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S.C. SUPREME COURT

**THE STATE OF SOUTH CAROLINA  
In the Supreme Court**

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**APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas**

**Stephanie P. McDonald, Circuit Court Judge**

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**Opinion No. 5442 (S.C. Ct. App. filed Sep. 28, 2016)  
Appellate Case No. 2017-000683**

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**OTHA DELANEY, .....PETITIONER**

**v.**

**FIRST FINANCIAL OF CHARLESTON, INC., ..... RESPONDENT**

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**PETITIONER'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION TO  
DISMISS PETITION FOR A WRIT OF CERTIORARI**

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## ARGUMENT

Respondent First Financial of Charleston, Inc. (“First Financial”) moved this Court on May 11, 2017, to dismiss Petitioner Otha Delaney’s (“Delaney’s”) pending Petition for a Writ of Certiorari, filed March 11, 2017, for lack of appellate jurisdiction. Motion to Dismiss at 5-6. Delaney disagrees and hereby opposes the Motion.

On September 28, 2016, the Court of Appeals filed a 2-1 decision affirming the trial court’s order dismissing Delaney’s claim. App. at 184. On October 18, 2016, Delaney filed and served by mail a Motion for Extension of Time to file his Petition for Rehearing.<sup>1</sup> App. at 200, 202. The next day, October 19, 2016, the Court of Appeals sent down the remittitur, apparently unaware of Delaney’s filing the day before which it had not yet received. App. 203. The following day, October 20, 2016, the Court of Appeals stamped Delaney’s Motion for Extension as received. App. at 200.

By letter dated October 26, 2016, to the Court of Appeals, First Financial opposed Delaney’s Motion for Extension on grounds that the Court of Appeals was deprived of appellate jurisdiction to hear Delaney’s request after the remittitur was sent, and that the Court could not recall the remittitur because, according to First Financial, it could not have been sent down due to “mistake, error or inadvertence of the Court.” App. at 204. The Court of Appeals did not agree with First Financial’s opposition, and on November 2, 2016, issued an Order recalling the remitter. App. 207. This was followed on November 3, 2016, with a second Order granting

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<sup>1</sup> Delaney moved for an extension on grounds that counsel personally received the Court of Appeals’ decision, filed September 28, 2016, on October 3, 2016, but that counsel and staff were by then under mandatory hurricane evacuation orders; that counsel and staff were unable to reenter Beaufort County “until October 11, 2016 at the earliest”; that counsel and staff were without “electricity and/or water” at his office until October 12, 2016; that counsel “lacked reliable internet service until approximately October 14, 2016;” and, that counsel’s home and staff homes still needed emergency “repairs, mud and water removal” and personal work efforts continued through the weekend of October 15 and 16, 2016, even though some of those properties lacked “power, water, and other necessities.” App. at 200-01.

Delaney's Motion for Extension to file his Petition for Rehearing by November 18, 2016. App. at 208.

Delaney timely filed his Petition for Rehearing on that date. App. at 209. Again, First Financial opposed the Petition by arguing in its Return in Opposition that the remittitur had deprived the Court of appellate jurisdiction, and that the Court of Appeals erred in recalling the remittitur and in granting the extension inasmuch as the remittitur could not have been sent by mistake, error or inadvertence of the court. App. at 228-32. Once again, the Court of Appeals did not agree that it was deprived of jurisdiction or that it had erred in recalling the remittitur. On February 16, 2017, it issued an Order on the merits, ruling that because it was "unable to discover any material fact or principal of law either overlooked or disregarded" in its decision, Delaney's Petition for Rehearing was denied. App. at 235.

Now by Motion to Dismiss Delaney's Petition for Writ of Certiorari, First Financial argues this issue for the third time, making the verbatim objections and relying upon the same authority, *Wise v. S.C. Dept. of Corrections*, 372 S.C. 175, 174, 642 S.E.2d 551 (2007). Motion to Dismiss at 5-6. Each time First Financial has argued that Delaney was required by *Wise* to file any petition for rehearing prior to the date the remittitur was sent (October 19, 2016); and, pursuant to Rule 221(a), SCRAC, filings of such petitions are not effective until they are "actually received" by the Court of Appeals.<sup>2</sup> App. at 204, 228, Motion to Dismiss at 3. Because Delaney's Motion to Extend was not "actually received" at the Court of Appeals until October 20, 2016, one day *after* the remittitur was sent and two days after it was mailed on October 18, 2016, it was not timely filed pursuant to Rule 221(a), according to First Financial. Thus the Court is deprived of appellate jurisdiction.

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<sup>2</sup> All rules cites are to the South Carolina Rules of Appellate Courts.

Delaney submits that First Financial's repeated objections pursuant to Rule 221 and its reliance upon *Wise* are misplaced. Delaney did *not* file a Petition for Rehearing, for which the effective date of filing is indeed controlled by Rule 221(a). Rather, on October 18, 2016, *one day prior to the Court's remittitur of October 19, 2016*, he filed and served by mail a Motion for Extension of time to file a rehearing petition, expressly invoking "Rule 263(b)[.]" App. at 200. In no way can his extension Motion be correctly construed by First Financial as a Petition for Rehearing controlled by Rule 221(a): it was not styled a Petition for Rehearing, it did not address any merits as required in petitions for rehearing, and it was filed under the express authority of "Rule 263(b)" rather than Rule 221(a). *Id.*

Rule 240(a) provides that rule will govern "all motions or petitions filed in the appellate courts, *including but not limited to: motions for extension of time, ...[and] petitions for rehearing.*" (emphasis added.) It further provides that while a party's time limits are not automatically stayed by filing an extension request, the applicable time limits "*may*" be extended or enlarged by "order[.] of the appellate court[.]" Rule 240(b). This is consistent with Rule 263(b), invoked by Delaney in his Motion for Extension, which provides: "The time prescribed by these Rules for performing any act except for serving the notice of appeal under Rule 203 and 243 *may be extended or shortened by the appellate court, or by any judge or justice thereof.*" (emphasis added.) Therefore, First Financial cannot seriously dispute that the Court of Appeals *may* grant a party's request for an extension or enlargement of time to file his petition for rehearing.

Unlike a petition for rehearing, the effective date of filing a motion to extend time under Rule 263(b) is controlled by Rule 262:

(a) *Except for petitions for rehearing (Rule 221) and motions for reinstatement (Rule 260)*, filing may be accomplished by (a)(1) Delivering the document to the

clerk of the appellate court; *or* (2) By depositing the document in the U.S. Mail, properly addressed to clerk [of the appellate court]...*The date of filing shall be the date of delivery or the date of mailing.*

Rule 262(b)(2). (emphasis added.)

Thus the date of actual receipt by the Court of Appeals of Delaney's Motion to Extend is not controlling, as the Rule provides that "the date of filing *shall be*...the date of mailing." Therefore, Delaney filed his Motion for Extension of Time on October 18, 2016, the date it was placed into the mail to the Clerk of Court of the Court of Appeals and served upon First Financial, and one day prior to the remittitur being sent. The Court of Appeals' Order of November 2, 2016, recalling the remittitur does not provide any findings or analysis why the remittitur was recalled. However, because the remittitur was sent down while the case was subject to a pending Motion to Extend the time to file the rehearing petition, the Court was not deprived of jurisdiction to consider, in its discretion, whether to grant such a request pursuant to Rules 263(b) or 240(b). The only logical explanation for the Court of Appeals' refusal on two occasions to agree with First Financial's position concerning recall was that it indeed considered the remittitur to have been sent down by error, mistake or inadvertence while the Motion for Extension of time was in fact filed and pending and which it was not aware of on October 19, 2016. Delaney further submits that under these circumstances, it was an appropriate exercise of judicial discretion to grant the extension, and First Financial provides no authority to the contrary.

Moreover, First Financial's reliance upon *Wise* is misplaced. In *Wise*, the plaintiff's appeal was dismissed by the Court of Appeals. *Wise v. S.C. Dept. of Corrections*, 642 S.E.2d at 551. The opinion does not state why the appeal was dismissed, but fifteen days later the Court of Appeals received *Wise's* petition to reinstate his appeal. *Id.* However, there was no proof of

service included with the reinstatement petition as was required under former Rule 224. *Id.* Three days later the remittitur was sent down when Wise had still not corrected this deficit. *Id.*

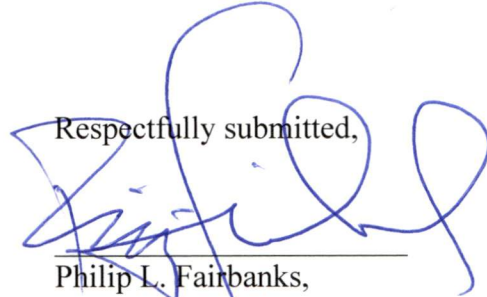
Two months after the remitter was sent Wise filed in the Supreme Court a motion to enlarge his time to file the reinstatement petition, which was denied on grounds that the Supreme Court was deprived of appellate jurisdiction after the remittitur was “properly sent.” *Id.* Wise followed this filing with a Rule 59(e) motion to alter or amend the judgment and a “notice of right to appeal” in the Supreme Court, which the Court construed as a petition for a writ of certiorari. *Id.* These filings were also dismissed for the same reason. The Court ruled that “[t]he only exception to this rule is when the remittitur is sent down by mistake, error or inadvertence” of the court. *Id.* Wise’s remittitur was not subject to any of these claims, as his remittitur was “correctly sent” pursuant to Rule 221(a) when Wise had not timely followed his dismissal with “a *proper* filing of a petition for reinstatement.” *Id.* (emphasis original.)

Unlike the time of filing Delaney’s Motion to Extend which is controlled by Rule 263(b), the filing date of Wise’s reinstatement petition was clearly controlled by Rule 221(a). Unlike Delaney’s Motion to Extend time, which was pending on the date his remittitur was sent down, Wise had no properly-filed, reinstatement petition that was pending when his remittitur was sent down. Finally, Wise’s motion to extend or enlarge his time to file his reinstatement petition was not filed until two months *after* the remittitur was sent down, and not the day *before* remittitur as in the present case. Thus the *Wise* rule did not apply here to prevent the Court of Appeals’ recall of the remittitur and to grant the extension request, nor did it deprive that court of appellate jurisdiction to hear Delaney’s Petition for Rehearing.

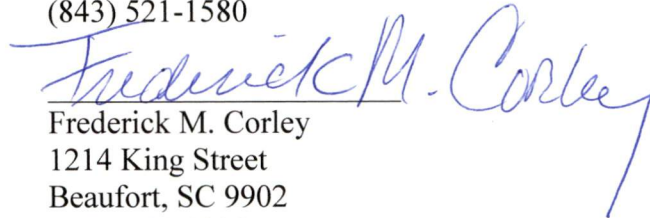
**CONCLUSION**

For the reasons set forth herein, Petitioner Otha Delaney requests that Respondent's Motion to Dismiss his pending Petition for a Writ of Certiorari be denied.

Respectfully submitted,



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