

**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 Sept. 28, 2016)

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Otha Delaney,

Petitioner,

v.

First Financial of Charleston, Inc.,

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Respondent.

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

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In further support of its motion to dismiss the petition for a writ of certiorari in this matter, Respondent makes the following points in reply to Mr. Delaney’s response in opposition to the motion:

**ARGUMENT IN REPLY**

1. Mr. Delaney misplaces his focus on the fact that his Motion for Extension of Time to File Motion for Rehearing (the “Motion for Extension”) was mailed—and therefore “filed” and “served,” pursuant to Rule 262, SCACR—on *October 18, 2016*, i.e., the day *before* the Court of Appeals remitted the case on *October 19, 2016*.<sup>1</sup> As explained in Respondent’s motion<sup>2</sup>—and not disputed, or otherwise addressed, by Mr. Delaney<sup>3</sup>—the deadline for Mr. Delaney’s petition for rehearing to have been “actually received”<sup>4</sup> by the Court of Appeals was *October 17, 2016*, and it had *already passed* by the time of the Motion for Extension on *October 18<sup>th</sup>*.

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<sup>1</sup> (See Resp. in Opp’n to Mot. to Dismiss Pet. for Writ of Cert. pp. 4-5.)

<sup>2</sup> (See Mot. to Dismiss Pet. for Writ of Cert. ¶¶ 1-5.)

<sup>3</sup> (See *generally* Resp. in Opp’n to Mot. to Dismiss Pet. for Writ of Cert.)

<sup>4</sup> Rule 221(a), SCACR (“Petitions for rehearing *must be actually received* by the appellate court no later than fifteen (15) days after the filing of the opinion, order, judgment, or decree of the court.”) (emphasis added)); *see also* 16 S.C. Jur. *Appeal and Error* § 148 (West 2017) (“A petition for rehearing *must be received in fact* by the appellate court no later than 15 days after the filing of the opinion, order, judgment or decree.”) (citing Rule 221(a)) (emphasis added).

2. Aside from the Motion for Extension having not been mailed until after the deadline to petition for rehearing had already passed, the mere filing/service of the Motion for Extension by mail on October 18<sup>th</sup> did *not* stay issuance of the remittitur. It is the appellate court's *actual receipt* of a petition for rehearing *before the remittitur is sent* that requires the remittitur to be held. Rule 221(b) ("If a petition for rehearing is received before the remittitur is sent, the remittitur shall not be sent pending disposition of the petition by the court."); *see also* Rule 240(b), SCACR ("Unless otherwise provided by these Rules, or ordered by the appellate court, the time limits imposed by these Rules shall not be stayed by the filing of a motion or petition.").

3. Contrary to Mr. Delaney's assertion, Respondent's reliance on *Wise v. S.C. Department of Corrections*, 372 S.C. 173, 642 S.E.2d 551 (2007), is not misplaced. (*See* Resp. in Opp'n to Mot. to Dismiss p. 5.) As stated in the motion to dismiss, Respondent cites *Wise* for the following proposition, which is a correct statement of the applicable law: "When the remittitur has been properly sent, the appellate court no longer has jurisdiction over the matter and no motion can be heard thereafter. The *only* exception to this rule is when the remittitur is sent down by mistake, error or inadvertence of *the Court.*" *Id.* at 174, 642 S.E.2d at 551; *see also* Jean Hoefler Toal et al., Appellate Practice in South Carolina at 122 ("Remittitur is the process by which the appellate court releases jurisdiction over a

case after the court resolves the appeal, permitting the return of full jurisdiction to the lower tribunal. . . . The appellate court sends the remittitur to the circuit court . . . fifteen after the filing of the opinion . . . disposing of the appeal, not including the day of filing.” (citing Rule 221(b)); *id.* (“Upon sending the remittitur, the appellate court no longer has jurisdiction and cannot hear any further motions concerning the matter. The only exception to this rule is when the remittitur is sent down by mistake, error, or inadvertence of the appellate court.”) (citing *Wise*, 323 S.C. 173, 642 S.E.2d 551); *id.* at 374 (“To justify the unusual power of recalling 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.”) (citing *State v. Barnes*, 413 S.C. 1, 4, 774 S.E.2d 454, 456 (2015)); *see, e.g., Barnes*, 413 S.C. at 4, 774 S.E.2d at 456 (“The State cites no authority, and we are aware of none, that permits the remittitur to be recalled, not because of an error or inadvertence on the part of the Supreme Court, but rather because of post-remittitur conduct by a party. Accordingly, we do not believe that even if we were to find merit to the State’s position, that we would be empowered to grant the relief it seeks.”).

4. There is no question that the Court of Appeals sent down the remittitur on October 19, 2016; the question is whether it was sent down by mistake, error or inadvertence the court: because the answer to this question is *no*,

i.e., because the Court of Appeals *properly* sent down the remittitur, without any mistake, error or inadvertence on its part, the Court of Appeals simply could not, and did not, properly recall the remittitur.

5. According to Mr. Delaney, although the Court of Appeals' November 2, 2016, order recalling the remittitur "does not provide any findings or analysis why the remittitur was recalled . . . [t]he only logical explanation . . . [i]s that [the Court of Appeals] 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 [the court] *was not aware of on October 19, 2016;*"<sup>5</sup> however, by conceding the point that the Court of Appeals, when it remitted the case on October 19, 2016, "was not aware of" his motion for extension—which, although mailed on October 18<sup>th</sup>, was not actually received by the court until October 20<sup>th</sup>—*Mr. Delaney's has effectively conceded that the Court of Appeals could not possibly have erred in remitting the case on October 19<sup>th</sup>.* Again, under Rule 221(a), "Petitions for rehearing must be *actually received* by the appellate court no later than fifteen (15) days after the filing of the opinion, order, judgment, or decree of the court,"<sup>6</sup> and under Rule 221(b),

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<sup>5</sup> (Resp. in Opp'n to Mot. to Dismiss Pet. for Writ of Cert. p. 5 (emphasis added).)

<sup>6</sup> (emphasis added).

The remittitur shall contain a copy of the judgment of the appellate court, shall be sealed with the seal and signed by the clerk of the court, and unless otherwise ordered by the court *shall not be sent to the lower court or administrative tribunal until fifteen (15) days have elapsed (the day of filing being excluded) since the filing of the opinion, order, judgment, or decree of the court finally disposing of the appeal. If a petition for rehearing is received before the remittitur is sent,* the remittitur shall not be sent pending disposition of the petition by the court. . . . .

(emphasis added). In this case, the Court of Appeals properly held the remittitur for the period of time required under Rule 221(b)—which, on account of the Hurricane Matthew Order, ran through October 17, 2016. Indeed, the Court of Appeals could have remitted the case a day earlier than it did, i.e., it could have remitted the case on October 18<sup>th</sup> instead of waiting until the 19<sup>th</sup>. Moreover, Rule 221(b) only requires that the Court of Appeals hold the remittitur “*if a petition for rehearing is received before the remittitur is sent . . . ,*”<sup>7</sup> and neither a petition nor, for that matter, the Motion for Extension was received by the court before the remittitur was timely sent—the rule did not require the Court of Appeals to hold the remittitur on account of the mere mailing of a motion (which, again, was itself after the expiration of the October 17<sup>th</sup> deadline) that it did not know about, and could not have known about, until after it had already remitted the case on October 19<sup>th</sup>.

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<sup>7</sup> (emphasis added).

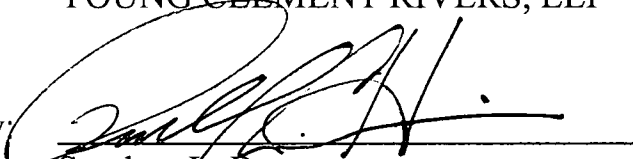
**CONCLUSION**

For the foregoing reasons, along with those previously set forth in the motion itself, Respondent maintains that this Honorable Court should dismiss Mr. Delaney’s petition for a writ of certiorari and, in conjunction with the dismissal, grant Respondent whatever relief may be required for the record to properly show that this appeal was decided with finality in accordance with the majority opinion of the Court of Appeals filed September 28, 2016, affirming the dismissal of Mr. Delaney’s complaint against Respondent.

Respectfully submitted,

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Dated: 5/30/17

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**PROOF OF SERVICE**

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*Counsel for Respondent*

I, Russell G. Hines, of Young Clement Rivers, LLP, counsel for Respondent, hereby certify that the foregoing **RESPONDENT'S REPLY TO PETITIONER'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS PETITION FOR A WRIT OF CERTIORARI** was served on all other parties to this matter by depositing a copy of same in the U.S. Mail on May 30, 2017, properly posted for delivery to the following addressees:

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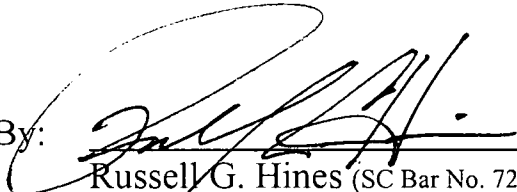
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Dated: 5/30/17