

THE STATE OF SOUTH CAROLINA
South Carolina Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Honorable Marvin H. Dukes, III

Appellate Case No.: 2020-001094

RECEIVED

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S.C. SUPREME COURT

BURTON FIRE DISTRICT.....Respondent,

vs.

CITY OF BEAUFORT.....Appellant.

And

BURTON FIRE DISTRICT.....Respondent,

vs.

TOWN OF PORT ROYAL.....Appellant.

RETURN TO PETITION FOR
WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED

The Court of Appeals correctly found that it could not recall the Remittitur issued in this case where the Petitioners' admittedly failed to comply with Rule 221(a), SCACR, and failed to offer any just cause or excuse for their noncompliance.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This appeal involves two (2) breach of contract cases which were consolidated prior to trial. The Respondent, Burton Fire District ("Burton"), is a public service district that provides fire protection, firefighting and first response emergency medical services. The Petitioners, City of Beaufort ("Beaufort") and the Town of Port Royal ("Port Royal"), are municipalities that are adjacent to and border Burton's territory. On September 2, 2010 Burton entered into a Contract with Beaufort and Port Royal pursuant to which Burton agreed to provide its services to Beaufort and Port Royal in exchange for an annual payment to Burton by Beaufort and Port Royal. In the Complaints filed by Burton, Burton alleges that Beaufort and Port Royal breached their Contract with Burton by failing to pay the full amount due each year.

B. PROCEDURAL HISTORY

On June 4, 2013 Civil Action Number 2013-CP-07-1463 was commenced by the filing of a Summons and Complaint in the Beaufort County Court of Common Pleas against the Defendant City of Beaufort, and Civil Action Number 2013-CP-07-1464 was commenced by the filing of a Summons and Complaint against the Defendant Town of Port Royal in the Beaufort County Court of Common Pleas. Beaufort duly served and filed its Answer on July 9, 2013, and Port Royal duly served and filed its Answer on July 11, 2013.

On January 23, 2014, at the request of the Defendant Port Royal and with the consent of all parties, these two (2) cases were consolidated under Case Number 2013-CP-07-1463.

On October 2, 2015 these consolidated cases were referred to the Honorable Marvin H. Dukes, III, Master in Equity and Special Circuit Court Judge for Beaufort County in accordance with §14-11-85 of the South Carolina Code of Laws.

The trial of these cases took place on December 1 and 2, 2015 in the Beaufort County Court of Common Pleas.

On October 24, 2016 the Honorable Marvin H. Dukes, III issued his Final Order, in which he concluded that Beaufort and Port Royal had breached their Contract with Burton by short-changing Burton on its annual payments. In accordance with the Order judgment was entered in favor of Burton against the City of Beaufort in the amount of \$91,458.07, and in favor of Burton against Port Royal in the amount of \$178,618.20.

On November 7, 2016 Beaufort and Port Royal filed a Motion to Reconsider, which was denied by an Order filed on March 8, 2017.

On March 10, 2017 Beaufort and Port Royal filed their Notice of Intent to Appeal to the South Carolina Court of Appeals.

On January 8, 2020 the South Carolina Court of Appeals issued its unanimous decision affirming the decision of the Beaufort County Court of Common Pleas.

On January 24, 2020 (sixteen (16) days after the Decision) the South Carolina Court of Appeals issued the Remittitur, remitting this case back to the Beaufort County Court of Common Pleas.

On January 27, 2020 (nineteen (19) days after the Decision) the South Carolina Court of Appeals received in the mail a Petition for Rehearing, purportedly pursuant to Rule 220, SCACR, sent on behalf of the Petitioners Beaufort and Port Royal. On that same date, Respondent's counsel also received the Petition for Rehearing in the mail. The Petition for Rehearing was accompanied by a cover letter from Petitioner's counsel dated January 23, 2020.

On January 28, 2020 the Petitioners filed a Motion to Recall the Remittitur and accept the Petition for Rehearing.

On March 24, 2020 the South Carolina Court of Appeals issued its Order denying the Petitioners' Motion to Recall Remittitur.

On March 30, 2020 the Petitioners filed a Petition for Rehearing, asking the Court of Appeals to rehear and reconsider its Order denying the Petitioners' Motion to Recall Remittitur, noting that this Order was issued by a single judge of the Court of Appeals and requesting review by a full panel of judges.

On July 8, 2020 a full panel of the South Carolina Court of Appeals, led by Chief Judge James E. Lockemy, issued its Order denying the Petitioner's Motion for Rehearing.

On August 10, 2020 the Petitioners filed their Petition for Writ of Certiorari in the South Carolina Supreme Court.

This Return to the Petition for Writ of Certiorari is respectfully filed on behalf of the Respondent Burton.

COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

THE COURT OF APPEALS CORRECTLY FOUND THAT IT COULD NOT RECALL THE REMITTITUR ISSUED IN THIS CASE WHERE THE PETITIONERS' ADMITTEDLY FAILED TO COMPLY WITH RULE 221(a), SCACR, AND FAILED TO OFFER ANY JUST CAUSE OR EXCUSE FOR THEIR NONCOMPLIANCE.

The South Carolina Court of Appeals issued its dispositional decision affirming the decision of the Beaufort County Court of Common Pleas on January 8, 2020. Nineteen (19) days later, on January 27, 2020, the South Carolina Court of Appeals, as well as Respondent's Counsel, received a Petition for Rehearing from the Petitioners, which had apparently been mailed on January 23, 2020.

Rule 221, SCACR, clearly and unambiguously provides as follows:

“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.”

Rule 221(a), SCACR (emphasis added). The Petitioners' Petition for Rehearing, accordingly, was not received until four (4) days after the deadline set forth in Rule 221(a) had elapsed.

In denying the Petition for Rehearing, the South Carolina Court of Appeals correctly noted that “because the Court did not actually receive the Petition for Rehearing within fifteen (15) days after the filing of the Opinion, Remittitur was properly sent, and this Court no longer has jurisdiction over the case.” Order of South Carolina Court of Appeals filed on March 24, 2020. See also Order of the South Carolina Court of Appeals filed July 8, 2020 (in which the Court noted that it “lost jurisdiction over the case when the Remittitur was filed.”)

This has been the law in South Carolina for well over a century. In 1881 the South Carolina Supreme Court observed that it had already been “repeatedly decided” that “the remittitur in the usual form had been sent and this Court had thereby lost its jurisdiction.” *Id.*, 16 S.C. at 300, citing *Pringle v. Sizer*, 3 S.C. 335 (1872); *Whaley v. Bank of Charleston*, 5 S.C. 262

(1874); *Adger & Co. v. Pringle* (1880); and *Ex Parte Dial* (1881). In the latter case, the South Carolina Supreme Court stated:

“It is well understood, and this was admitted in the argument of counsel, that after the remittitur has been transmitted to the Court below in any case, this Court thereby loses jurisdiction of the cause, and can afterwards entertain no motion whatever in reference thereto.”

Ex Parte Dial, 14 S.C. 584, 585 (1881). The Court was unapologetic in its holding, noting that “it concerns the welfare of the country that there should be an end of litigation.” *Id.*, 14 S.C. at 586-87.

This legal principle has been adhered to time and time again over the ensuing years. See, e.g., *Wise v. S.C. Department 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.”); *Thomas v. Lynch*, 87 S.C. 44, 68 S.E. 817 (1910) (“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.”).

In *State v. Keels*, 39 S.C. 553, 17 S.E. 802 (1893) the South Carolina Supreme Court recognized what appears to be the only exception to the foregoing rule, as follows:

“In order to justify this Court in exercising the unusual power of recalling the remittitur after it has been sent down, 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 . . .**”

Id., 39 S.C. at 802 (emphasis added).

In this case, the Petitioners have made no showing that the Remittitur was sent down through some mistake or inadvertence on the part of the Court of Appeals. In fact, the

Petitioners admit that the Remittitur was properly sent down due to the Petitioners' own failure to file or serve the Petition for Rehearing on time.

Indeed, in their Motion to Recall Remittitur the Petitioners failed to set forth **any** facts or good cause justifying their request to recall the Remittitur. The Petitioners simply state that, instead of delivering the Petition for Rehearing to the Court of Appeals, they chose for some unknown reason to place it in the mail instead. In neither their Motion to Recall the Remittitur, nor in their Petition asking the Court of Appeals to rehear its decision denying the Motion to Recall the Remittitur, did the Petitioners set forth any justification for their failure to comply with the deadline plainly and clearly set forth in Rule 221(a), SCACR.

In their Petition for Writ of Certiorari the Petitioners imply that Rule 221 is a "trap for the unwary lawyer." Petition, pg. 2. Respondent respectfully disagrees. The language of Rule 221 is plain, clear, and unambiguous. There is nothing misleading in the mandate that "Petitions for rehearing must be **actually received** by the Appellate Court no later than fifteen (15) days after the filing of the opinion." *Id.*, Rule 221(a) (emphasis added). The necessity of receipt by the Court is even emphasized by including the redundant word "actually."

Petitioners also assert that this Court should avoid a "hypertechnical application" of the Appellate Court Rules. There is nothing "hypertechnical," about Rule 221. Compliance is simple and uncomplicated. The Petition for Rehearing simply must be actually received by the Appellate Court on time.

Petitioners also assert that "because the court does have the discretion to recall the remittitur it in fact does not lose the ability to retake jurisdiction in the absolute sense." Petition for Writ of Certiorari, pg. 3. The Respondent respectfully disagrees. As noted above, it has been well established in this State for over a hundred years that the Court does **not** have the discretion

to recall the remittitur. Once the remittitur has been sent, the Court loses jurisdiction over the case. E.g., *Wise v. South Carolina Department of Corrections*, 372 S.C. 173, 642 S.E.2d 551 (2007).

Finally, the Petition for Writ of Certiorari argues that the people of Port Royal and Beaufort should not be “punished” for the failure to comply with Rule 221 and should be allowed their day in court. This overlooks the fact that no one is being “punished,” and the Petitioners have already had their day in Court, with both the Beaufort County Court of Common Pleas and the South Carolina Court of Appeals having given them a full and fair hearing on the merits. As the South Carolina Supreme Court noted long ago it is in the interest of the citizens of this country that there ultimately be an end to litigation. The countervailing rights of the citizens of Burton in this regard should not be ignored.

In closing, it is worth noting that a writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are **special** and **important** reasons.” Rule 242(b), SCACR (emphasis added). A list enumerating the “character of reasons” justifying a writ of certiorari is enumerated in Rule 242. These reasons, and their applicability to the case *sub judice*, are as follows:

1. Where there are novel questions of law. This case does not involve any novel questions of law. As previously noted, the loss of appellate jurisdiction after the remittitur has been sent has been the law in South Carolina for well over a century.

2. Where there is a dissent in the decision of the Court of Appeals. Both the Order denying the Motion to Recall the Remittitur, and the Order refusing to rehear the denial of the Motion to Recall the Remittitur, were unanimous.

3. Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court. The decision of the Court of Appeals in this case is not only not in conflict with, but is mandated by, all prior decisions of the Supreme Court.

4. Where substantial constitutional issues are directly involved. No constitutional issue is involved in this case. Even the underlying case on its merits is a simple breach of contract claim.

5. Where a federal question is included and the decision of the Court of Appeals conflicts with the decision of the United States Supreme Court. There is no federal question involved in this case.

Accordingly, there is no “special and important reason” justifying the issuance of a Writ of Certiorari in this case.

CONCLUSION

The Petitioners are essentially requesting that the South Carolina Court of Appeals ignore the deadline for filing a Petition for Rehearing which is plainly and clearly set forth in Rule 221(a), SCACR. The Petitioners admit that the South Carolina Court of Appeals properly issued the remittitur. They likewise admit that they failed to comply with Rule 221(a). They have offered absolutely no just cause or excuse for their noncompliance. The relief requested by Petitioners in this case would essentially render the mandate of Rule 221(a) meaningless. If the deadline is ignored in this case, then the precedent is set to ignore it in every case.

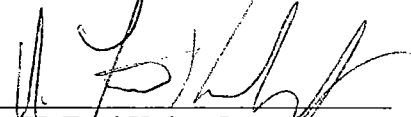
At some point in time there needs to be an end to litigation. The Petitioners in this case had a full and fair trial on the merits before the Beaufort County Court of Common Pleas and they subsequently had a full and fair hearing on the merits before the South Carolina Court of Appeals. They admittedly failed to comply with Rule 221 of the South Carolina Appellate Court

Rules, and they have offered no just cause or excuse for their noncompliance. It is time to bring this case to an end.

It is accordingly respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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