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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

Appellate Case No.: 2017-001996

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**

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 filed by Appellants on September 2, 2021.

BACKGROUND

Appellants commenced an appeal on September 27, 2017 to orders of the Honorable J.C. Nicholson, Jr. During this appeal, the COVID-19 public health crisis caused the Supreme 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, this Court heard oral arguments in this case on September 15, 2020 via Webex. The Court affirmed Judge Nicholson's orders on March 3, 2021.

On March 17, 2021, Appellants filed a Motion for Rehearing, followed by returns filed on behalf of the Respondents on March 29, 2021. This Court denied the motion by Order entered and served on counsel of record on May 13, 2021. Appellants had 30 days to file and serve a Petition for Writ of Certiorari. They failed to do so.

Appellants contend they attempted to file a Petition for Writ of Certiorari on June 14, 2021. That attempt, however, failed to conform to any 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.¹

On June 24, 2021, having received no petition for writ of certiorari within the time prescribed by rule (plus an additional ten days), this Court sent the remittitur to the lower court. The issuance of the remittitur ended the appeal. Later that day, Appellants moved the Supreme Court to recall the remittitur. The Supreme Court denied that request on August 9, 2021 without prejudice in an order that was served on counsel of record. Appellants filed nothing until September 2, 2021, when their counsel contends he first received the Supreme Court's August 9, 2021 Order.

For the reasons set forth below, Appellants' motion (and amended motion) to recall the remittitur should be denied.

¹ Additionally, the proof of service included with the documents Appellants attempted to file did not include a date of service as required by the rule.

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 due to the alleged inadvertence of Appellants and their counsel, not because the Court of Appeals committed any error, mistake, or inadvertent act. The distinction is critical. Appellants’ failure to show any mistake, error, or inadvertence of this Court when is dispatched the remittitur is fatal to the 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, the Supreme 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 suptcfilings@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 court-sanctioned filing methods.

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 correctly sent the remittitur to the lower court. The Court 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 long expired. Prior to that time, Appellants' counsel had an additional 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 and requires proof of mistake, error, or inadvertence on the part of the court or its officer. It is insufficient to show mistake, error, or inadvertence of a party's counsel. 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. South Carolina courts have 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 have identified 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 this Court; rather, it was due to Appellants' own mistake, error, or inadvertence. Appellate court orders and rules set forth a protocol that Appellants did not follow, and South Carolina 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 from this Court. At the outset of this appeal, this Court dismissed the appeal after inquiring about Appellants' receipt of the transcript and receiving no response from Appellants. This Court eventually granted latitude to Appellants based upon their own inadvertence and allowed the appeal to proceed.

In their Motion to Recall the remittitur, Appellants again claim inadvertence. However, the issue before the Court on this motion requires evidence of mistake, error, or inadvertence *on the part of the Court*, not merely inadvertence of counsel. Appellants have not and cannot identify any mistake, error, or inadvertence *of the court* in sending the remittitur. The remittitur has now been filed with the lower court for months, further supporting denial of the motion.

[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 these consolidated cases were pending for more than a decade. The compass of justice should now point toward finality, not toward perpetual litigation. This Court should not recall the remittitur, and Appellants' Motion to Recall Remittitur should be denied.

CONCLUSION

For the reasons discussed, the Attorney Respondents respectfully request that Appellants' Motion to Recall Remittitur be denied.

Respectfully submitted,

s/ Susan Taylor Wall

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September 13, 2021

Charleston, South Carolina

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PROOF OF SERVICE

The undersigning counsel hereby certifies that she served the **Joint Return of Respondents Lawrence E. Richter, Jr., David J. Haller, and Richter and Haller, LLC to Petitioners' Motion to Recall Remittitur** upon counsel by attachment to AIS-registered email, pursuant to Order of the Supreme Court in re: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (filed August 25, 2021) on September 13, 2021, as follows:

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s/ Chelsea J. Clark (102211)

September 13, 2021
Columbia, South Carolina