

THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Honorable Marvin H. Dukes, III

Appellate Case No.: 2017-000620

RECEIVED
MAR 30 2020
SC Court of Appeals

BURTON FIRE DISTRICT.....Respondent,

vs.

CITY OF BEAUFORT.....Appellant.

And

BURTON FIRE DISTRICT.....Respondent,

vs.

TOWN OF PORT ROYAL.....Appellant.

PETITION FOR REHEARING

This petition is filed pursuant to Rule 240(i) and (j), SCRAP. The Appellants Town of Port Royal and City of Beaufort respectfully request rehearing on the Order of the Court dated March 24, 2020. The subject Order denying the Appellants' Motion to Recall Remittitur and accept the Petition for Rehearing was filed by a single judge, and the Appellants in this matter hereby request review Judge Hill's March 24, 2020 by a full panel of judges.

Procedural History

The Order of the Court of Appeals affirming the Circuit Court was issued on January 8, 2020. As the result of a calendaring error in counsel for the Appellant's office, the Petition for Rehearing was put in the mail on the day it was due at the Court, Thursday, January 23, 2020. The court issued remittitur on the very next day, January 24, 2020 and these two documents crossed in the mail. Notice of remittitur was received in the mail on Monday, January 27, 2020. Realizing that the petition was mistakenly put in the mail on the day it was due based on the erroneous calendar entry, counsel for the City and Town immediately contacted Fred Kuhn, counsel for the Respondent Burton Fire District, and explained the situation. Counsel for the Respondent graciously consented to and signed the motion to recall remittitur, which was filed on Monday, January 27, 2020. Judge Hill issued an order for the Court nearly two months later on March 24, 2020 denying the motion to recall remittitur.

Argument

The Appellant municipalities urge the Court to recall remittitur in this matter so as to not punish the people of the Town of Port Royal and the City of Beaufort for the calendaring error of counsel for the municipalities. The petition for rehearing in this matter was calendared as if it was to be mailed and post-marked (like other filing deadlines in the rules) on the date it was due as opposed to being filed at the court by the due date. This was a simple procedural error. In Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004) our Supreme Court held that civil procedure and appellate rules should not be written

or interpreted to create a trap for the unwary lawyer or party. See also Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (expressing concern about the "over-zealous application" of "long-standing error preservation rules" and discouraging a "hypertechnical application" of those rules resulting in appellate arguments being procedurally barred); Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review ... Imposing such a requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." (quotation marks and citations omitted)); Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (citation omitted) ("Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it."). Gamble v. State, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989) (stating rules applicable to post-conviction relief actions should not be construed in manner which operate as a trap for the unwary lawyer).

This is particularly true in light of the consent of the Respondent to have jurisdiction returned to the appellate court, as evidenced by their Counsel's signed consent on the motion to recall, and considering that the Petition for rehearing was in fact postmarked on the due date. It is important to note as well that parties filing motions for reconsideration are at a distinct disadvantage when they are located remotely from Columbia as the mail can take as much as five

days to reach places like Beaufort from Columbia, and five more days back again.

Based on the foregoing, it is respectfully submitted that a full panel should review this order pursuant to Rule 240(i) and (j), and reverse the order dated March 24, 2020, given the fact the Appellant's petition for rehearing was placed in the mail by the date it was due, coupled with the fact that the opposing party consented to the recall of remittitur, this court should not allow simple procedural error to result in the ability of the Town of Port Royal and City of Beaufort to have its petition for rehearing heard and thereby ending the rights appellate rights of the municipalities. It is respectfully submitted that this Court should recall remittitur and accept the filing of the Appellant's petition for rehearing.

HOWELL, GIBSON & HUGHES, P.A.

By: 

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Attorney for Appellants

Beaufort, South Carolina

March 30, 2020

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South Carolina Court of Appeals

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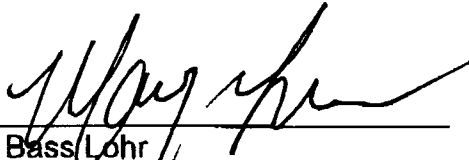
PROOF OF SERVICE

The undersigned counsel hereby certifies that she has served the foregoing Petition for Rehearing upon all counsel of record by affixing same with proper postage and placing same with the United States Postal Service on 30

day of March, 2020 addressed to the following:

H. Fred Kuhn, Jr., Esquire
Moss, Kuhn & Fleming, P.A.
Post Office Drawer 507
Beaufort, SC 29901-0507

HOWELL, GIBSON & HUGHES, P.A.

By: 
Mary Bass Lohr
Post Office Box 40
Beaufort, SC 29901-0040
(843) 522-2400
Attorney for Appellants

Beaufort, South Carolina

March 30, 2020

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MAR 30 2020

SC Court of Appeals

March 30, 2020

(Via Facsimile 803-734-1839)

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

Re: Burton Fire District vs. Town of Port Royal and City of Beaufort
Civil Action No.: Appellate Case No.: 2017-000620
Our File No: 11279 MBL

Dear Ms. Kitchings:

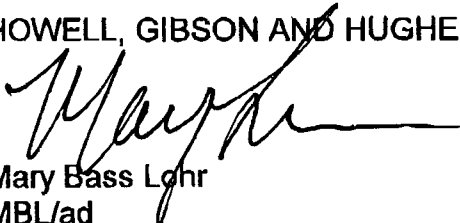
Please find enclosed herewith for filing a Petition for Rehearing and Proof of Service with regard to the above referenced matter. Pursuant to the Supreme Court Order RE: Operation of the Appellate Courts During the Coronavirus Emergency dated March 20, 2020 I am also placing the firm's check in the amount of \$50.00 representing the appropriate filing fee in the mail to the Court of Appeals today.

Please do not hesitate to contact me with any question or comment regarding the enclosure

With kindest regards, I am

Yours truly,

HOWELL, GIBSON AND HUGHES, P.A.



Mary Bass Lohr
MBL/ad
Enclosure

cc: H. Fred Kuhn, Jr. (Via U.S. Mail and Email)