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AUG 26 2015

SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2012-CP-10-04969  
Appellate Case No. 2013-001273

South Carolina Public Interest Foundation and Waring  
S. Howe, Jr., individually, and on behalf of all others  
similarly situated, .....

Appellants,

v.

James H. "Jay" Lucas, in his official capacity as  
Speaker of the South Carolina House of  
Representatives, Hugh K. Leatherman, Sr., in his  
official capacity as President of the South Carolina  
Senate, Representative Peter M. McCoy, Jr., Senator  
George Campsen, and the State of South Carolina, .....

Respondents.

**Return to Appellants' Petition to Recall Remittitur**

Pursuant to Rule 240(e) of the South Carolina Appellate Court Rules,  
Respondents James H. "Jay" Lucas, in his official capacity as Speaker of the South  
Carolina House of Representatives; Hugh K. Leatherman, Sr., in his official capacity  
as President of the South Carolina Senate; Representative Peter M. McCoy, Jr.,  
Senator George Campsen, and the State of South Carolina file this return to Appellants'  
Petition to Recall Remittitur. The petition should be denied for two reasons. First, this  
Court should deny the petition because Appellants fail to set forth good cause to allow  
recall of the remittitur. Second, recall is unnecessary because our appellate court rules

do not allow a party to seek certiorari from the denial of a motion that did not dismiss the appeal, which is what Appellants seek to do with this recall of remittitur.

### Relevant Background

After oral argument in this matter, Respondents moved to dismiss the appeal as moot. Appellants **consented to the dismissal** but filed a separate petition for attorney's fees and costs under Section 15-77-300 of the South Carolina Code. The Panel correctly construed the petition for attorney's fees as a motion filed by Appellants. *See* Order at p. 1 ("Appellants consent to the dismissal of the appeal on the grounds of mootness, **and move** this court for attorneys' fees and costs."). On June 17, 2015, the Panel dismissed the appeal as moot. The Panel also disposed of Appellants' motion by denying the petition for attorney's fees.

Thereafter, Appellants filed a petition for rehearing **only** as to the denial of their motion for attorney's fees. *See* Appellants' Petition for Rehearing. Appellants did not seek rehearing of the operative order dismissing the appeal. *Id.*

Respondents opposed the petition for rehearing, arguing that the appellate court rules do not allow a party to seek rehearing of a motion or petition, such as Appellants' motion for attorneys' fees and costs.<sup>1</sup> Specifically, Respondents noted that the petition for attorney's fees and costs did not dismiss or finally decide the appeal. The Panel's order dismissing the appeal as moot previously ended the appeal, and Appellants did not seek rehearing on that dismissal. Therefore, the effect of the denial of the petition for attorney's fees and costs did not, and could not, dismiss or finally decide Appellants' appeal. The Panel denied the petition for rehearing on July 17, 2015. *See*

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<sup>1</sup> *See* Rule 221(c), SCACR; Rule 240(i), SCACR.

Order denying Petition for Rehearing. This Court issued the remittitur on August 18, 2015. *See* Remittitur dated August 18, 2015. Appellants, via counsel, now seek to recall that remittitur to allow them to seek certiorari review of the denial of their motion for attorney's fees. *See* Petition to Recall Remittitur p. 4.

### Argument

This Court should deny the petition to recall remittitur. Appellants failed to set forth any proper basis to recall the remittitur. Moreover, the recall of remittitur would constitute a futile act because our appellate court rules preclude Appellants from seeking certiorari from the denial of a motion by this Court.

The recall of remittitur is an extraordinary act. An appellate court cannot recall remittitur after it has been sent down in order to correct errors. *Carpenter v. Lewis*, 65 S.C. 400, 43 S.E. 881 (1903). "In order to justify the unusual power of recall the remittitur, a very strong showing is required that the remittitur was sent down through some mistake or inadvertence on the part of the appellate court." Toal, Vafai, and Muckenfuss, *Appellate Practice in South Carolina* 2d. p. 295 citing (*State v. Keels*, 39 S.C. 553, 553, 17 S.E. 802, 802 (1893)). Moreover, an appellate court will not recall remittitur "due to some excusable neglect on the part of the appellant" in failing to meet appellate deadlines. *Id.*

Appellants fail to meet this significant burden. Appellants offer no excuse for recall other than simply missing a deadline, which is patently insufficient under *Appellate Practice* and *Keels*. Petition to Recall at p. 4 ("I now understand that the Petition for Writ of Certiorari needed to have been filed by close of business on August 17 . . . ."). Appellants' counsel should be well-versed in the appellate court rules and

timing of the filing of a petition for a writ of certiorari. Appellants' counsel has appeared as counsel of record in 29 matters before this Court and the Supreme Court.

Despite Appellants' counsel's significant appellate experience, Appellants simply failed to meet the clear and unambiguous deadline set forth in our appellate court rules for the filing of a petition for a writ of certiorari. Appellants' mistake as to the deadline to file a petition for a writ of certiorari does not meet the extraordinary burden needed to recall remittitur. Therefore, this Court should deny the petition to recall remittitur.

In an improper<sup>2</sup> filing, Appellants remarkably claim that the issuance of remittitur does not divest this Court of appellate jurisdiction. *See* Supplemental Memorandum at p. 3-4. Appellants misconstrue the effect of the issuance of the remittitur. As the clerk of the Supreme Court advised counsel for Appellants, the issuance of the remittitur immediately divests the **appellate courts** of jurisdiction to entertain motions in the case. *Wise v. S.C. Dep't of Corr.*, 372 S.C. 173, 174, 642 S.E.2d 551, 551 (2007) (recognizing that the **issuance** of remittitur ends appellate jurisdiction over the matter and divests the appellate courts of the ability to rule on

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<sup>2</sup> Appellants' two recent filings with this Court fail to follow our appellate court rules. First, Appellants filed a petition for rehearing of a motion (for attorney's fees) that did not dismiss the appeal in contravention of Rule 221(c), SCACR and Rule 240(i), SCACR. Second, at 9:36 p.m. on August 24, 2015, Appellants' counsel emailed a Supplemental Memorandum in Support of Petition to Recall Remittitur to this Court and to counsel for Respondents. Our rules do not allow for such a filing. Motions practice is controlled by Rule 240, SCACR. That rule provides that the moving party is required to file the motion and supporting memorandum simultaneously. *See* Rule 240(c)(2) and 240(d), SCACR (requiring the motion with any "memorandum with citations of authorities in support of the motion" at the same time). Appellants filed the motion, with no supporting authority, on August 20, 2015. Appellants then emailed this Supplemental Memorandum on August 24, 2015, to include authority in support of the motion. The rules do not allow for such a supplemental filing. The Supplemental Memorandum should be disregarded as improper. At a minimum, this Court should construe the Supplemental Memorandum as Appellants' reply to this return and bar Appellants from filing any reply to this motion.

anything other than a motion to recall remittitur); *see also* Letter from Shearouse to Carpenter dated August 21, 2015, attached hereto as Exhibit A.

Appellants' reliance on *Christy v. Christy*, 317 S.C. 145, 452 S.E. 1 (Ct. App. 2005), *Brackenbush North Charleston, LP v. County of Charleston*, 366 S.C. 503, 623 S.E.2d 91 (2005), and *Harleysville Mutual Insurance Co. v. State*, 401 S.C. 15, 736 S.E.2d 651 (2012), does not alter this settled rule. Appellants rely on isolated parts of those cases to claim that each case stands for the proposition that this Court retains appellate court after the issuance of remittitur until the remittitur is filed by the circuit court. *See* Supplemental Memorandum at p. 4. The full context of those cases establishes that Appellants' misconstrue each case and illustrates Appellants' misapprehension of the effect of the issuance of remittitur by this Court.

In *Christy*, this Court addressed the effect of the issuance remittitur on the appellate court and as to final disposition of the case before the circuit court. 317 S.C. at 151, 452 S.E. at 4. This Court noted that **final disposition** of the case cannot occur in the circuit court until the remittitur is filed in the circuit court. *Id.* ("The final disposition of a case occurs when the remittitur is returned by the clerk of the appellate court and filed in the lower court"). Appellants cite only this statement to this Court. However, this Court addressed the effect issuance of remittitur and held:

Once the remittitur is **sent down** from the appellate court, the lower court acquires jurisdiction to enforce the judgment and take any action consistent with the appellate court ruling.

*Id.* (emphasis added). Thus, the issuance of remittitur divests this Court of jurisdiction and vests the circuit court with authority to address any remaining issues. The circuit

court can enter the final disposition of the case **in that court** after filing of the remittitur. As a result, this Court should reject Appellants' misconstruction of *Christy*.

Likewise, Appellants misinterpret *Brackenbush*. In that case, the Supreme Court resolved the parties' first appeal, which had the effect of dismissing the underlying civil action. *Brackenbush*, 366 S.C. at 506-07, 623 S.E.2d at 92-93. The remittitur "was returned" to the circuit court. *Id.* at 506, 623 S.E.2d at 92. After remittitur, the appellant filed a motion for attorney's fees with the circuit court. *Id.* The circuit court dismissed the motion "apparently because the court concluded that once the underlying civil action had been dismissed, it no longer had jurisdiction over the request" for attorney's fees. *Id.* at 507, 623 S.E.2d at 93. On appeal of that ruling, the Supreme Court reversed the circuit court because "jurisdiction of the circuit court to hear matters related to a case after the issuance of remittitur is well-established." *Id.* at 508, 623 S.E.2d at 93. The Supreme Court merely reaffirmed the circuit court's authority to move forward with collateral issue after the issuance of the remittitur. The Supreme Court did not hold that the appellate court retains jurisdiction over all matter until the filing of the remittitur in the circuit court, as claimed by Appellants. This Court should reject Appellants' misconstruction of *Brackenbush*.

Appellants also misrepresent *Harleysville*. That case was an original jurisdiction action which involved a convoluted procedural history, two opinions issued by the Supreme Court in related litigation, and the impact of legislation passed after the issuance of the first opinion but prior to the issuance of remittitur. *Harleysville*, 401 S.C. at 22-23, 736 S.E.2d at 654-55. The petitioner asked the Supreme Court to address whether the legislation passed while an appeal was pending violated various

constitutional provisions. The court was not asked to address whether an appellate court retains jurisdiction over an appeal after the issuance of remittitur.

In addressing the claims, the court first recounted the procedural history of litigation. The court first rendered an opinion known as *Crossmann I* on January 7, 2011. *Id.* at 22, 736 S.E.2d 654. The petitioner filed a petition for rehearing as to that opinion, which stayed the issuance of remittitur. *Id.* While the rehearing was pending, the General Assembly passed legislation on May 17, 2011, that impacted the issues in *Crossmann I*. *Id.*<sup>3</sup>

Petitioners argued that the passage of the act in direct response to the opinion in *Crossmann I* violated the separation of powers doctrine. *Id.* at 24-25, 736 S.E.2d at 655-56. The Supreme Court noted that “the General Assembly wrote and ratified [the act] in direct response to this Court’s decision in *Crossmann I*.” *Id.* at 25, 736 S.E.2d at 656. However, the Supreme Court rejected the separation of powers claim because *Crossmann I* was not final and remittitur had not issued at the time the General Assembly passed the act. *Id.* The court reasoned that “[h]ad *Crossmann I* been this Court’s final opinion, the doctrine might have been implicated.” *Id.*

In the supplemental memorandum, Appellants rely on a footnote from *Harleysville* that states “[a]n opinion of an appellate court is not final until the remittitur is filed in the lower court.” See Supplemental Memorandum at p. 4. This again distorts the rationale behind that statement. That footnote related to the court’s holding

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<sup>3</sup> The court held argument on the rehearing on May 23, 2011. *Id.* That same day, the petition for original jurisdiction was filed, arguing that the legislation passed by the General Assembly during the pendency of the appeal violated various constitutional provisions. *Id.* at 22, 736 S.E.2d at 654-55. On August 22, 2011, the court issued a revised opinion after rehearing known as *Crossmann II*. *Id.* at 22, 736 S.E.2d at 655.

that the General Assembly does not violate the separate of powers doctrine by passing legislation prior to an appellate decision becoming final. The Supreme Court did not hold that the appellate court retains jurisdiction over all matter until the filing of the remittitur in the circuit court, as claimed by Appellants. Thus, this case does not support the recall of remittitur.

Moreover, Appellants' claim that this Court retains jurisdiction has no practical effect in this matter. There are no pending matters before this Court at this time other than the petition to recall remittitur. Thus, even if this Court retained jurisdiction as argued by Appellants, this Court can take no action other than to address the recall petition.

Lastly, even if a recall of remittitur were allowed, it would have no impact on Appellants' stated goal to seek review of the denial of motion for attorney's fees. Appellants cannot seek certiorari review from the denial of motion that did not dismiss the appeal before this Court. Our appellate court rules are clear:

The appellate court will not entertain petitions for rehearing on a motion or petition unless the action of the court on the motion or petition has the effect of dismissing or finally deciding a party's appeal.

*See* Rule 221(c), SCACR; Rule 240(i), SCACR (same). The rules are equally as clear that a proper petition for rehearing is a prerequisite to the filing of a petition for a writ of certiorari. *See* Rule 242(d)(2), SCACR ("Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented for review by the Supreme Court.").

Therefore, Appellants are barred from seeking review of the denial to the motion for attorney's fees; thus, recall of remittitur would have no impact on this matter. This Court should deny the petition and allow the remittitur to stand.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

Michael J. Anzelmo  
SC Bar No. 72933  
E-Mail: michael.anzelmo@nelsonmullins.com  
1320 Main Street / 17th Floor  
Post Office Box 11070 (29211-1070)  
Columbia, South Carolina 29201  
803.799.2000

Attorneys for James H. "Jay" Lucas, in his official capacity as Speaker of the South Carolina House of Representatives

And with the consent to sign on behalf of counsel for Respondents Representative Peter M. McCoy, Jr., Hugh K. Leatherman, Sr., in his official capacity as President of the South Carolina Senate, and Senator George Campsen

Also:

By: 

J. Emory Smith, Jr.  
SC Bar No. 5262  
Deputy Solicitor General  
Post Office Box 11549  
Columbia, South Carolina 29211  
803.734.3680

by Michael Anzelmo with authorization

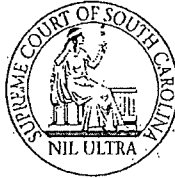
Attorneys for the Respondent State of South Carolina

Columbia, South Carolina

August 26, 2015

EXHIBIT

A



38955/01500  
rec'd 8/24/2015

## The Supreme Court of South Carolina

DANIEL E. SHEAROUSE  
CLERK OF COURT

BRENDA F. SHEALY  
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330  
COLUMBIA, SOUTH CAROLINA  
29211  
1231 GERVAIS STREET  
COLUMBIA, SOUTH CAROLINA 29201  
TELEPHONE: (803) 734-1080  
FAX: (803) 734-1499  
www.sccourts.org

August 21, 2015

James G. Carpenter, Esquire  
819 E. North St., Ste. 230  
Greenville SC 29601

Re: SC Public Interest Foundation v. James H. "Jay" Lucas  
Appellate Case No. 2015-001765

Dear Counsel:

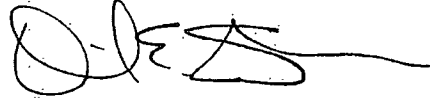
This Court has received your petition for a stay by e-mail, and this matter has been assigned the appellate case number that appears above.

Please be advised that this Court has not received your petition for a writ of certiorari to review the decision of the South Carolina Court of Appeals. Further, I have contacted the Court of Appeals, and while it has received your motion to recall the remittitur, it has not received a copy of the petition for a writ of certiorari.

The sending of the remittitur ended appellate jurisdiction over this case and no further motion (other than a motion to recall the remittitur which you have already made to the Court of Appeals) can be considered by either appellate court in this case. *Wise v. S.C. Dept. of Corr.*, 372 S.C. 173, 642 S.E.2d 551 (2007).

Therefore, no action will be taken on your petition for a stay by this Court.

Very truly yours,

A handwritten signature in black ink, appearing to be 'D. E. S.', with a long horizontal flourish extending to the right.

CLERK

cc: John Potter Hazzard, V, Esquire  
Kenneth M. Moffitt, Esquire  
Edward Houseal Bender, Esquire  
Jennifer J. Miller, Esquire  
C. Mitchell Brown, Esquire  
Michael J. Anzelmo, Esquire  
Robert E. Tyson, Jr., Esquire  
J. Emory Smith, Jr., Esquire  
The Honorable Jenny Abbott Kitchings

THE STATE OF SOUTH CAROLINA  
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official capacity as President of the South Carolina  
Senate, Representative Harry B. "Chip" Limehouse III,  
Senator George Campsen, and the State of South  
Carolina, .....

Respondents.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson  
Mullins Riley & Scarborough LLP, attorneys for Robert W. Harrell, in his official  
capacity as Speaker of the South Carolina House of Representatives, do hereby certify  
that I have served all counsel in this action with a copy of the pleading(s) hereinbelow  
specified by mailing a copy of the same by United States Mail, postage prepaid, to the  
following address(es):

Pleadings:

Return to Appellants' Petition to Recall Remittitur

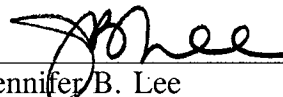
Counsel Served:

Alexis K. Lindsay  
Robert E. Tyson, Jr.  
Sowell Gray Stepp & Laffitte, LLC  
Post Office Box 11449  
Columbia, SC 29211

Kenneth M. Moffitt  
Edward Houseal Bender  
South Carolina Senate  
Post Office Box 142  
Columbia, SC 29202

James G. Carpenter  
Jennifer J. Miller  
Carpenter Law Firm, PC  
819 E. North Street  
Greenville, SC 29601

J. Emory Smith  
South Carolina Attorney General's Office  
Post Office Box 11549  
Columbia, SC 29211



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Jennifer B. Lee  
Administrative Assistant

August 26, 2015

# Nelson Mullins

Nelson Mullins Riley & Scarborough LLP  
Attorneys and Counselors at Law  
1320 Main Street / 17th Floor / Columbia, SC 29201  
Tel: 803.799.2000 Fax: 803.255.9024  
www.nelsonmullins.com

Michael J. Anzelmo  
Tel: 803.255.9312  
Fax: 803.255.9024  
michael.anzelmo@nelsonmullins.com

August 26, 2015

## Hand Delivered

The Honorable Jenny Abbott Kitchings  
Clerk of Court  
SC Court of Appeals  
1220 Senate Street  
Columbia, SC 29201

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SC Court of Appeals

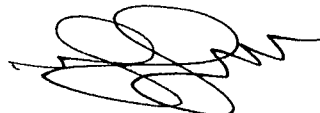
RE: South Carolina Public Interest Foundation, et al. v. Robert W. Harrell, Jr., in  
his official capacity as Speaker of the S.C. House of Representatives, et al.  
Civil Action No.: 2012-CP-40-1589  
SC Court of Appeals Case No. 2013-001273  
Our file no.: 38955/01500

Dear Ms. Kitchings:

Enclosed please find an original and seven copies of a Return to Appellants' Petition to Recall Remittitur in the above-referenced matter. Please file the original and return a clocked-in copy to me via our courier. Should you have any questions, please do not hesitate to contact.

By copy of this letter, I am hereby serving opposing counsel.

Very truly yours,



Michael J. Anzelmo

MJA:jlee  
Enclosures

cc: James G. Carpenter  
J. Emory Smith  
Edward Houseal Bender  
Robert E. Tyson, Jr.

Jennifer J. Miller  
Kenneth M. Moffitt  
Alexis K. Lindsay