPEALS

COME NOW the Respondents, John Zohlen, Mary Zohlen, Leslie Anne O'Neal, and Trivette C. Hatcher (herein referred to collectively as the "Respondents"), by and through their undersigned counsel, and respond to the Motion for Rehearing filed/served on December 19, 2013 by Appellants East Bridge Town Lofts, LLC, a/k/a East Bridge, LLC, a/k/a East Ridge Homes, LLC, a/k/a East Bridge Lofts, LLC, Central 3, LLC, Creekstone East Bridge, LLC, Creekstone SC I, LLC, Alexandra Road Investors, LLC, Creekstone Management, LLC, Creekstone Management, Inc., Donald K. Henry, Everett Jackson, Steve Keller, Edward Michael Washburn, and Kevin Ball (herein referred to collectively as the "Appellants") as follows.

1. On October 28, 2013, the Court filed an Order dismissing this matter in its entirety.

2. The Court's October 28, 2013 Order of dismissal advised that "[t]he remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules."

3. The Court duly provided a copy of its October 28, 2013 Order of dismissal to counsel of record, including the Appellants' counsel.

4. Rule 221(a) provides: "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."

5. Rule 221(b) provides: "The remittitur . . . shall not be sent to the lower court or administrative tribunal until fifteen (15) days have elapsed (the day of filing

being excluded) since the filing of the opinion, order, judgment, or decree of the court finally disposing of the appeal.”

6. In accordance with Rule 221, after the passage of fifteen (15) days from the filing of the Court’s October 28, 2013 Order of dismissal with no petition for rehearing being received by the Court, this matter was properly remitted to the lower court on November 13, 2013.

7. More than a month later, on December 19, 2013, the Appellants filed/served the instant Motion for Rehearing.

8. It appears that the Appellants are now making a petition for rehearing under Rule 221.

9. Even if timely filed, a return to such a petition is not required unless specifically requested by the Court. *See* Rule 240(e), SCACR.

10. Here, the Appellants’ petition is not timely filed, coming more than a month after this matter was properly remitted to the lower court on November 13, 2013 (the matter having, of course, already been dismissed by the Court’s October 28, 2013 Order).

11. As the Appellants’ Motion for Rehearing appears to acknowledge, “[w]hen the remittitur has been properly sent, the appellate court no longer has jurisdiction over the matter and no motion can be heard thereafter.” Wise v. SC Dept. of Corrections, 372 S.C. 173, 174, 642 S.E.2d 551 (2007).

12. While there is a narrow exception to this rule “when the remittitur is sent down by mistake, error, or inadvertence of the Court,” this exception is not applicable here. Id.

13. As is clear from the instant Motion for Rehearing, the error cited/relied upon by the Appellants is not actually in remittitur on November 13, 2013, but in the October 28, 2013 Order of dismissal that preceded the remittitur: “On October 28, 2013, the Court **remitted** [sic] the entire case to the trial court based on the settlement of the two groups of Plaintiffs. In light of the Appellants having had no part in the settlement between the Plaintiffs, this remittitur was issued in error, as Appellants’ appeals were not impacted by that ruling and have not yet been heard.” (Motion for Rehearing p. 3) (emphasis added.)

14. Clearly, the substance of the Appellants’ challenge in the instant Motion for Rehearing is directed at the Court’s action on October 28, 2013, which the Appellants erroneously equate/conflate with the remittitur itself, not the actual remittitur on November 13, 2013, which is, of course, separate from the October 28, 2013 Order of dismissal. Notably, the Appellants do not contend that they were not properly notified of the filing of the October 28, 2013 Order of dismissal.

15. Most respectfully, it is too late for the Appellants to seek rehearing of the October 28, 2013 Order of dismissal. *See* Rule 221.

16. There is simply no such thing as a petition for rehearing of a “remittitur.” *Cf.* Rule 221(a) and (b) (indicating that rehearing may be sought of an “opinion, order, judgment, or decree of the court finally disposing of the appeal,” before the “remittitur” is issued). And the narrow exception to the rule that the appellate court loses jurisdiction upon issuance of the remittitur is not applicable here.

17. While the Respondents disagree with the Appellants’ argument regarding error in the October 28, 2013 Order of dismissal, the Respondents respectfully contend

that this argument is beside the point, and, as a procedural matter, is not properly raised in light of the current posture of this case, which has been properly remitted to the lower court.

18. With the matter being dismissed in its entirety by this Court by Order filed October 28, 2013, and the Appellants being properly notified thereof, it was incumbent upon the Appellants to take any issue that they were inclined to take with this Order by the deadline for filing a petition for rehearing under Rule 221. They did not do so.

19. Having received no timely petition for rehearing, this matter was properly remitted on November 13, 2013.

20. As in the Wise case, “[t]he 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.” Id. (emphasis in original).

21. Accordingly, as in Wise, “this Court does not have jurisdiction to act in this matter,” and “[t]he documents filed by [A]ppellant[s] [should be] dismissed.”

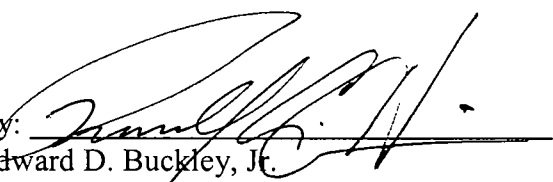
CONCLUSION

Respectfully, for the reasons set forth herein, the Appellants’ Motion for Rehearing is improper and unavailing and should be denied or dismissed. (But, to the extent, however, that a more substantive response to the error alleged in the Appellants’ Motion for Rehearing with respect to the October 28, 2013 Order of dismissal is appropriate and desired by the Court, the Respondents will, of course, provide the same as the Court may direct.)

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

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Trivette C. Hatcher*

Charleston, South Carolina

Dated: 12/30/13

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Charleston County
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Case No. 2010-CP-10-9672

Hayden Jeffords, individually, and on behalf of All Others Similarly Situated, Titus Gudel, Harold S. McEwan, D. Everett Walker, Paul Kane, Jeanne Debosh, Margarita Staudt, Leslie Anne O'Neal, Trivette C. Hatcher, William Scanlon, Delia Scanlon, Christy C. Parish, Joseph LaDue, Deborah LaDue, Pamela Snyder, Steven Goldberg, Brent McClaine, Brian Rasmussen, McKenzie Hutaff, Brian Kavanagh, Lynn Harris, and Kenneth A. Brown, Plaintiffs,

Of Whom Titus Gudel, Harold S. McEwan, William Scanlon, Delia Scanlon, Steven Goldberg, Brent McClaine, McKenzie Hutaff, Lynn Harris, and Kenneth A. Brown are the Secondary Appellants,

and

Of Whom John Zohlen, Mary Zohlen, Leslie Anne O'Neal, and Trivette C. Hatcher are the Respondents.

v.

East Bridge Town Lofts, LLC, a/k/a East Bridge, LLC, a/k/a East Ridge Homes, LLC a/k/a East Bridge Lofts, LLC; Central 3, LLC; Creekstone East Bridge, LLC; Creekstone SC I, LLC; Alexandra Road Investors, LLC; Creekstone Management, LLC; Creekstone Management, Inc.; Donald K. Henry; Everett Jackson; Steve Keller; Edward Michael Washburn; Kevin Ball; East Coast Carpentry a/k/a ECC Contracting, LLC; Fuller Drywall & Paint, Ltd.; Delta Mechanical, Inc. a/k/a Carolina Delta Mechanical; Wasson Electric Heating & Air; Bay Club Homes, LLC; Terracon Consultants, Inc.; Salvador Rubalcaba d/b/a Rubalcaba Construction, Defendants,

Of Whom East Bridge Town Lofts, LLC, a/k/a East Bridge, LLC, a/k/a East Ridge Homes, LLC, a/k/a East Bridge Lofts, LLC; Central 3, LLC; Creekstone East Bridge, LLC; Creekstone SC I, LLC; Alexandra Road Investors, LLC; Creekstone Management, LLC; Creekstone Management, Inc.; Donald K. Henry; Everett Jackson; Steve Keller; Edward Michael Washburn; and Kevin Ball are the Primary Appellants,

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v.

Robert Wasson and Barbara Wasson, individually and d/b/a Wasson Electric Heating & Air; and Charleston Chimney Services, Inc., Third-Party Defendants.

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Trivette C. Hatcher*

I, Russell G. Hines, of Young Clement Rivers, LLP, do hereby certify that a copy of the **RESPONDENTS' RETURN TO APPELLANTS' MOTION FOR REHEARING** was sent to all counsel via United States Mail, postage pre-paid on December 30, 2013 addressed as follows:

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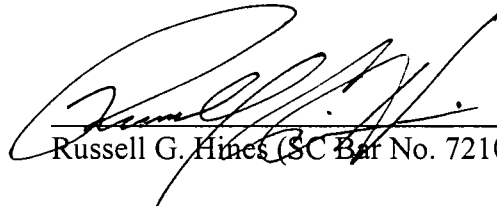
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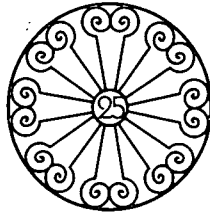
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Russell G. Hines (SC Bar No. 72100)

Charleston, South Carolina

Dated: 12/30/13



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December 30, 2013

VIA US MAIL

Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: East Bridge Lofts Property Owners Association, Inc. vs. East Bridge Lofts, LLC; Mike Washburn; Creekstone SC I; Creekstone Builders, Inc.; Don Henry; Everett Jackson and Steve Keller
Case No.: 2010-CP-10-10204
Appellate Case No.: 2012-213351
YCR File: 14096-20090424

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of Respondents' Return to Appellants' Motion for Rehearing and the original and two (2) copies of the Proof of Service for the above-referenced matter. I kindly request that you file the original and return a Court-stamped copy to me in the enclosed self-addressed stamped envelope. By copy of this correspondence, I am notifying all counsel of record of this filing. Should you have any questions regarding this filing, please feel free to contact our office.

With best wishes and kindest regards, I am

Sincerely,

YOUNG CLEMENT RIVERS, LLP

Jennifer L. McGibbon
Secretary

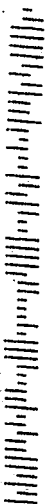
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cc: (via US Mail)
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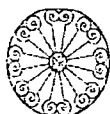
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