

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master In Equity

Case No. 2016-000971

RECEIVED
AUG 16 2018
SC Court of Appeals

Florida Citizens Bank, Appellant,

v.

Sustainable Building Solutions, Inc., John Porretto, Sr., Sue A. Porretto, The County of Charleston,
and Island Preservation Partnership, Defendants,

Of Whom John Porretto, Sr. and Sue Porretto are the Respondents.

APPELLANT’S MOTION TO RECALL THE REMITTITUR

Comes Now Appellant Florida Citizens Bank (“Florida Citizens”) and respectfully moves this court for an Order recalling the remittitur and permitting it to reinstate the appeal in this case. This motion is based upon the following points and authorities.

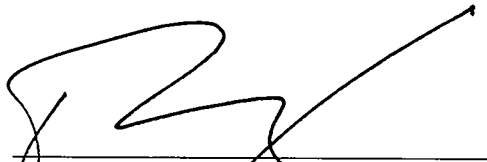
The case of *State v. Keels*, 39 S.C. 553, 17 S.E. 802 (1893) is still the widely cited case on the unusual power of the Court of Appeals to recall a remittitur after it has been sent down. In *Keels*, the Supreme Court held that in order to exercise that power, “a very strong showing would be required that the remittitur was sent down through some mistake or inadvertence on the part of this court or its officer...”. The *Keels* criteria for a motion to recall remittitur has been relied upon by more recent decisions including the Supreme Court’s ruling in *Wise v. South Carolina*

Department of Corrections, 372 S.C 173, 642 S.E. 2d 551 (SC 2007).

In this instance, the remittitur was issued when the Court of Appeals did not receive Appellants Petition for Rehearing on June 28, 2018, the 15th day after issuing its ruling affirming the lower court's order (which was issued on June 13, 2018). The reason the Court of Appeals did not actually receive the Petition for Rehearing on that day is because Appellant's counsel was told that depositing the Petition in the mail satisfied the filing requirement of Rule 221. (This is set forth in the Affidavit of Sydney Wolk dated July 9, 2018, which is attached hereto.) The Petition for Rehearing was completed and deposited in the US Mail on June 28, 2018, in conformance with the reasonable but apparently erroneous instruction from the Court of Appeals staff.

While it is acknowledged that the South Carolina Appellate Court Rules take precedence over the interpretations of those rules by the staff, the particular rule is problematic. By requiring that the pleading be "received by the Appellate Court" on the 15th day, the rule gives lawyers in closer proximity to the Court of Appeals a time advantage over lawyers who are farther away. As noted by Ms. Wolk, her call for clarification to the Court of Appeals was in the morning of June 28, 2018. Had she been told that actual filing with the Court of Appeals that day was required, someone from Appellants counsel's office would have driven two hours to Columbia that afternoon to file the Petition and made the drive back. Based on the instructions by Court of Appeals staff, the Petition was put into the mail instead, with a certificate of service to Respondent's counsel attached.

For the foregoing reasons, Appellant hereby requests that the Remittitur be recalled.



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Attorneys for Appellant

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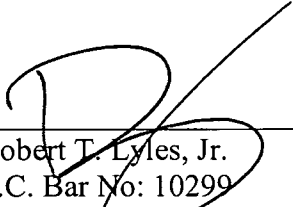
Sustainable Building Solutions, Inc., John Porretto, Sr., Sue A. Porretto, The County of Charleston,
and Island Preservation Partnership, Defendants,

Of Whom John Porretto, Sr. and Sue Porretto are the Respondents.

PROOF OF SERVICE

I certify that I have served the Appellant's Motion to Recall the Remittitur on counsel for the Respondent by depositing a copy in the United States Mail, First Class postage prepaid, this 14th day of August, 2018, addressed to the following:

Paul E. Tinkler
Law Offices of Paul E. Tinkler
154 King St., 3rd Floor
Charleston, SC 29401
Attorney for Respondents


Robert T. Lyles, Jr.
S.C. Bar No: 10299
Lyles & Associates, LLC
342 East Bay Street
Charleston, SC 29401
(843) 577-7730
rtl@lylesfirm.com
Attorneys for Appellant

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AFFIDAVIT OF SYDNEY WOLK

PERSONALLY, APPEARED BEFORE ME, Sydney Wolk, who being duly sworn
deposes and says that

1. I am an employee of Lyles & Associates, LLC and am one of the Paralegals assisting Robert T. Lyles, Jr.
2. On the morning of June 28, 2018, I called the Court of Appeals at (803)734-1890 and asked the receptionist if a Petition for Rehearing needed to be physically in the Court of Appeals office fifteen days after the Opinion was issued or if the petition could be postmarked for that same day.
3. The receptionist did not refer me to the assigned case manager.
4. The receptionist told me the Petition for Rehearing could be postmarked for

fifteen days after the Opinion.

5. Pursuant to the Proof of Service the Appellant's Petition for Rehearing was placed in the US Mail on June 28, 2018.

FURTHER DEPONENT SAYETH NOT.

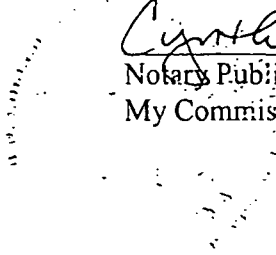


Sydney Wolk

Paralegal to Robert T. Lyles, Jr.
Lyles & Associates, LLC
342 East Bay Street
Charleston, SC 29401

July 9, 2018

SWORN to before me this 9th
Day of July, 2018.


Cynthia R. Walston
Notary Public for South Carolina
My Commission expires: 2-6-24

LYLES & ASSOCIATES, LLC

ATTORNEYS AT LAW
342 East Bay Street
Charleston, South Carolina 29401
Telephone: (843) 577-7730
Facsimile: (843) 577-7172

Robert T. Lyles, Jr.
Member

Direct: (843) 735-5560
E-mail: rtl@lylesfirm.com

August 14, 2018

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

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SC Court of Appeals

Re: *Florida Citizens Bank v. Sustainable Building Solutions, Inc., et al.*
Appellate Case Number: 2016-000971

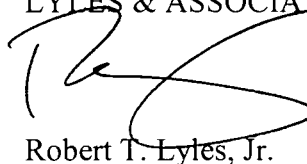
Dear Clerk:

Enclosed please find the original and seven (7) copies each of Appellant's Motion to Recall the Remittitur and Proof of Service regarding the above-referenced matter, along with this firm's check in the amount of \$25.00 to cover the required filing fee. I would appreciate your filing these pleadings and returning one (1) file-stamped copy of each to me in the envelope provided for your convenience.

Should you have any questions concerning the enclosed, please do not hesitate to give me a call. Thank you, and with kindest regards, I remain

Very truly yours,

LYLES & ASSOCIATES, LLC



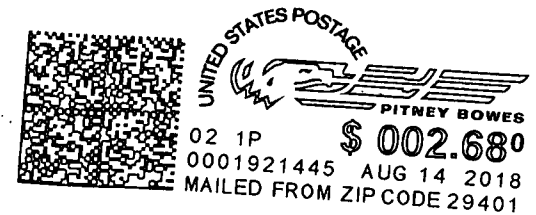
Robert T. Lyles, Jr.

RTL/sw

Enclosures

cc: Paul Tinkler, Esquire

Lyles & Associates, LLC
342 East Bay Street
Charleston, SC 29401



First Class Mail

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

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USPS TRACKING #



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