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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J. C. Nicholson, Jr., Circuit Court Judge

Civil Action Nos.: 2010-CP-10-05520, 2010-CP-10-07233, 2012-CP-10-05559, 2013-CP-10-03733, 2013-CP-10-04175, 2013-CP-10-04176, 2015-CP-10-05486, 2016-CP-10-01632

Court of Appeals Consolidated Case No.: 2017-001996

Supreme Court Consolidated Case No.: 2021-000668

John Doe 2 and Jane Doe 4, John Doe 10, Jane Doe 11, John Doe 193, Father Doe 194, John Doe 194, John Doe 245 and Father Doe 245, and John Doe 297,..... Petitioners,

v.

The Bishop of Charleston, A Corporation Sole; Robert Gugliemone, The Bishop of Charleston, in his official Capacity; Rev. Monsignor Martin Laughlin, former Administrator of the Diocese of Charleston, in his official Capacity; Robert J. Baker, former Bishop of Charleston, in his official Capacity; Lawrence E. Richter, Jr.; David K. Haller; and Richter and Haller, LLC;.. Respondents.

JOINT RETURN OF RESPONDENTS LAWRENCE E. RICHTER, JR., DAVID J. HALLER, AND RICHTER AND HALLER, LLC TO PETITIONERS' MOTION TO RECALL REMITTITUR

Pursuant to the Supreme Court's request of June 28, 2021, Respondents Lawrence E. Richter, Jr., David K. Haller, and Richter & Haller, LLC (the "Attorney Respondents") jointly submit this Return to Appellants' Motion to Recall the Remittitur in this matter.

BACKGROUND

This matter is before the Court on appeal from orders of the Honorable J.C. Nicholson, Jr.

The appeal consolidated eight circuit court cases, the oldest of which have been pending since 2010.

Appellants commenced this appeal on September 27, 2017. During this appeal, the COVID-19 public health crisis caused this Court to prescribe protocols for, among other things, the electronic filing and service of papers. *See* Order of the Sup. Ct. in Re: Operation of the Appellate Courts During the Coronavirus Emergency (filed March 30, 2020; amended May 29, 2020). With these COVID-19 protocols in place, the Court of Appeals heard oral arguments in this case on September 15, 2020 via Webex. The Court of Appeals affirmed Judge Nicholson's orders on March 3, 2021. [R. App. 3028.] On March 17, 2021, Appellants filed a Motion for Rehearing [R. App. 3032], followed by returns filed on behalf of the Respondents on March 29, 2021. [R. App. 3047.][1] The Court of Appeals denied Appellants' motion for rehearing on May 13, 2021. [R. App. 3061.] Appellants then attempted to file a Petition for Writ of Certiorari the following month. That attempt, however, failed to conform to any one of the filing methods available to the Appellants, and the Attorney Respondents are aware of no record that either appellate court received the Appellants' attempted filings before Appellants filed the Motion to Recall the remittitur.[2]

On June 24, 2021, the Court of Appeals, having received no petition for writ of certiorari within the time prescribed by rule (plus an additional ten days), sent the remittitur to the lower court. At the request of this Court, the Attorney Respondents now submit this joint Return to the

[1] "Volume 9" of the appendix compiled by Appellants for their petition contains only the return of the Richter & Haller Respondents and omits the return of the Diocese Respondents, which is available on C-Track, filed March 29, 2021.

[2] Additionally, the proof of service included with the documents Appellants attempted to file did not include a date of service.

Motion to Recall the remittitur. For the reasons set forth below, Appellants' motion should be denied.

STANDARD OF REVIEW

When a remittitur has been properly dispatched to the lower court, the appellate court no longer has jurisdiction over the case. See Wise v. S.C. Dep't of Corrs., 372 S.C. 173, 174, 642 S.E.2d 551, 551 (2007) (citing Mickle v. Blackmon, 255 S.C. 136, 177 S.E.2d 548 (1970); Thomas v. Lynch, 87 S.C. 44, 68 S.E. 817 (1910); Carpenter v. Lewis, 65 S.C. 400, 43 S.E. 881 (1903); State v. Keels, 39 S.C. 553, 17 S.E. 802 (1893)). "The only exception to this rule is when the remittitur is sent down by mistake, error or inadvertence of the Court." Id. (citing Keels, supra).

ARGUMENT

Appellants contend the remittitur should be recalled not because the Court of Appeals committed any error, mistake, or inadvertent act but rather due to the alleged inadvertence of Appellants and their counsel. Because the Court of Appeals committed no mistake, error, or inadvertence when it dispatched the remittitur, this Court should deny Appellants' motion to recall.

Rule 221(b), SCACR governs remittiturs. That rule provides in pertinent part,

> Where a petition for rehearing has been denied, the Court of Appeals shall not send the remittitur to the lower court or administrative tribunal until the time to petition for a writ of certiorari under Rule 242(c) has expired. If a petition for writ of certiorari is filed, the Court of Appeals shall not send the remittitur until notified that the petition has been denied. If the writ is granted by the Supreme Court, the Court of Appeals shall not send the remittitur.

Id. If a petition for writ of certiorari is not filed within the time prescribed in Rule 242, SCACR, then the Court of Appeals shall send the remittitur to the lower court.

In this case, Appellants failed to file their Petition for Writ of Certiorari as required by rule. "A petition for writ of certiorari shall be served on opposing counsel and filed with proof of service with the Clerk of the Court of Appeals and the Clerk of the Supreme Court within thirty (30) days

after the petition for rehearing or reinstatement is finally decided by the Court of Appeals." Rule 242(c), SCACR. Under the Appellate Court Rules, filing is accomplished by hand-delivery, by mailing, or by "electronic means in a manner provided by order of the Supreme Court of South Carolina." Rule 262(a), SCACR. During the COVID-19 pandemic, the Supreme Court issued several orders introducing various methods of electronic filing. *See* Order of the Sup. Ct. in Re: Operation of the Appellate Courts During the Coronavirus Emergency (filed March 30, 2020; amended May 29, 2020). On June 14, 2021, this Court allowed parties to file by (1) delivering documents to a drop box at the Supreme Court, (2) mailing documents, (3) faxing documents, (4) electronic filing via OneDrive for Business, or (5) filing by e-mail. Id. Regarding filing by e-mail, the Court wrote:

> During this emergency, filings may be made by e-mail. For the Supreme Court, the e-mail shall be sent to supctfilings@sccourts.org; for the Court of Appeals, the e-mail shall be sent to ctappfilings@sccourts.org. *This method may not be suitable for large documents, and if it becomes necessary to split a document into multiple parts, the e-mail shall identify the part being sent (i.e., Record on Appeal, Part 1 of 4).* A document filed by this method must be in an Adobe Acrobat file format (.pdf). In the event the document requires a filing fee, a check or money order for the fee must be mailed to the Appellate Court within five (5) days of the filing; the case name and the Appellate Case Number, if known, should be listed on the check or money order. *A document transmitted and received by e-mail on or before 11:59:59 p.m., Eastern Standard Time, shall be considered filed on that day.*

Id. (emphasis added).

Under the Appellate Court Rules, therefore, Appellants had three methods of electronically filing their return within the thirty-day deadline: (i) facsimile, (ii) OneDrive, or (iii) e-mail the documents as attachments, with the admonition that filing large documents by e-mail may not be suitable. *Appellants used none of these methods*. Instead, Appellants apparently tried to use a fourth method involving a cloud share. Neither the Appellate Court Rules nor the Court's operative COVID order allowed for the method Appellants attempted to use. Furthermore, the Attorney Respondents are not aware that either appellate court received the documents Appellants

now claim they attempted to file. A document cannot be deemed filed by e-mail if the appellate court never receives the e-mail. The COVID protocols and methods for electronic filing were in place for over a year, and Appellants can offer no allowable explanation as to why they failed to submit the documents in one of the methods that were in place as ordered by this Court.

On June 24, 2021, forty-two days after having denied Appellants' petition for rehearing, and having received no petition for writ of certiorari, the Court of Appeals correctly sent the remittitur to the lower court. The Court of Appeals did not do so by mistake, error, or inadvertence but rather in compliance with Rule 221(c), SCACR, and after Appellants' time to file and serve the petition for writ of certiorari had expired. Prior to that time, Appellants' counsel had ten days to follow-up with the appellate courts to ensure they received the petition for writ of certiorari but did not do so.

Remittiturs are final and divest the appellate court of jurisdiction unless the remittitur is sent down by mistake, error, or inadvertence *of the Court*. See Wise, at 174, 642 S.E.2d at 551 (emphasis added). A review of our State's jurisprudence reveals this standard is well-established. For instance, as early as 1893, the Court wrote:

> 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, and there is no pretense of any such showing in this case. It is not enough to show that the default of the appellant in perfecting his appeal was due to some excusable neglect, for the proper time to make such a showing would be when the motion to dismiss the appeal was made, or at least before the remittitur was sent down.

Keels, 17 S.E. at 802–03. This Court has consistently followed that standard as recently re-stated in Wise, where the Court held the remittitur was properly sent when a party's attorney failed to file a petition for reinstatement. *See id.* Over the past decades, the Supreme Court has considered many requests to recall the remittitur and counsel for the Attorney Respondents have found no

case granting the recall. See, e.g., State v. Barnes, 413 S.C. 1, 774 S.E.2d 454 (2015); Missouri v. State, 378 S.C. 594, 596, 663 S.E.2d 480, 481 (2008); McGill Bros. v. Seaboard Air Line R. R., 69 S.E. 670, 670 (S.C. 1910); Thomas v. Lynch, 87 S.C. 44, 68 S.E. 817, 817 (1910); McKenzie v. Sifford, 52 S.C. 394, 29 S.E. 811, 812 (1898); Millhouse v. Sally, 43 S.C. 318, 21 S.E. 885, 885 (1895); and State v. Merriman, 35 S.C. 607, 14 S.E. 394, 395 (1892).

The facts of this case do not justify this Court exercising recall of the remittitur. The only mistake, error, or inadvertence Appellants identify is their own. The failure to follow the approved electronic filing methods and to follow-up to ensure the appellate courts received the documents was not the fault of the appellate courts; rather, it was due to Appellants' own mistake, error or inadvertence. This Court's orders and rules set forth a protocol that Appellants did not follow, and this Court's case law makes it clear that Appellants' failure and the issuance of the remittitur deprives the court of jurisdiction.

This is not the first occasion that Appellants have requested unusual relief in this appeal. At the outset of this appeal, the Court of Appeals dismissed the appeal after inquiring about Appellants' receipt of the transcript and receiving no response from Appellants. (See Order of Dismissal, June 12, 2018.) Six days later, on January 18, 2018, Appellants served a motion to have the appeal reinstated claiming Appellants' counsel never received the transcript. The Attorney Respondents opposed the motion to reinstate because the court reporter stated in an e-mail that Appellants' counsel had, in fact, received the transcript. Over the following month, the court reporter and Appellants' counsel each submitted multiple letters to the Court of Appeals in which the court reporter maintained she sent the transcript, and in which Appellants' counsel was adamant he never received it. Ultimately, Appellants' counsel conceded he had, in fact, received a digital copy of the transcript on November 28, 2017; however, he claimed technological difficulties accessing the transcript. Appellants' counsel finally acknowledged that the court

reporter was correct and there was "some confusion about this transcript, all of which seems to have been created by me." (See Letter from Meyers to Court, February 19, 2018, Exhibit G; see also Exhibits A through F, attached hereto.) Counsel described his "omission as inadvertent, and created by family concerns of unusual gravity." Id. The Court of Appeals eventually granted latitude to Appellants and allowed the appeal to proceed.

In their Motion to Recall the remittitur, Appellants again claim inadvertence. The method and timing of filing a motion, however, is set by the court and is applicable to and binding on all litigants. The decision to disregard the established methods of filing was not inadvertent or accidental, nor does it warrant recalling a remittitur. Appellants have not and cannot identify any mistake, error, or inadvertence *of the court* in sending the remittitur. Thus, the Motion to Recall the remittitur should be denied.

> [I]t must always be remembered that the [Respondent] 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.

Thomas, 68 S.E. 817 at 817. A number of the cases to this appeal have been ongoing for more than a decade. The compass of justice should point towards finality, as articulated in the Court of Appeals' decision, not toward perpetual litigation. Appellants' motion should be denied.

CONCLUSION

For the reasons discussed above, the Attorney Respondents respectfully request that Appellants' motion be denied.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,

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