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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

D. Craig Brown, Circuit Court Judge
William B. McKinnon, Circuit Court Judge

Appellate Case No. 2022-000288

Angela Patton, as Next Friend of Alexia L., a minor, Respondent,

v.

Dr. Gregory A. Miller and Rock Hill Gynecological & Obstetrical Associates, P.A.,..... Appellants.

RESPONDENT’S MOTION FOR LEAVE TO FILE OUT OF TIME

AND

RESPONDENT’S REPLY TO APPELLANTS’ RETURN TO RESPONDENT’S MOTION FOR LEAVE TO FILE AN AMENDED RETURN

Before this Court are two similar motions, both related to whether the lower court properly exercised its discretion in conditioning its *supersedeas* order on an appeal bond of \$6.25 million dollars. An understanding of the procedural history is useful for evaluating the merit of these motions.

PROCEDURAL HISTORY

This birth injury medical malpractice case was tried in York County from January 4 through 14, 2022, before the Honorable William A. McKinnon. Trial resulted in a verdict in favor of Respondent for \$2.5 million dollars. See Ex. 4, Amended Return. Following a hearing on the first

set of post-trial motions, Judge McKinnon denied Appellants' motion for new trial, reduced the verdict by offsetting a prior \$50,000 settlement with a co-Defendant, and increased the reduced verdict by 8% per year under Rule 68, SCRCF. This increase resulted from Appellants' rejection of Respondent's Offer of Judgment for \$1 million dollars made in October 2010. Accordingly, on March 3, 2022, Judge McKinnon entered judgment on behalf of Respondent for \$4,682,678.57. *Id.*

Thereafter, on March 11, 2022, Appellants filed their Notice of Appeal with this Court and a Motion for a Stay of Execution on the Judgment in the lower court. Respondent responded to the latter by requesting that a Stay of Execution be conditioned on a *supersedeas* bond not less than \$6.25 million dollars, the minimum she believed necessary to protect her interests on appeal. She did not object to a Stay of Execution if conditioned on such a bond. Appellants argued in the alternative that there should be no appeal bond required in this case, or one for \$1 million or \$2 million dollars.

The latter sum is the aggregate insurance policy limits for the Appellants and would therefore not provide Respondent any protection during appeal for the obligations of the Appellants above their policy limits. The part of the judgment above policy limits is more than double the \$2 million-dollar limits and will accrue all post-judgment interest.

By Form 4 Order filed May 19, 2022, the Honorable D. Craig Brown granted the Motion for a Stay of Execution on the Judgment, conditioned on Appellants' posting a *supersedeas* bond of \$6.25 million dollars. See Ex. 1, Amended Return.

Pursuant to Rule 59(e), SCRCF, Appellants moved on May 27, 2022, for Judge Brown to alter or amend his order to reduce the *supersedeas* bond requirement to \$2 million dollars. See Ex. G, Appellants' Petition for Writ of *Supersedeas*. Appellants attempted to support their Rule 59(e) motion with new arguments based on newly filed affidavits from Appellant Dr. Miller and Sam McEwen, which had never been filed or even mentioned prior to this Rule 59(e) motion. *Id.*, at p. 3, paragraphs 4-5. As new arguments and affidavits are not to be considered if first presented at a Rule

59 hearing, Judge Brown denied this motion by Form 4 Order filed on June 1, 2022. See Ex. 2, Amended Return.

Appellants next moved Judge Brown on June 6, 2022, to amend his order to express more specific grounds for his rulings. See Ex. H, Appellants' Petition for Writ of *Supersedeas*. Judge Brown did so by Order filed June 10, 2022. See Ex. A, Appellants' Petition for Writ of *Supersedeas*.

Appellants filed their Petition for Writ of *Supersedeas* with this Court on June 20, 2022, seeking a reduction of the appeal bond to the policy limits of \$2 million dollars. Respondent objected to the relief sought in the Petition for Writ of *Supersedeas* by filing her Return dated June 30, 2022. The official filing date of the Return and Proof of Service is July 1.¹

On July 7, 2022, Respondent filed her Motion for Leave to File an Amended Return, with her proposed Amended Return attached. On July 15, 2022, Appellants filed their return to this motion. Appellants not only opposed the motion, but also argued that Respondent's initial Return was untimely, representing a waiver of her opposition to the Petition such that it should be granted.

Now before this Court are two closely related matters: (1) Respondent's Motion for Leave to File Out of Time; and (2) her Reply to Appellants' Return to Respondent's Motion for Leave to File an Amended Return.

**RULES 240(e) AND 263(b), SCACR, ARE DISPOSITIVE OF RESPONDENT'S MOTION
FOR LEAVE TO FILE OUT OF TIME**

This Court, or any Judge thereof, has the discretion to extend deadlines for virtually any pleading under the SCACR, including a Return to a Petition for Writ of *Supersedeas*. Rule 240, SCACR, addresses motions and petitions generally. Although it allows ten days for a Return to a

¹ See Exhibit 1, Affidavit of Eugene Benton, in which he describes in good faith efforts to file the Return and exhibits, his lack of knowledge and training regarding the differences in e-filing procedures between our circuit court and appellate courts, his actual filing approximately eight minutes after midnight, and the steps he took the next day to make proper service and corrections.

motion or petition to be filed, Rule 240(e) provides discretion: “The court may in its discretion enlarge or limit the time for filing the return [to a petition or motion].”

Rule 263, SCACR, addresses “time” issues in the S.C. appellate courts. Subsection 263(b) provides that “The time prescribed by these Rules for performing any act... may be extended or shortened by the appellate court, or by any judge or justice thereof.”

Appellants assert in error that Respondent’s filing of her return and exhibits eight minutes after midnight signify that she has waived opposition to the Petition, which should therefore be granted. In fact, Rule 240(e) provides that, “Failure of a party to timely file a return **MAY** be deemed a consent by that party to the relief sought in the motion or petition.” (**emphasis added.**)

The Affidavit of Eugene Benton establishes Respondent’s good faith efforts to file her Return and exhibits on the June 30 due date and her actual filing eight minutes after midnight, resulting in an official filing date of July 1, 2022. While late, the filing was only eight minutes late. This hardly represents a waiver of Respondent’s objection to the Petition for a Writ of *Supersedeas*.

Respondent’s filing of her return and exhibits eight minutes late is not prejudicial to Appellants. Respondent respectfully requests the Court to allow her filing of the Return and exhibits out of time, and also allow her filing of the Amended Return and exhibits. See *infra*.

**THIS COURT SHOULD GRANT LEAVE FOR RESPONDENT TO FILE AN AMENDED
RETURN TO THE PETITION FOR WRIT OF SUPERSEDEAS**

Respondent hereby submits her Reply to Appellants’ Return to her Motion for Leave to File an Amended Return. As noted in her Motion, Respondent was unable to address in her initial Return all points and authorities she would respectfully ask the Court to consider.

Due to other professional responsibilities, court deadlines and appointments, Respondent’s counsel lacked sufficient time to include in his initial Return all points and authorities he desires the

Court to consider. As a consequence, mindful of the 11:59 PM deadline for filing, he curtailed his more detailed Return he had not yet completed, to provide time he believed his paralegal would need to file a Return before the June 30, 2022, deadline had expired.

Allowing the Amended Return would not prejudice Appellants. Respondent requests the Court to allow the Amended Return to be filed and given due consideration. This is supported by the authorities cited with respect to her Motion for Leave to File Out of Time, and would also serve the ends of justice.

Respectfully submitted,

Anderson, South Carolina
July 19, 2022

GRAHAM LAW FIRM, P.A.

By: s/Edward L. Graham
Edward L. Graham
Graham Law Firm
120 Donald Drive
Pendleton, SC

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Rock Hill, SC 29730

Attorneys for Respondent

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON) AFFIDAVIT OF EUGENE BENTON

Personally appeared, Eugene B. Benton, who states the following:

1. My name is Eugene Benton. I am a resident of Charleston County, South Carolina, and am employed as a paralegal with Graham Law Firm, P.A.
2. I am older than the age of 18 years and competent to make this Affidavit.
3. On June 30, 2022, I was tasked with filing Respondent's Return to Appellants' Petition for Writ of Supersedeas along with its exhibits. I was to file these in the case of Angela Patton, as Next Friend of Alexia L., a minor, Respondent v. r. Gregory A. Miller and Rock Hill Gynecological & Obstetrical Associates, P.A., Appellants; South Carolina Court of Appeals; Appellate Case No. 2022-000288.
4. I received these documents from Mr. Graham to file after normal work hours.
5. I did not anticipate any difficulty or time delay in e-filing these materials. This was because substantially of my work with Mr. Graham's firm had been in the S.C. circuit courts rather than the appellate courts. I was very familiar with e-filing and service in the circuit courts, which I handle frequently and routinely. However, as this was my first experience e-filing in this Court, I had no knowledge of the differences in e-filing procedures in our trial versus appellate courts. I expected e-filing in this Court to operate the same way as in circuit court.
6. I knew the Court had sent an email to Mr. Graham which contained information about an e-file folder I was to use. This was the first different e-filing step in this Court of which I had become aware. When I located this email, it stated that the link worked only for the

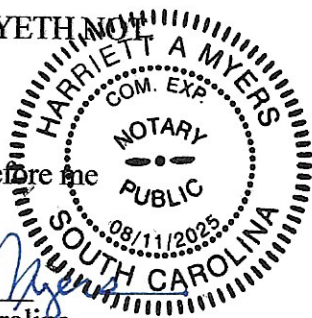
direct recipient of that message. My understanding was that the direct recipient was Mr. Graham. This statement created more uncertainty in my mind.

7. I had no knowledge of all the differences in appellate court e-filing versus that in circuit court. With no prior training, I attempted to learn how to do so on my own.
8. Because of the late hour, I had no means of reaching anyone with authority for help. By this time midnight was approaching. I thought I had figured out how to upload the Return and exhibits into the e-filing folder assigned to Mr. Graham, but I was not sure. I tried to upload the documents, but it was around eight minutes after midnight before I believed I had managed to do so. However, I did not receive any responsive email acknowledging receipt of the documents, as occurs with circuit court e-filing.
9. Thus, I was uncertain whether I had filed these documents effectively. In an abundance of caution, I emailed the Return and exhibits via this Court's e-mail filing address. This was approximately twenty minutes later.
10. The next morning, on July 1, 2022, I telephoned the Clerk of Court's office to explain what I had done and seek guidance on whether I had accomplished filing correctly or needed to take any corrective action. I left a voice message for the case manager, requesting a return call.
11. Meanwhile, I received an email from the Court confirming that I had filed the Return and exhibits on July 1, 2022. This date made sense because I had not uploaded the documents until a few minutes after midnight. Although I had attempted to file these on June 30, 2022, the due date, I was unable to do so until a few minutes into the next day.
12. Our case manager returned my call the afternoon of July 1, 2022. She pointed out that I had not filed a Proof of Service of the Return and attached exhibits as required under the

appellate courts' e-filing process. She informed me I needed to serve opposing counsel the Return, exhibits, Proof of Service and a copy of the email by which I had accomplished service.

13. I had been unaware of these requirements until she informed me that afternoon. I promptly served the required documents on opposing counsel after this conversation ended.
14. When a document is filed in circuit court after the initial pleadings, the e-filing system automatically serves all opposing counsel who have made an appearance. Until my conversation with the case manager, I was unaware that opposing counsel does not receive automatic notice of filing and service from our appellate courts' e-filing system, and that Proof of Service must be served and filed.
15. I had done my best in all respects to e-file the Return and exhibits correctly on June 30, 2022. To the extent my actions were imperfect, this was due to my lack of knowledge and training about the differences between e-filing in this Court versus the circuit courts, as well as the time constraints under which I was working.
16. Staff members of the Court of Appeals were extremely helpful in explaining to me the procedural differences in their e-filing procedures as compared with those of the circuit court system. In like fashion they explained the May 2022 amendments to the appellate court e-filing procedures, and the corrective action I needed to take, which I did promptly. I am confident that I will e-file and serve my future e-filings in this Court in compliance with appellate court procedures.

FURTHER AFFIANT SAYETH NOT



Sworn to and subscribed before me
this 20 day of July, 2022

Harriett A. Myers

Notary Public for South Carolina

My Commission expires: _____

Eugene Benton

Eugene Benton

July 20, 2022

MY COMMISSION EXPIRES
08/11/2025

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V.

Dr. Gregory A. Miller and Rock Hill Gynecological & Obstetrical
Associates, P.A., Appellants

PROOF OF SERVICE

I, the undersigned Paralegal of the law offices of Graham Law Firm, P.A., Attorneys for Angela Patton, as Next Friend of Alexia L., a minor do hereby certify that on July 20, 2022, I served all counsel in this action with a copy of the pleading(s) hereinbelow by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System.

Pleadings Served: **Respondent's Motion for Leave to File out of Time & Reply to Return to Respondent's Motion for Leave to File an Amended Return to Appellants' Petition for Writ of Supersedeas**

Counsel Served: Ashby W. Davis, Esquire
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Eugene B Benton
Eugene B. Benton

Eugene Benton

From: Eugene Benton
Sent: Wednesday, July 20, 2022 6:33 PM
To: mitch.brown@nelsonmullins.com; nick.charles@nelsonmullins.com;
adavis@davisnyder.com; Edward Graham; bradjordan@comporium.net
Cc: eileen.hindman@nelsonmullins.com; jessica.trautman@nelsonmullins.com;
susie@jordanlawfirmnpc.com
Subject: RE: Angela Patton v. Dr. Gregory A. Miller 2022-000288
Attachments: Mot for Leave and Reply to Return re Amended Return.pdf; EBB - Aff - Ex 1.pdf

Counsel,

Attached for service upon you in the above matter is the Motion for Leave & Respondent's Reply to Appellants' Return to Respondent's Motion for Leave to Amend Return with Exhibit 1. Service is made via email pursuant to the Supreme Court Order 2021-08-25-02.

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