THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County
Court of Common Pleas

Stephanie P. McDonald, Circuit Court Judge

Case No. 2011-CP-10-07166

On Writ of Certiorari to the Court of Appeals

Appellate Case No. 2017-000683
Opinion No. 27884 (S.C. Sup. Ct. filed May 8, 2019)

Otha Delaney, Petitioner,

v.

First Financial of Charleston, Inc. Respondent.

PETITION FOR REHEARING

YOUNG CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
Russell G. Hines (SC Bar No. 72100)
Perry M. Buckner, IV (SC Bar No. 100031)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

Attorneys for Respondent

NOW COMES First Financial,[1] by and through its undersigned counsel, pursuant to Rule 263(b), SCACR, and hereby petitions this Honorable Court to rehear this matter and reconsider its decision herein, i.e., the 4-1 majority decision in *Delaney v. First Financial of Charleston, Inc.*, Op. No. 27884 (S.C. Sup. Ct. filed May 8, 2019) (Shearouse Adv. Sh. No. 19 at 31) (the "Subject Decision").

GROUNDS FOR REHEARING

The Subject Decision reverses the court of appeals' prior affirmance of the trial court's dismissal of this action as barred by the statute of limitations. The Court should rehear this matter because, most respectfully, it has misapprehended or overlooked the following material points.

1. **The Subject Decision does not address First Financial's jurisdictional issue/argument (Issue/Argument II.A. in its brief) about the consequences of the court of appeals having *properly* remitted this case to the trial court and *improperly* recalled the remittitur thereafter. The answer to this question is necessary to the decision of this appeal (indeed it is dispositive in favor of First Financial), and most respectfully, First Financial is entitled to that answer under not only Rule 220, SCACR, but also by virtue of its constitutional rights of due process and/or equal protection.**

As explained in First Financial's motion to dismiss Mr. Delaney's petition for a writ of certiorari filed May 11, 2017 (which is already of record in this Court and, for the sake of brevity, is incorporated by reference herein, along with First

[1] The shorthand references already defined in First Financial's brief (e.g., "First Financial" refers Respondent, First Financial of Charleston, Inc.) are followed in this petition.

Financial's reply in support of the motion, which is likewise of record, filed May 30, 2017), the deadline for Mr. Delaney to petition the court of appeals for rehearing was October 17, 2016. Having not "actually received" a petition for rehearing from Mr. Delaney, the court of appeals *properly* remitted this case to the trial court on October 19, 2016. The court of appeals then *improperly* recalled the remittitur on November 2, 2016.

What prompted the court of appeals to recall the remittitur was a motion by Mr. Delaney for an extension of time to petition for rehearing. That motion was not even *mailed* until October 18, 2016, i.e., after the deadline for Mr. Delaney to petition for rehearing had already passed, and the court of appeals did not *receive* it until October 20, 2016, i.e., after it had already properly remitted the case on October 19th.

Upon receipt of Mr. Delaney's motion, First Financial wrote the court of appeals on October 28, 2016, advising of its position that the appeal had been duly concluded with finality by virtue of the court's issuance of the remittitur on October 19th and objecting to recall of the remittitur—there having been no mistake, error, or inadvertence of the court in sending down the remittitur. *Wise v. S.C. Dep't of Corrections*, 372 S.C. 173, 174, 642 S.E.2d 551 (2007) ("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*.") (emphasis added) (internal citations omitted). When the court of appeals thereafter recalled the remittitur and allowed Mr. Delaney to petition for rehearing, First Financial filed a return wherein it argued that the court had properly sent the remittitur to the trial court on October 19th, at which point the appeal was finally decided; that there was no longer appellate jurisdiction; and that the court had improperly recalled the remittitur.

After the court of appeals denied Mr. Delaney's petition for rehearing and he petitioned this Court for a writ of certiorari, First Financial filed the aforementioned motion to dismiss on May 11, 2017. By order filed March 28, 2018, the Court granted Mr. Delaney's petition for a writ of certiorari and summarily denied First Financial's motion to dismiss as "moot," but providing no explanation as to why. Thereafter, in its brief to this Court, First Financial again raised this issue/argument about appellate jurisdiction having been lost as a result of the court of appeals' proper remittitur of the case to the trial court on October 19, 2016. (*See* Brief of Respondent at pp. 1, 3–4, 12–16.)[2]

As argued in First Financial's brief (*see* Issue/Argument II.A.),

> Because the Court of Appeals lost appellate jurisdiction as of October 19, 2016, having *properly* remitted this case to the trial court on that date, and thus *improperly*

[2] First Financial's brief is, of course, already of record in this Court and, for the sake of brevity, is incorporated by reference herein.

> recalling the remittitur thereafter, (1) this Court cannot now upset the Court of Appeals' final decision via issuance of a writ of certiorari to that court after it has already lost appellate jurisdiction over this case, and (2) the Court's doing so violates [First Financial's] constitutional rights to equal protection and/or due process.

(Brief of Respondent pp. 12–16.) This issue/argument is dispositive in First Financial's favor, but the Subject Decision does not address it at all.

First Financial has duly raised this issue/argument at every turn since it arose. It implicates a foundational principle of our system of justice: jurisdiction. All this Court has said about it thus far is that it was somehow "moot[ed]" by the Court's grant of Mr. Delaney's petition for a writ of certiorari. Respectfully, this is not so—but even if it were, surely some reasonably detailed explanation as to why is warranted under the circumstances. To say that the point is "moot" because of this Court's grant of cert is to say that even if First Financial is right—that indeed the court of appeals did properly remit the case on October 19, 2016, and indeed the court did improperly recall it thereafter—it does not matter. Again respectfully, First Financial is not able to understand how this could possibly be so—but even assuming, *arguendo*, First Financial is mistaken, surely the point is not so obvious as to be wholly underserving of any substantive explanation. Surely, on such a point—a point both foundational to the justice system itself and potentially dispositive in favor of the party who stands accused—First Financial

should not be left to wonder whether it has even been meaningfully considered.

Again most respectfully, First Financial is entitled to have this question ruled upon in reasonably substantive detail. Under Rule 220(a), the Court is required to "make its decisions in writing by published opinions or memorandum opinions, with any concurring or dissenting opinions attached." Further, "[i]n *every* decision rendered by [the] [C]ourt, *every* point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the [C]ourt *must be stated in writing* and *must, with the reason for the [C]ourt's decision*, be preserved in the record of the case." Rule 220(b) (emphasis added).[3] Again, this question is jurisdictional and dispositive. It has been duly raised and an answer to it is absolutely nececcassry to the decision of this appeal—and indeed First Financial contends the correct answer to it ends this case in its favor. To deny First Financial such an answer violates not only Rule 220 but also its constitutional rights to equal protection and/or due process. (*See* U.S. Const. amend. XIV; S.C. Const. art. I, § 3; U.S. Const. amend. V; S.C. Const. art. I, § 3; *Weaver v. S.C. Coastal Council*, 309 S.C. 368, 375, 423 S.E.2d 340, 344 (1992) ("While the three permits issued during the period immediately preceding respondent's application

[3] Certain exceptions to this requirement are provided in Rule 220(b)(1) and (2), but they are not applicable here. Rule 220(b)(1) applies only to "memorandum" opinions that are "unanimous." The Subject Decision has been identified for publication; moreover, it is a split decision. Rule 220(b)(2) applies only to decisions of "[t]he Court of Appeals."

may have been granted in error, absent a showing in the record that Council had taken appropriate remedial action and given due notice thereof, the respondent was entitled to be treated in the same manner as other applicants. We conclude that Council violated the equal protection and due process provisions of the state and federal constitutions in treating the respondent in a manner different from Beckmann, Cope and Crowley, thereby denying her a benefit granted to others similarly situated."); *Thomas v. Lynch*, 87 S.C. 44, 68 S.E. 817 (1910) ("It is to be regretted in any case when a party loses the opportunity afforded by the law and the rules prescribed for the administration thereof to present his cause on the merits. But it must always be remembered that the other party to the cause has the right to the orderly disposition thereof, and that his rights must be respected, and that it is essential to the due and orderly administration of the law that the methods of procedure prescribed by the statutes and rules of court be complied with. Otherwise, there would be no end to litigation. It has frequently been decided that, when the remittitur has been properly sent to the court below, the Supreme Court loses jurisdiction, and thereafter neither the court nor any justice thereof can make any order in the case. *Carpenter v. Lewis*, 65 S. C. 400, 43 S. E. 881; *State v. Adams*, 83 S. C. 149, 65 S. E. 220, and cases cited therein. *See, also, State v. Keels*, 39 S. C. 553, 17 S. E. 802, a case very much like the one under consideration.").

2. **Even assuming, *arguendo*, there is appellate jurisdiction, the Court should reconsider the entirety of First Financial's argument on the merits, the majority opinion of the court of appeals, and Justice Kittredge's dissenting opinion.**

The court of appeals' majority decided this case correctly on the merits. This Court should rehear this matter and give new consideration to that decision, along with Justice Kittredge's dissent, which endorses the decision, and First Financial's brief, and decide this matter anew in favor of First Financial.

CONCLUSION

For the foregoing reasons, First Financial asks this Honorable Court to grant rehearing and vacate the Subject Decision in favor of an order that recognizes the appeal to have been concluded with finality as of the court of appeals' proper remittitur of the case on October 19, 2016, or, alternatively, in favor of a new or revised decision that that affirms the court of appeals on the merits, and thus affirms the trial court.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

YOUNG CLEMENT RIVERS, LLP

By: _____

Stephen L. Brown (SC Bar No. 66468)
Russell G. Hines (SC Bar No. 72100)
Perry M. Buckner, IV (SC Bar No. 100031)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

Attorneys for Respondent

Charleston, South Carolina

Dated: 6/15/19

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PROOF OF SERVICE

YOUNG CLEMENT RIVERS, LLP
Stephen L. Brown (SC Bar No. 66468)
Russell G. Hines (SC Bar No. 72100)
Perry M. Buckner, IV (SC Bar No. 100031)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

Attorneys for Respondent

I, Russell G. Hines, of Young Clement Rivers, LLP, attorneys for Respondent, hereby certify that the foregoing **PETITION FOR REHEARING** was served on all other parties to this matter by depositing a copy of same in the U.S. Mail on June 18, 2019, properly posted for delivery to the following addressees:

Philip L. Fairbanks, Esquire
Law Offices of Philip L. Fairbanks, LLC
1214 King Street
Beaufort, SC 29902

-and-

Frederick M. Corley, Esquire
1214 King Street
Beaufort, SC 29902

-and-

Kathy D. Lindsay, Esquire
Kathy D. Lindsay, PA
P.O. Box 1911
Beaufort, SC 29901

Attorneys for Petitioner

Respectfully submitted,
YOUNG CLEMENT RIVERS, LLP

By: _____
Russell G. Hines (SC Bar No. 72100)
Attorneys for Respondent

Charleston, South Carolina

Dated: 6/18/19