

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2008-CP-23-05739

RECEIVED
FEB 03 2014
SC Court of Appeals

Andrew P. (Andy) Ballard, Respondent,

v.

Tim Roberson, Rick Thoennes, Rick Thoennes III,
and Warpath Development, Inc. Appellants.

**APPELLANTS' RETURN TO RESPONDENT'S MOTION TO DISMISS
APPELLANTS' APPEAL OR, IN THE ALTERNATIVE, IMPOSE AN APPEAL BOND**

In response and opposition to Respondent's motion to dismiss Appellants' appeal or, in the alternative, impose a \$1,000,000 "appeal bond", Appellants' set forth the following:

Without addressing the factual and legal matters that will be presented on appeal in the return to Respondent's motion, the issues presented by this appeal are significant issues of concern to the businesses within this state. Appellants will present questions that directly concern judicial dissolution, business appraisal and the limits of judicial authority. For the reasons set forth below, Respondents motion to dismiss or, in the alternative, the request to require a \$1,000,000 "appeal bond" are without merit and should be denied.

A. Respondent's Motion Should be Denied as Notice of Appeal was Timely

Respondents claim Appellants' notice of appeal was untimely and the appeal should be dismissed. Respondent's motion is without merit and should be denied. According to Rule 203, SCACR, "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." In this matter, Appellants' counsel received written notice as required by Rule 203 upon being provided a copy of the court's order on December 19, 2013. See Howard Aff. ¶ 10. Appellants thereafter served notice of appeal on December 20, 2013, clearly within the 30 days set forth in Rule 203. As such, Appellants notice of appeal was timely and Respondents motion should be denied.

In support of his motion, Respondent appears to assert that the Rule 203 standard mandating that the 30-day clock start upon the receipt of written notice be modified or appended with a *per se* standard based upon the timing of the clerk's mailing of written notice or the filing. This is an unfounded and improper argument. First, the rule itself is premised upon actual receipt and not based upon filing, service or mailing. Presumably, this rule is so worded in order to prevent the miscarriage of justice that could arise from a failure of receipt as a result of the countless unknown errors that could arise as the written notice passes from the judge's chambers to the lawyer's office. If in the course of drafting Rule 203, it was sought to make the timing premised on filing, mailing or service, the Rule could have been drafted in that manner. For example, Rule 240, SCACR, which sets forth the procedure for the filing and service of this and other motions, requires that returns be filed "ten (10) days from the **date of service**" (emphasis added), as opposed to after written receipt. Second, even if the court was empowered to deem that receipt occurred sometime after mailing as a matter of law, as a factual matter in this situation, there is no contemporary evidence that the order was ever mailed to Appellants'

counsel's office. The certificate of mailing on the Form 4 Order was not completed. See Ex. C, Respondent's Mem. Supp. M. to Dismiss. Outside of Respondent's counsel's efforts to prove mailing with an unsworn, after-the-fact letter, there is no actual evidence on the order itself in the space provided on the order or otherwise issued contemporary with the order that establishes the order was ever put in an envelope addressed to Appellants' counsel's office and that such envelope was placed in the mail. Even if there existed a *per se* rule based upon mailing as suggested by Respondent, justice would at least require that the court officials complete the certificate of mailing on the order before the application of such a rigid policy.

Respondent further criticizes the Rule 203 standard of "receipt of written notice" by asserting that the standard should not be followed as drafted because it is subject to abuse. While that is a very cynical view of the members of the South Carolina Bar, Appellants suppose that if that view is held today, it also was most certainly held and considered when Rule 203 was drafted. In every notice of appeal filed, it is appellant's counsel who establishes the timing of the appeal when the representation of the date of actual written receipt is stated in the notice and the notice is signed by appellant's counsel. This procedure is endorsed by the Rules in Form 1 of Appendix C, SCACR. When determining the proper timing for a notice of appeal, the court must always rely on the honesty, ethics and honor of appellant's counsel in properly stating when they received written notice of the entry of the order or judgment giving rise to the appeal.

This matter does not present a factual situation of neglect or a miscalculation of time. While Respondent's counsel has taken efforts to avoid disparaging Appellants' counsel, nevertheless this motion at its essence presents the factual question of whether Appellants' counsel is honestly and ethically representing that the notice of appeal correctly states that December 19, 2013 was the first time written notice of entry of the order or judgment was

received. By affidavit included herein, Appellants' counsel affirms that the representation in the notice of appeal is accurate.

In this matter, a motion for reconsideration was timely filed on October 11, 2013. Knowing that the court's Order of Judgment called for action within 90 days and having heard nothing from the court or Respondent's counsel either by email, telephone call or otherwise concerning the motion for reconsideration, appellants' counsel sent a follow-up email on December 19, 2013 at 9:04 A.M. to the presiding judge and requested a hearing. See Howard Aff. ¶¶ 3, 4, and 5. At 9:09 A.M., Respondent's counsel, who was copied on the email to the presiding judge, presented Appellants' counsel with an email stating that Appellants' counsel must not have been notified as a decision denying the motion had been issued on November 8, 2013 and he received notice in or around November 14. See Howard Aff. ¶ 6.

All physical mail coming into Appellants' counsel's office is sorted and distributed to the proper administrative assistant. See Howard Aff. ¶ 7. Once received by the administrative assistant, the mail is opened, scanned, electronically stored and a copy emailed to all firm attorneys referenced. Id. While Appellants' counsel has no specific recall of any misplaced mail in his 10 years with the firm, any misplaced mail, in particular, and order, would be immediately rerouted to the proper place. Id. at ¶ 8. Janice Barry, Appellants' counsel's assistant, also maintains for a period of time a physical file by month of all mail received. Id. Immediately upon receiving Respondent's counsel's email of December 19, a search of the firm's physical and electronic files ensued. Id. It was determined from the search that this firm had not received the written notice referenced in Respondent's counsel's email. Id. An email confirming that lack of notice was transmitted at 9:24 A.M. on December 19, 2013. See Howard Aff. ¶ 9.

Respondent's motion cannot factually be justified. Appellant's counsel's received written notice of entry as set forth in Rule 203 on December 19, 2013. Appellants' counsel thereafter timely filed notice of appeal on December 20, 2013. For these reasons, Respondent's motion to dismiss should be denied.

B. There is no basis in law, the Rules or prior precedence to support Respondent's request for an "appeal bond".

In the alternative, without any authority to support the request, Respondent urges the Court to require an appeal bond in the amount of \$1,000,000 in order to move forward on appeal. Finding no authority to justify this request, as set forth below, Respondent's motion in the alternative is certainly without merit and should be denied.

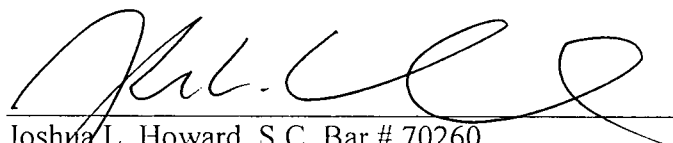
First, there is no Rule providing for Respondent's requested "appeal bond" or any precedent giving rise to the request for an appeal bond. Second, as Appellants are currently experiencing, execution proceedings are specifically excluded from an automatic stay and are governed by another body of statutory law. Concurrent to this appeal, those matters are being addressed by the circuit court. Appellants have sought a stay of execution. In opposition, Respondent has requested the same bond they are improperly requesting in this motion. Third, in light of another area of law covering the same issue, this request to impose a barrier to an appeal outside of the established rules causes significant due process concerns. Finally, without arguing the entire appeal in this return, Respondent's assertion that the only issue is "how much appellants should be required to pay" and that affirmance is "highly likely" signals that Respondent fails to understand the contours of this appeal. This appeal concerns issues far beyond the price of Respondent's shares. Given the testimony at trial and the issues presented,

the entire remedy is in issue in this appeal. For these reasons, Respondent's alternative request for an "appeal bond" should likewise be denied.

Conclusion

For the reasons set forth herein, Respondent's motion to dismiss or, in the alternative, to impose a \$1,000,000 "appeal bond" should be denied.

Respectfully submitted,



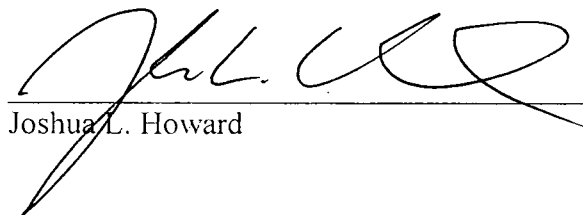
Joshua L. Howard, S.C. Bar # 70260
HAYNSWORTH SINKLER BOYD, P.A.
One North Main Street, 2nd Floor
Post Office Box 2048
Greenville, South Carolina 29602
(864) 240-3200

Attorneys for Appellants

Dated: January 31, 2014
Greenville, South Carolina

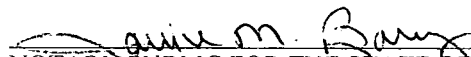
11. Notice of appeal was thereafter timely served on December 20, 2013.

FURTHER AFFIANT SAYETH NOT


Joshua L. Howard

Sworn to and subscribed before me this

31st day of January, 2014.


NOTARY PUBLIC FOR THE STATE OF SOUTH CAROLINA
MY COMMISSION EXPIRES: Dec 5, 2015

Howard, Joshua

From: Howard, Joshua
Sent: Thursday, December 19, 2013 9:04 AM
To: emillerj@sccourts.org; emillerlc@sccourts.org
Cc: 'Wallace K. Lightsey'
Subject: Ballard v. Warpath
Attachments: DM-#1540451-v1-Defs_Motion_for_Reconsideration_to_Alter_or_Amend_and_....pdf;
DM-#1542693-v1-Howard_letter_to_Judge_Miller_with_Defs_Motion_for_Reconsideration_and_or_New_Trial_-_ (pending).PDF

Judge Miller:

Defendants have a pending motion for reconsideration of the court's Order entered on October 3, 2013. The motion was filed and delivered on October 11, 2013. Defendants request a hearing on their motion at the court's earliest convenience.

Kind regards,

Josh Howard

**Haynsworth
Sinkler Boyd, P.A.**

ATTORNEYS AND COUNSELORS AT LAW

Joshua L. Howard | Attorney | Haynsworth Sinkler Boyd, P.A.

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[website](#) | [bio](#) | [vCard](#) | [map](#) | [email](#)

EXHIBIT A

Howard, Joshua

From: Wallace K. Lightsey <wlightsey@wyche.com>
Sent: Thursday, December 19, 2013 9:09 AM
To: Howard, Joshua; emillerj@sccourts.org; emillerlc@sccourts.org
Subject: RE: Ballard v. Warpath
Attachments: Form 4 Order.pdf

Josh - The motion for reconsideration was denied on November 8. Form 4 order attached.

We received this around November 14, and I confirmed with a woman in the clerk's office that a copy was mailed to you. Apparently it didn't reach you for some reason.



Wallace K. Lightsey | Wyche

44 East Camperdown Way | Greenville, SC 29601-3512
Phone: (864) 242-8207 | Fax: (864) 298-3999
wlightsey@wyche.com | www.wyche.com/wlightsey | [vCard](#)
A Lex Mundi Member Firm

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Thank you.

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Howard, Joshua

From: Howard, Joshua
Sent: Thursday, December 19, 2013 9:24 AM
To: 'Wallace K. Lightsey'; emillerj@sccourts.org; emillerlc@sccourts.org
Subject: RE: Ballard v. Warpath

Thank you Wallace. I have searched paper, email and electronic records. We have no record of receiving this.

Josh

From: Wallace K. Lightsey [<mailto:wlightsey@wyche.com>]
Sent: Thursday, December 19, 2013 9:09 AM
To: Howard, Joshua; emillerj@sccourts.org; emillerlc@sccourts.org
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Wallace K. Lightsey | Wyche

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wlightsey@wyche.com | www.wyche.com/wlightsey | [vCard](#)

A [Lex Mundi](#) Member Firm

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EXHIBIT C

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Edward W. Miller, Circuit Court Judge

Case No. 2008-CP-23-05739

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SC Court of Appeals

Andrew P. (Andy) Ballard, Respondent,

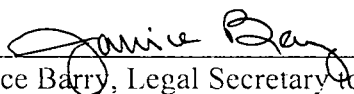
v.

Tim Roberson, Rick Thoennes, Rick Thoennes III,
and Warpath Development, Inc. Appellants.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of *APPELLANTS' RETURN TO RESPONDENT'S MOTION TO DISMISS APPELLANTS' APPEAL OR, IN THE ALTERNATIVE, IMPOSE AN APPEAL BOND* was served upon all counsel of record on this the 31st day of January, 2014, by U.S. Mail, postage prepaid, to the following:

Wallace K. Lightsey, Esquire
WYCHE, PA
44 East Camperdown Way
Greenville, SC 29601


Janice Barry, Legal Secretary to Joshua L. Howard
Haynsworth Sinkler Boyd, P.A.
75 Beattie Place, Eleventh Floor (29601)
P.O. Box 2048
Greenville, SC 29602
Phone: (864) 240-3223/Fax: (864) 240-3300

GREENVILLE | CHARLESTON | COLUMBIA | FLORENCE

Haynsworth
Sinkler Boyd, P.A.

ATTORNEYS AND COUNSELORS AT LAW

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WEBSITE www.hsblawfirm.com

January 31, 2014

The Honorable Jenny Abbot Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: Andrew P. (Andy) Ballard v. Tim Roberson, Rick Thoennes, Rick Thoennes III, and
Warpath Development, Inc..
C.A. No.: 2008-CP-23-5739

Dear Ms. Kitchings:

Please find enclosed the original and seven copies, *Appellants' Return to Respondent's Motion to Dismiss Appellants' Appeal or, in the Alternative, Impose an Appeal Bond*, and a Certificate of Service showing service of the same on the Respondent. We have enclosed an additional copy of the motion to be filed-stamped and returned to us in the enclosed self-addressed stamped envelope.

Please contact me if you have any questions. Thank you for your assistance in this matter.

With kind personal regards, I am

Very truly yours,

HAYNSWORTH SINKLER BOYD, P.A.



Joshua L. Howard

JLH:jmb
Enclosures

cc: Wallace Lightsey, Esquire

RECEIVED

FEB 03 2014

SC Court of Appeals