THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Appellate Case No. 2015-002383
Circuit Court Case No. 2013-CP-15-1023

James C. Kincannon, James J. Kincannon, and Carolyn R. Kincannon ..... Appellants,

v.

U.S. Bank National Association, U.S. Bank National Association ND, Palmetto Property Conservation, and Mark Brown ..... Defendants,

of whom

U.S. Bank National Association and U.S. Bank National Association ND are ..... Respondents

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APPELLANTS' VERIFIED RETURN TO RESPONDENTS' MOTION TO DISMISS OR, ALTERNATIVELY, APPELLANTS' PETITION FOR REHEARING AND OTHER RELIEF NEEDED TO CURE RESPONDENTS' FAILURE TO PROPERLY SERVE THE MOTION TO DISMISS

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February 16, 2016

APPELLANTS' VERIFIED RETURN TO RESPONDENTS' MOTION TO DISMISS OR, ALTERNATIVELY, APPELLANTS' PETITION FOR REHEARING AND OTHER RELIEF NEEDED TO CURE RESPONDENTS' FAILURE TO PROPERLY SERVE THE MOTION TO DISMISS

TIMELINESS

This filing constitutes Appellants' Return to Respondents' Motion to Dismiss Appeal filed on November 30, 2015. It may seem at first blush that this return is untimely. Rule 240(e), SCACR establishes a ten day deadline, yet this return is being filed over two-and-a-half months after the motion was filed. Even worse, the Court has already granted Respondents' Motion to Dismiss and expressly noted Appellants' failure to file a return in the order of dismissal. See Order of February 1, 2015 (FEW, C.J.).

Yet Appellants' Return is not untimely. The ten day deadline established by Rule 240(e), SCACR runs from service, not filing, and Respondents have not yet served their motion to dismiss in accordance with the South Carolina Appellate Court Rules. And while improper service arguments are often based on ticky-tack technicalities, this one is certainly not. As a direct result of Respondents' failure to properly serve the motion to dismiss, Appellants had absolutely no idea Respondents had filed a motion to dismiss until February 3, 2015, when Appellants received Chief Judge Few's Order of February 1, 2015 granting Respondents' heretofore unknown motion to dismiss.

RESPONDENTS' VIOLATION OF RULE 240, SCACR'S SERVICE RULES

Service obligations under the South Carolina Appellate Court Rules are quite simple. All adversarial litigation filings must be served on every other party to the appeal except for the very rare situation where ex parte proceedings are justified. No 200-level

SCACR rule permits service of adversarial filings on fewer than all adverse parties except in the ex parte situation.[1]

The certificate of service that Respondents filed along with their motion to dismiss proves that Respondents failed to properly serve the motion. Because there are three Appellants and each is a pro se litigant who separately signed the Notice of Appeal, Respondents had a duty to serve a copy of the motion to dismiss on each Appellant. Yet instead of sending one copy to each Appellant, Respondents sent only two copies total addressed as follows:

> James C. & Carolyn R. Kincannon
> 216 Jones Avenue
> Simpsonville, SC 29681
>
> James J. Kincannon
> 200 Townes Road
> Columbia, SC 29210

Compare this with the method used by the Court of Appeals Clerk's Office—i.e., the proper method. When the Court sends materials to Appellants, three copies are sent addressed as follows (identically to the way Appellants' names and addresses appear on the Notice of Appeal):

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[1] See Rule 203(b)(1-5), SCACR ("A notice of appeal shall be served on **all respondents**"); Rule 203(b)(6), SCACR ("the notice of appeal shall be served on . . . **all parties of record**"); Rule 203(c), SCACR ("serv[e] notice of [cross] appeal on **all adverse parties**"); Rule 207(a-b) ("Appellant shall contemporaneously furnish **all counsel of record** . . . with copies of all correspondence"); Rule 208(a)(1-3), SCACR ("[filer] shall serve one copy of his brief on **all parties** to the appeal"); Rule 209(a), SCACR ("[filer] shall also serve on **all parties** to the appeal a Designation of Matter"); Rule 210(a), SCACR ("the appellant shall serve a copy of the Record on Appeal on **each party** who has served a brief") (parties that do not submit briefs have no need for copies of the Record on Appeal; further such parties have already received the designations of matter); Rule 211(a), SCACR ("each party shall serve a copy of his final brief(s) on **every other party** to the appeal"); Rule 240(c)(1), SCACR ("Each motion or petition shall include [a] certificate or affidavit of service reflecting the date of service upon **all parties**."); Rule 240(e), SCACR ("Any party opposing a motion or petition shall . . . serve on **all parties** a copy of the return"); Rule 240(f), SCACR ("The moving party shall . . . serve on **all parties** a copy of the reply."); Rule 241(d)(5) ("The petition and accompanying documents shall be served **on the opposing party(ies)**.").

James C Kincannon
216 Jones Avenue
Simpsonville, SC 29681

James J Kincannon
200 Townes Road
Columbia, SC 29210

Carolyn R Kincannon
216 Jones Avenue
Simpsonville, SC 29681

Appellants have received every piece of mail connected with this case that has been addressed in the fashion used by the Court of Appeals. Appellants have not effectively received any mail connected with this case that has been addressed in the fashion reflected on Respondents' certificate of service filed along with the motion to dismiss.

It is true that of a single copy of a litigation document on a lawyer is generally effective as to all of the lawyer's clients in the case, regardless of how many different entities the lawyer represents. Where a group of clients decides to act through a single lawyer in a legal matter, this implicitly (or explicitly) signals to third parties that they may treat the lawyer as a single point of contact for the entire group of litigants. This is nothing more than general agency law applied to the litigation process. Further, lawyers who act on behalf of a group of clients have a professional and fiduciary obligation to adequately communicate with each client.

Contrarily, third parties *cannot* assume that pro se litigants who happen to share a mailing address are ipso facto fiduciaries who are so cooperative and professional towards one another that the relationship is practically indistinguishable from the attorney-client relationship. In fact, South Carolina law contains a bright-line prohibition on attempting to serve two pro se litigants who list the same mailing address by mailing

one copy of the litigation document to "Litigant A & Litigant B." The Court of Appeals confronted this exact situation in McCall v. Ikon, 363 S.C. 646, 622 S.E.2d 315 (Ct. App. 2005):

> In the present case, McCall attempted to provide notice of the damages hearing to IKON by way of a single letter addressed jointly to "IKON d/b/a IKON Educational Services and C.E.S.C. (Computer Educational Services Corporation)." This letter was mailed to 1001 Keys Drive in Greenville, IKON Education Services' former office location that was taken over by CESC following its purchase of the IKON education business in December 2001. IKON argues the mailing of one letter addressed to both defendants was not adequate to satisfy the notice requirements of Rule 55(b)(2). We agree.
>
> Under Rule 55(b)(2), SCRCP, "[p]ursuant to Rule 5(a), notice of any trial or hearing on unliquidated damages shall also be given to parties in default by first class mail to the last known address of such party whether or not such party has appeared in the action." The service requirements of Rule 5(a), SCRCP, incorporated into Rule 55(b)(2) mandate that "[e]very order required by its terms to be served, every pleading subsequent to the original summons and complaint . . . *every written notice*, appearance, demand, offer of judgment, designation of record or case and exceptions on appeal, and similar papers shall be served upon *each* of the parties. . ." (emphasis added). The plain language of the rule therefore requires that *each* party shall be served separately. Mailing one letter to both IKON and CESC, therefore, was not sufficient to comply with Rule 55(b)(2) and Rule 5(a).

McCall v. Ikon, 363 S.C. 646, 622 S.E.2d 315 (Ct. App. 2005).

The South Carolina Appellate Court Rules' service requirements are not materially different from the requirements of Rule 5(a), SCRCP discussed in McCall v. Ikon. Therefore, Respondents' mailing of a single copy of the motion to dismiss addressed to both James C. Kincannon and Carolyn R. Kincannon was not sufficient to comply with the requirement of "service upon all parties" established by Rule 240(c)(1), SCACR.

Appellants are individual litigants acting pro se in this matter, just like IKON and CESC in the McCall case. Though Appellants' interests are aligned, Respondents cannot presume that Appellants are unfailingly cooperative and responsible with regard to joint matters. By sending only one copy of a litigation document jointly addressed to James C. Kincannon and Carolyn R. Kincannon, Respondents forced James C. Kincannon and Carolyn R. Kincannon into a dependence relationship that neither consented to. In this circumstance, the due process rights of the non-recipient are wholly dependent on whether the recipient handles the matter in a responsible fashion upon receiving the jointly addressed envelope.

APPELLANTS' CASE-RELATED MAIL PRACTICES

Appellants each have an independent right to effectively participate in this litigation. This is integral to due process. James C. Kincannon and Carolyn R. Kincannon are free to voluntarily compromise their independence and depend on one another in certain ways in connection with this case. But they cannot have dependence forced upon them by a litigation adversary unwilling to send all notices, motions, etc. to both of them.

In fact, the reason Appellants were unaware that Respondents had filed a motion to dismiss is because Appellants were forced by necessity to rely on Carolyn R. Kincannon as the recipient of mail relating to this case. This is due to James C. Kincannon's extensive work-related travel obligations and James J. Kincannon's current medical situation.[2] Because the South Carolina Appellate Court Rules require

[2] James C. Kincannon and James J. Kincannon do not believe that they have to provide any explanation for why they rely on Carolyn R. Kincannon's receipt of mail related to this case. Appellants are pro se litigants who are fully aligned and whose interests are inextricably intertwined. Appellants are entitled to make whatever agreements they wish with regard to allocating litigation tasks. For example, as a practical matter, only one person can sign a certificate of service and serve and file litigation documents. Appellants have selected James J. Kincannon for this task due to James J. Kincannon's detail oriented nature. Likewise, Appellants have decided that because Carolyn R. Kincannon is home a substantially higher percentage of

Respondents to sent a copy of each litigation filing to each Appellant, James C. Kincannon and James J. Kincannon had the right to expect that Carolyn R. Kincannon would receive all litigation documents relating to this matter and to rely on Carolyn R. Kincannon for that purpose.

James C. Kincannon and Carolyn R. Kincannon receive a relatively large volume of mail. Neither is exclusively responsible for getting and sorting the mail—either may perform either task or both tasks. The usual division of labor is that Carolyn R. Kincannon deals with all the mail addressed *only* to her, while James C. Kincannon deals with all the rest. This division of labor works because James C. and Carolyn R. Kincannon have their affairs up so that most important mail comes addressed only to Carolyn R. Kincannon so it can be easily identified and handled. This has been the way James C. Kincannon and Carolyn R. Kincannon have handled mail at all times relevant to the matters addressed in this filing.

By mailing only two copies of the motion to dismiss and addressing them to James J. Kincannon in Columbia and "James C. & Carolyn R. Kincannon" in Simpsonville, Respondents inadvertently made it highly unlikely that Appellants would notice the motion to dismiss in time to do anything about it. After receiving the order of dismissal on February 3, 2016, James C. Kincannon located the item addressed to "James

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the time than either James C. Kincannon or James J. Kincannon, Carolyn R. Kincannon is the designated recipient of mail related to this case and is responsible for scanning all correspondence addressed to her connected with this case and sending scanned copies to James C. Kincannon and James J. Kincannon. Appellants have divided litigation labor in other ways as well and do not believe Respondents have standing to complaint about or question the division of labor.

James J. Kincannon also avers that Carolyn R. Kincannon's handling of received mail is a necessary accommodation due to a disability covered by Title II of the Americans with Disabilities Act that James J. Kincannon presently suffers from. James J. Kincannon would prefer not to go into extreme detail about his medical situation in a public litigation filing, but if further details are requested by the Court, Appellant James J. Kincannon respectfully requests an opportunity to provide such details under seal to protect his medical privacy rights and as a reasonable accommodation for disability under Title II of the Americans with Disabilities Act.

C. & Carolyn R. Kincannon" in his automobile along with other pieces of mail addressed to him that he intended to go through during out-of-town down time.

If a copy of the motion to dismiss was sent to James J. Kincannon in Columbia as indicated by the certificate of service, it is now missing. James J. Kincannon is certain he never personally received it, but it is possible that the individual who looks after his house when he is out of town retrieved it from the mailbox and misplaced it. James J. Kincannon has also had issues with mail being removed from his mailbox by third parties, something that was briefly at issue during a previous appeal in this case.[3] James J. Kincannon also notes that he was adjudicated as incapacitated by the South Carolina Supreme Court on August 28, 2015 in connection with the suspension of his law license. That legal status has not changed, so far as James J. Kincannon is aware. To the extent James J. Kincannon has been unable to effectively handle important legal documents since August 28, 2015, such inability results from a lack of capacity caused by a medical disability and not a lack of personal responsibility or a cavalier attitude towards important legal matters.

One further issue bears scrutiny. Not knowing that a motion to dismiss had been filed, Appellants expected to face the usual brief filing deadlines. Appellant James J. Kincannon contacted the Court of Appeals in early December to ask a question about briefing deadlines and learned in the course of that communication that there were no impending deadlines in the case due to a stay. Unaware of the motion to dismiss, James J.

[3] James J. Kincannon suspected that an autistic young man who lived across the street had removed mail from his home mailbox. After that incident, James J. Kincannon stopped using his home mailbox for law-related mailing and used his post office boxes exclusively for mailing and receipt of important mail from that point forward. Unfortunately, James J. Kincannon had to return to using his home mailbox upon being suspended from the practice of law. The suspension order vested control of his post office box in the receiver appointed to handle his law practice.

Kincannon suspected that the case was stayed due to his incapacity per Rule 265(a), SCRCP. James J. Kincannon asked if the stay had anything to do with his law license troubles and transfer to incapacity inactive status. The staff member said that appeared to be the case. James J. Kincannon asked no further questions about the matter.

It appears this misunderstanding occurred because Respondents' Motion to Dismiss—for whatever reason—discusses James J. Kincannon's transfer to incapacity inactive status in detail on the very first page of the Motion to Dismiss. The first paragraph of Footnote 1 of the Motion to Dismiss states as follows:

> James J. "Todd" Kincannon, James C. Kincannon, and Carolyn R. Kincannon ("Appellants") apparently appear *pro se* in this appeal. Until recently, James J. "Todd" Kincannon ("Mr. Kincannon") represented himself and his parents in this and three related lawsuits. However, the Supreme Court transferred Mr. Kincannon to incapacity inactive status by Order dated August 24 [sic: August 28], 2015. In the Matter of J. Todd Kincannon, Respondent, Appellate Case No. 2015-001824. As of this writing, Mr. Kincannon remains on inactive status, and appears to be proceeding *pro se* in this matter.

Respondents' Motion to Dismiss Appeal at 1-2, n1.

This footnote purports to explain that Appellants are pro se in this matter, suggesting Appellants had been unclear about the matter: "[Appellants] ***apparently*** appear pro se." (emphasis added). The Notice of Appeal could not be clearer that Appellants all appear pro se in this appeal. Each signature box for Appellants contains the words "Appellant Pro Se". Appellants did absolutely nothing to indicate or suggest that Appellants, or any of them, are represented by counsel in this appeal or are themselves practicing attorneys.

It would appear that the purpose of the footnote is not to explain anything to the Court of Appeals but to smear Appellants for being, or for being related to, allegedly

disgraced lawyer James J. "Todd" Kincannon. None of the information included in the footnote is relevant to Respondents' arguments in support of dismissal. However, the footnote is quite relevant to this Return. It proves beyond all doubt that Respondents were completely aware of the fact that Appellants were three separate individuals acting pro se in this matter and, therefore, individually entitled to notice and service of motions and other documents.

Further, the footnote indicates that Respondents were aware that James J. Kincannon had been declared incapacitated by the Supreme Court in August of 2015 and that James J. Kincannon's status in this regard had not changed between then and November 30, 2015 when Respondents' filed and attempted to serve their Motion to Dismiss. This is troubling because it suggests that Respondents' failure to comply with Rule 240 was no mere innocent mistake.

The facts are hard to ignore. Respondents knew that because James J. Kincannon had been suspended from the practice of law, Appellants were no longer represented by counsel of any kind and all were acting pro se in this appeal. Respondents knew that they were no longer permitted to serve all Appellants by sending one copy of documents to James J. Kincannon. Respondents also knew that James J. Kincannon had been suffering from health problems severe enough to cause the Supreme Court to adjudicate him as incapacitated in August of 2015. Respondents further knew that James J. Kincannon's adjudication of incapacitation was still in place as of November 30, 2015, suggesting that James J. Kincannon was continuing to suffer from serious health problems that greatly impaired his ability to handle legal matters.

It seems highly unlikely that the only properly served Motion to Dismiss would be the one sent to the only Appellant known by Respondents to be incapacitated and unable to effectively handle legal matters, while the improperly served Motion to Dismiss was addressed in an unusual fashion wholly inconsistent with what a reasonably sophisticated person would expect in terms of a litigation document being served by mail.

CONCLUSION

It is not necessary for Appellants to show that Respondents' improper service of the Motion to Dismiss was a calculated effort to deprive Appellants of the right to notice and an opportunity to be heard. All Appellants have to show is that Respondents failed to properly serve the Motion to Dismiss and that Appellants were prejudiced by the failure.

Having shown these things, Appellants request the following relief:

1. The Court vacate the order of dismissal dated February 1, 2016.
2. The Court strike the improperly served Motion to Dismiss for violating Rule 240, SCACR, without prejudice.
3. The Court permit Respondents ten days to refile and properly serve the Motion to Dismiss, whereupon Appellants will have ten days to file a Return addressing the substantive arguments made in the Motion to Dismiss.
4. In the alternative the Court chooses not to treat this as a Return, or deems it untimely filed, Appellants respectfully request the Court vacate the order of dismissal dated February 1, 2016, permit Appellants to file an out-of-time Return to Respondents' Motion to Dismiss for good cause shown, and decide the Motion to Dismiss anew on the benefit of a full record with participation by both sides.

5. In the alternative the Court chooses not to do any of the foregoing, Appellants respectfully request the Court deem Respondents' conduct to have violated Appellants' due process rights and award whatever relief the Court deems equitable and proper under the circumstances.

Respectfully submitted,

s/James C. Kincannon
JAMES C. KINCANNON
216 Jones Avenue
Simpsonville, South Carolina 29681
Phone: 864.963.4374
Appellant Pro Se
Dated: February 16, 2016

s/James J. Kincannon
JAMES J. KINCANNON
200 Townes Road
Columbia, South Carolina 29210
Phone: 803.727.4991
Appellant Pro Se
Dated: February 16, 2016

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s/Carolyn R. Kincannon
CAROLYN R. KINCANNON
216 Jones Avenue
Simpsonville, South Carolina 29681
Phone: 864.963.4374
Appellant Pro Se
Dated: February 16, 2016

VERIFICATION

Appellants affixed their above signatures having first been duly sworn and verifying foregoing as being true within the own personal knowledge except as to matters stated to be upon information and belief, and as to those matters Appellants are informed and believe them to be true.

The above signatures of James C. Kincannon and Carolyn R. Kincannon are notarized by James J. Kincannon, full name James John Todd Kincannon, as follows:

s/James John Todd Kincannon
Notary Public for South Carolina
My Commission Expires: 2-9-2017

The above signature of James J. Kincannon is notarized by Carolyn R. Kincannon, full name Carolyn Roxie Todd Kincannon, as follows:

s/Carolyn Roxie Todd Kincannon
Notary Public for South Carolina
My Commission Expires: 6-2-2025

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of whom

U.S. Bank National Association and U.S. Bank National Association ND are ..... Respondents

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CERTIFICATE OF SERVICE

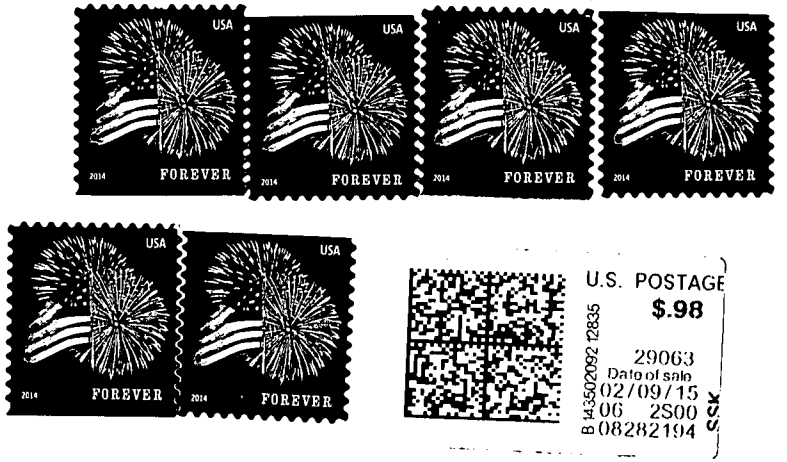
I, the undersigned, certify that I have on the date below indicated served all respondents in this matter with the foregoing Appellants' Return together with this proof of service by first class mail by and through their counsel of record as follows:

JOHN C. HAWK IV
WOMBLE CARLYLE SANDRIDGE & RICE LLC
Post Office Box 999
Charleston, South Carolina 29401

February 16, 2016

s/James J. Kincannon

Kincannon
216 Jones Ave.
Simpsonville, S.C. 29681



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