THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Cynthia Graham Howe
Master-in-Equity, Fifteenth Judicial Circuit

Case No.: 2009-CP-26-620

Ellis E. Smith, individually and on behalf of A&E Constructors and Consultants, Inc., a South Carolina Corporation ..... Plaintiffs,

vs.

Arthur Wayne Vereen, Park Place Properties of Myrtle Beach, LLC, Parkway Offices, LLC, Arthur Vereen Construction, Inc., Linda C. Vereen, Arthur W. Vereen, as Trustee of the Arthur W. Vereen Residence Trust, and Linda C. Vereen, as Trustee of the Linda C. Vereen Residence Trust, ... Defendants,

AND

Arthur Wayne Vereen, individually and on behalf of A&E Constructors and Consultants, Inc. and 29th Place Developers, Inc.,..... Third-Party Plaintiffs,

vs.

E. Smith and Sons Construction, LLC, EES Construction and Consulting, Inc. and Ellis E. Smith, individually, ...Third-Party Defendants.

OF WHOM Arthur Wayne Vereen, individually and on behalf of A&E Constructors and Consultants, Inc., Park Place Properties of Myrtle Beach, LLC, Parkway Offices, LLC, Arthur Vereen Construction Company, Inc., Linda C. Vereen, Arthur W. Vereen, as Trustee of the Arthur W. Vereen Residence Trust, Linda C. Vereen, as Trustee of the Linda C. Vereen Residence Trust and 29th Place Developers, Inc. are ..... Appellants,

AND

Ellis E. Smith, individually and on behalf of A&E Constructors and Consultants, Inc., a South Carolina Corporation and E. Smith and Sons Construction, LLC, EES Construction and Consulting, Inc. and Ellis E. Smith, individually are ..... Respondents.

APPELLANTS' PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

Pursuant to Rule 221, SCACR, Appellants respectfully submit this Petition for Rehearing and suggestion for rehearing *en banc*. The grounds for this Petition are set forth below. Based on these grounds, the Court of Appeals should reverse its Order dated September 22, 2016 and deny Respondents' Motion to Dismiss Appellants' Notice of Appeal. In the alternative, this Court should grant a rehearing *en banc* to consider the issues raised in this petition.

I. This Court overlooked the fact that there was no final order when Judge Howe's law clerk emailed the Parties a copy of the First Order on March 24, 2015 and a copy of the *Nunc Pro Tunc* Oder on March 25, 2015.[1]

In granting Respondents' Motion to Dismiss, this Court found that Appellants "received written notice of entry of the judgment through the emails from Judge Howe's law clerk on March 23, 2015 and March 24, 2015." (**Order, p. 2**). This Court found the emails from Judge Howe's law clerk started the time for appeal. (**Order, p. 2**). Respectfully, these findings overlook the material fact that there was no final order in place when Judge Howe's law clerk emailed the Parties on March 24 and March 25, 2015. As a result, the emails from Judge Howe's law clerk did not start the time for appeal, as it did not constitute "written notice of entry of the order or judgment." Rule 203(b)(4), SCACR.

Generally speaking, "[o]nly final judgments ... are appealable." Cobb v. Maccaro, 310 S.C. 303, 305, 423 S.E.2d 156, 157 (Ct. App. 1992). A final judgment must dispose of all parties,

[1] As a point of clarity, this Court's Order incorrectly recites the dates when Judge Howe's law clerk emailed counsel of record. Judge Howe's law clerk emailed the First Order to the Parties on March 24, 2015, and then, on March 25, 2015, Judge Howe's law clerk emailed a copy of the *Nunc Pro Tunc* Order.

reserving no further questions or directions for future determination. Good v. Hartford Accident & Indem. Co., 201 S.C. 32, 41-42, 21 S.E.2d 209, 212 (1942). In multi-party litigation or where there are multiple claims for relief, "the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties *only* upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." Rule 54(b), SCRCP (emphasis added). However, in the absence of such a determination and direction, any order or other form of decision, however designated, *which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action* as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. Rule 54(b), SCRCP (emphasis added).

When Judge Howe's law clerk emailed the First Order to the Parties on March 24, 2015 and the *Nunc Pro Tunc* Order on March 25, 2015, Judge Howe had not issued a final order. Thus, the emails from Judge Howe's law clerk did not start the clock on the time for appeal. As set forth above, a final order is one that disposes of all parties in the lawsuit and leaves nothing to be done but the enforcement of the judgment. Good, 201 S.C. at 42, 21 S.E.2d at 212. The First Order emailed by Judge Howe's law clerk neither disposed of all the defendants, nor issued a ruling upon which all defendants would be liable for the judgment. The First Order was silent with respect to the following defendants: Park Place Properties of Myrtle Beach, LLC, Parkway Offices, LLC, Arthur Vereen Construction Company, Inc., Linda C. Vereen, Arthur W. Vereen, As Trustee of the Arthur W. Vereen Residence Trust, Linda C. Vereen, As Trustee of the Linda C. Vereen Residence Trust, and 29th Place Developers, Inc. (collectively referred to as "Remaining Defendants"). It was not until April 10, 2015, when page thirty-seven (37) first surfaced, that the

Remaining Defendants were disposed of and made liable for the judgment under a veil piercing theory. In page thirty-seven (37), Judge Howe found that all the defendants were jointly and severally liable for the judgment based on a finding that the corporate veil should be pierced and "that each of the Defendants is the alter ego of the other." Prior to the emergence of page thirty-seven (37), there was neither a finding, nor a theory of liability upon which the Remaining Defendants were liable for the judgment.

Counsel for Appellants received written notice of page thirty-seven (37) on April 11, 2015. On this date, the First Order became final. Thereafter, Appellants had ten (10) days to file a Motion for Reconsideration pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, which they timely filed on April 20, 2015.

Accordingly, the emails from Judge Howe's law clerk on March 24 and 25, 2015 did not constitute written notice of a final order because at that time, Judge Howe had not issued an order disposing of all the defendants.

II. The Remaining Defendants should, at the very least, be allowed to appeal from the judgment.

The Remaining Defendants did not receive notice of their liability for the judgment until the receipt of page thirty-seven (37) on April 11, 2015. On page thirty-seven (37), the trial court found the Remaining Defendants jointly and severally liable for the judgment based on a finding that the corporate veil should be pierced and "that each of the Defendants is the alter ego of the other." On April 20, 2015, Appellants filed a Motion for Reconsideration, arguing the trial court erred in piercing the corporate veil and in finding the Remaining Defendants jointly and severally liable for the judgment. Appellants argued the trial court erred in granting this relief because Respondents did not seek it in their pleading.

On April 25, 2016, the trial court issued a Post-Trial Order, reversing the First Order's finding that the Remaining Defendants should be jointly and severally liable for the judgment under a veil piercing theory. Instead, the Post-Trial Order found the Remaining Defendants jointly and severally liable for the judgment "under an amalgamation of interest or blurred identity theory." Within thirty (30) days of receipt of the Post-Trial Order, Appellants timely filed a Notice of Appeal. On appeal, the Remaining Defendants seek to challenge the trial court's imposition of liability upon them based on an amalgamation theory. Respondents did not seek this relief in their pleading, and the Remaining Defendants had no notice that such liability would ever be imposed upon them until the receipt of page thirty-seven (37). As Judge Howe observed in the First Order, this lawsuit "is a shareholder's derivative action brought by Ellis E. Smith, individually and on behalf of A&E Constructors and Consultants, Inc. against Arthur Wayne Vereen, the treasurer and remaining shareholder ...." **(First Order, p. 2)**. The Remaining Defendants had no notice that liability would be imposed upon them in this type of action.

This Court misapprehended or overlooked the fact that the Remaining Defendants filed a Motion for Reconsideration within ten (10) days after receiving written notice of page thirty-seven (37), which imposed liability upon the Remaining Defendants. Accordingly, this Court should, at the very least, allow the Remaining Defendants to appeal from the judgment.

III. This Court's Order is inconsistent with the specific instructions of the Supreme Court of South Carolina in Ackerman v. 3-V Chem., Inc., which directs counsel, under the circumstances of this case, to request a copy of the written order from the court when he/she is not in possession of it.

This Court's ruling overlooks the Supreme Court's ruling in Ackerman v. 3-V Chem., Inc., 349 S.C. 212, 215, 562 S.E.2d 613, 615 (2002). In Ackerman, 349 S.C. at 215, 562 S.E.2d at 615, the Supreme Court explained how to deal with the "due process problem in requiring an appeal to be taken when the party is not in receipt of the order." The Supreme Court observed, "The short

and simple answer to this contention is that *upon receiving written notice of the entry of an order or judgment, an attorney may immediately call and request a copy of the order*." Id. (emphasis added).

Here, trial counsel for Appellants acted in accordance with the instructions provided by the Supreme Court in Ackerman. The trial judge signed the First Order on March 23, 2014. The next day, on March 24, 2015, the judge's law clerk sent an email to all attorneys of record, with the First Order attached to the email. The order sent by the judge's law clerk was incomplete. Counsel for Appellants wrote a letter to the trial judge requesting "page 37 or a complete copy of the Order ... so I can take steps to file a motion to reconsider this case." Ultimately, trial counsel for Appellants received page thirty-seven (37) on April 11, 2015, and on April 20 2015, Appellants filed a Motion for Reconsideration.

Trial counsel for Appellants acted in accordance with the specific instructions from the Supreme Court in Ackerman, and, under such circumstances, due process mandates that this Court find Appellant's timely filed their Motion for Reconsideration.

IV. This Court's Order deprives Appellants of due process, as Appellants have been subjected to an unfair proceeding, preventing them from receiving a full review of all aspects of the trial court's ruling.

Appellants did not have adequate notice that an appeal would be denied to them under the circumstances of this case. Ackerman, 349 S.C. at 215, 562 S.E.2d at 615. Further, Appellants were subject to an unfair procedure, preventing them from receiving a full review of all aspects of the trial court's ruling. Appellants could not comply with issue preservation rules and the time restraints in which to file a post-trial motion. The tension between these requirements prevented Appellants from receiving a full review of all aspects of the trial court's ruling.

It is impossible to preserve arguments in a Rule 59(e) Motion without a copy of the order. Trial counsel for Appellants acted appropriately and in accordance with Ackerman in requesting a copy of the order from the trial court. See Elam v. S.C. DOT, 361 S.C. 9, 25, 602 S.E.2d 772, 780-81 (2004) ("We strive to avoid an interpretation of procedural rules which routinely would place a party between the proverbial rock and a hard place."). Appellants received page thirty-seven (37) on April 11, 2015, and Appellants filed a Motion for Reconsideration on April 20, 2015.

Accordingly, under these circumstances, this Court should find that Appellants timely filed their Motion for Reconsideration and deny Respondents' Motion to Dismiss the appeal.

CONCLUSION

For the foregoing reasons, this Court should reverse its Order dated September 22, 2016 and deny Respondents' Motion to Dismiss Appellants' Notice of Appeal. In the alternative, this Court should grant a rehearing *en banc* to consider the issues raised in this petition.

Respectfully Submitted,

Dated: 10/4/16

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AND

Arthur Wayne Vereen, individually and on behalf of A&E Constructors and Consultants, Inc. and 29th Place Developers, Inc., ... Third-Party Plaintiffs,

vs.

E. Smith and Sons Construction, LLC, EES Construction and Consulting, Inc. and Ellis E. Smith, individually, ... Third-Party Defendants.

OF WHOM Arthur Wayne Vereen, individually and on behalf of A&E Constructors and Consultants, Inc., Park Place Properties of Myrtle Beach, LLC, Parkway Offices, LLC, Arthur Vereen Construction Company, Inc., Linda C. Vereen, Arthur W. Vereen, as Trustee of the Arthur W. Vereen Residence Trust, Linda C. Vereen, as Trustee of the Linda C. Vereen Residence Trust and 29th Place Developers, Inc. are ..... Appellants,

AND

Ellis E. Smith, individually and on behalf of A&E Constructors and Consultants, Inc., a South Carolina Corporation and E. Smith and Sons Construction, LLC, EES Construction and Consulting, Inc. and Ellis E. Smith, individually are ..... Respondents.

PROOF OF SERVICE

I, Carole Koerner, an employee of McNair Law Firm, P.A., attorneys for Appellants, Arthur Wayne Vereen, individually and on behalf of A&E Constructors and Consultants, Inc., Park Place Properties of Myrtle Beach, LLC, Parkway Offices, LLC, Arthur Vereen Construction Company, Inc., Linda C. Vereen, Arthur W. Vereen, As Trustee of the Arthur W. Vereen Residence Trust, Linda C. Vereen, As Trustee of the Linda C. Vereen Residence Trust, and 29th Place Developers, Inc. in the above-entitled action, certify that I have served **APPELLANTS' PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*** and Proof of Service on Counsel of Record to this matter by depositing a copy in the United States Mail, first class postage prepaid on the 4th day of October, 2016 as follows:

OTHER COUNSEL OF RECORD:

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Carole Koerner

Carole Koerner

Myrtle Beach, South Carolina

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SOUTH CAROLINA COURT OF APPEALS

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October 4, 2016

Via Federal Express

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

Re: Ellis Smith v. Arthur Vereen
Appellate Case no.: 2016-001075
Our file #: 064758.00001

Dear Ms. Kitchings:

Enclosed for filing is an original and seven copies of **Appellants' Petition for Rehearing and Suggestion for Rehearing *En Banc*** and Proof of Service in the above matter. Also enclosed is a check in the amount of $25.00 for the filing fee.

Please return one filed copy of the Petition for Rehearing and Suggestion for Rehearing *En Banc* and Proof of Service in the enclosed, self-addressed stamped envelope. By copy of this letter, and as indicated in the Proof of Service, we are serving Counsel of Record.

Sincerely,

McNAIR LAW FIRM, P.A.

James K. Gilliam

JKG/ck
cc: Frank H. DuRant, Esquire
J. Jackson Thomas, Esquire
Clients (via email)

Enclosures

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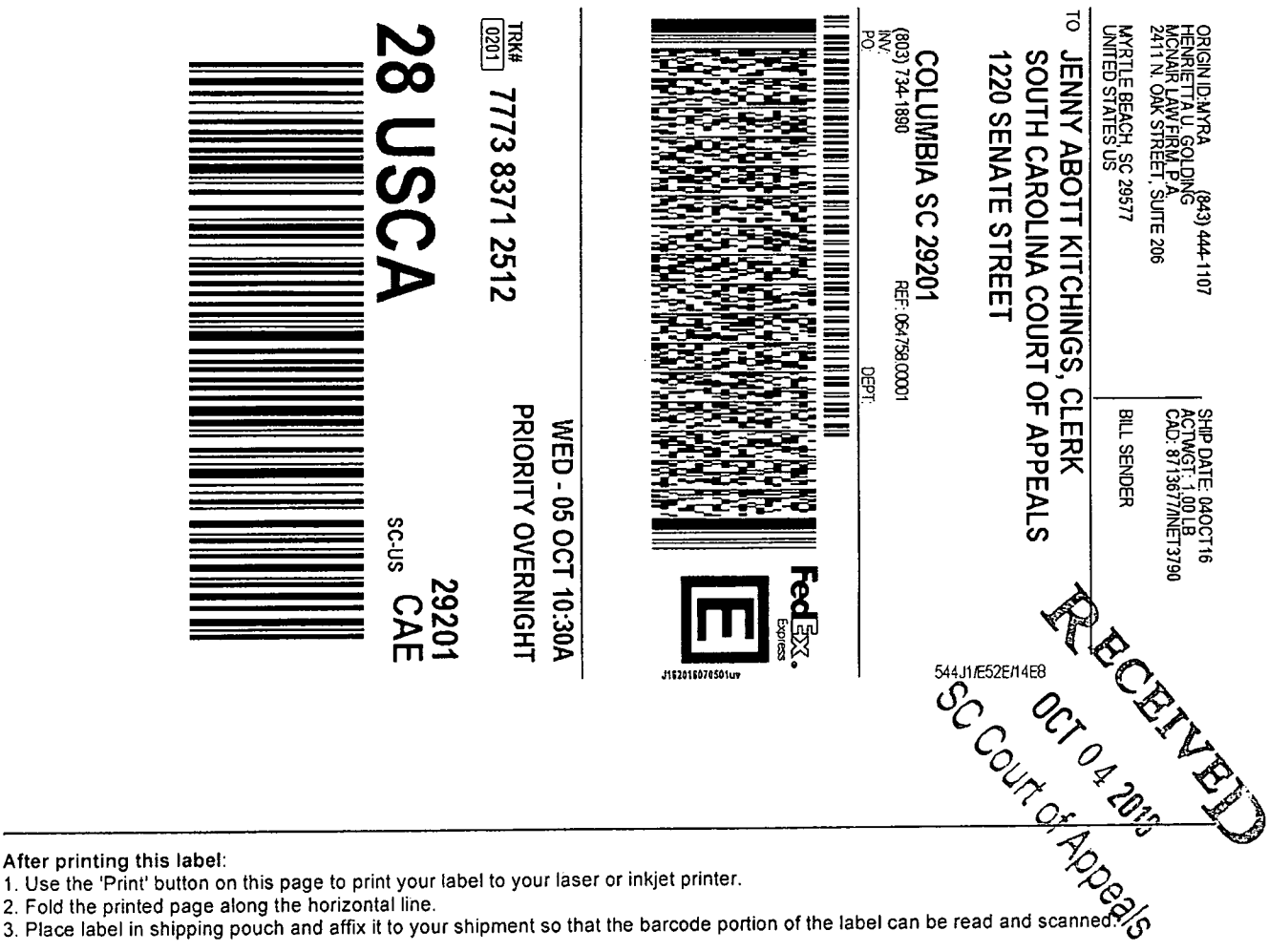

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