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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Cases No. 2019-CP-42-03708 and 2019-CP-42-03709

Appellate Case No. 2022-001059

Kenneth Pace,
Individually and as Personal Representative of
the Estate of Earl E. Pace,

Respondent,

v.

Lake Emory Post Acute Care; THI of South Carolina at Camp Care, LLC; THI of South Carolina, LLC; THI of Baltimore, Inc.; Fundamental Administrative Services, LLC; Fundamental Clinical and Operational Services, LLC; Fundamental Clinical Consulting, LLC; Fundamental Long Term Care Holdings, LLC; and Kerry L. Wheeler, DO,

Defendants,

Of which Lake Emory Post Acute Care; THI of South Carolina at Camp Care, LLC; THI of South Carolina, LLC; THI of Baltimore, Inc.; Fundamental Administrative Services, LLC; Fundamental Clinical and Operational Services, LLC; and Fundamental Long Term Care Holdings, LLC, are

Appellants.

APPELLANTS' RETURN TO RESPONDENT'S MOTIONS TO DISMISS APPEAL

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Appellants[1] submit this return in opposition to Plaintiff's[2] motions to dismiss this appeal.

BACKGROUND

When Mr. Pace was admitted to the Facility on or about January 30, 2015, he was a vulnerable adult in the protective custody of the South Carolina Department of Social Services ("DSS"). (App.[3] pp. 4, 13, 70–81, 144–55.) Mr. Pace's DSS caseworker handled the paperwork in conjunction with his admission and, in so doing, signed an Admission Agreement and an Arbitration Agreement on Mr. Pace's behalf. (App. pp. 22, 38, 82–93, 156–67.)

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[1] "Appellants" refers to both the "Facility," which is a skilled nursing facility in Spartanburg County, and the "Other Appellants," collectively. The "Facility" refers to both the Defendant/Appellant identified as Lake Emory Post Acute Care ("LEPAC") and Defendant/Appellant THI of South Carolina at Camp Care, LLC ("Camp Care LLC"), collectively. (Note: LEPAC and Camp Care LLC are misidentified in the caption as separate entities, which they are not. Rather, LEPAC, or, more precisely, "Lake Emory Post-Acute Care," is the name under which Camp Care LLC does business.) The "Other Appellants" refers to Defendants/Appellants THI of South Carolina, LLC; THI of Baltimore, Inc.; Fundamental Administrative Services, LLC; Fundamental Clinical and Operational Services, LLC; and Fundamental Long Term Care Holdings, LLC, n/k/a Hunt Valley Holdings, LLC, collectively.

[2] "Plaintiff" refers to Plaintiff/Respondent, Kenneth Pace, individually and as personal representative of the Estate of Earl E. Pace. "Mr. Pace" refers to the decedent, Earl E. Pace.

[3] Because the Record on Appeal has not been filed, an appendix of documentary material ("App.") accompanies this memorandum. *See* Rule 240(c)(3), SCACR ("Where the Record on Appeal . . . has not been filed . . . the parties shall file affidavits and other documents in support of their positions."); Rule 240(e), SCACR ("The provisions of Rule 240(c) shall apply to a return.").

On October 21, 2019, Plaintiff filed two lawsuits in the Spartanburg County Court of Common Pleas styled *Kenneth Pace, Individually and as Personal Representative of the Estate of Earl E. Pace v. Lake Emory Post Acute Care; THI of South Carolina at Camp Care, LLC; THI of South Carolina, LLC; THI of Baltimore, Inc.; Fundamental Administrative Services, LLC; Fundamental Clinical and Operational Services, LLC; Fundamental Clinical Consulting, LLC; Fundamental Long Term Care Holdings, LLC; and Kerry L. Wheeler, DO*, one of which was docketed as Case No. 2019-CP-42-03708 ("Case 3708"), the other as Case No. 2019-CP-42-03709 ("Case 3709"). (App. pp. 1–18.) Plaintiff's summons and complaint in Case 3708 identify it as a survival action. (App. pp, 1, 3.) Plaintiff's summons and complaint in Case 3709 identify it as an action for wrongful death. (App. pp. 10, 12.) In both cases, Plaintiff asserts Appellants are liable for money damages because of alleged deficiencies in the care/treatment Mr. Pace received as a resident of the Facility. (App. pp. 3–9, 12–18.)

Based on the Arbitration Agreement Mr. Pace's DSS caseworker signed for him, the Facility moved in both cases to compel Plaintiff's claims against it to arbitration (the "Motion to Compel Arbitration"). (App. pp. 19–22, 35–37.) Contemporaneously, the Other Appellants moved in both cases for a stay until the arbitrability issue, i.e., the issue raised by the Motion to Compel Arbitration, was finally decided and any arbitration proceedings were concluded (the "Motions to

Stay"). (App. pp. 23–34, 39–50.) Collectively, the Motion to Compel Arbitration and the Motions to Stay are referred to as the "Principal Motions."

The circuit court heard the Principal Motions on January 20, 2021, the Honorable R. Keith Kelly presiding. (App. pp. 204, 216.) On February 1, 2021, Judge Kelly's law clerk emailed all counsel advising of the court's decision to deny the Principal Motions and requesting Plaintiff's counsel to submit a proposed order to that effect. (App. p. 199.) On February 16, 2021, Plaintiff's counsel e-filed the same proposed order in both cases. (App. pp. 201–03, 213–15.) The caption of the order included both case numbers, and it was filed by the court in both cases on April 8, 2021. (App. pp. 204–210, 216–22.)

Pursuant to Rule 59(e), SCRCP, on April 19, 2021, Appellants timely moved in both cases for reconsideration (the "Motion to Reconsider"). (App. pp. 225–58.) On June 6, 2022, Judge Kelly's law clerk emailed all counsel advising of the court's decision to deny the Motion to Reconsider and requesting Plaintiff's counsel to submit a proposed order to that effect. (App. pp. 259–60.) On June 17, 2022, Plaintiff's counsel e-filed the same proposed order in both cases. (App. pp. 261–63, 276–77.) The caption of the order included both case numbers, and it was filed by the court in Case 3708 on June 23, 2022, and in Case 3709 four days later, on June 27, 2022. (App. pp. 264–73, 278–87.)

By notice served and filed July 26, 2022,[4] and amended notice served and filed July 27, 2022,[5] this appeal follows.

Plaintiff has made two motions to dismiss the appeal, one specifically targeting Case 3708 and another specifically targeting Case 3709. At bottom, however, Plaintiff's argument for dismissal is the same as to both cases, and it is this: The time for Appellants to appeal began to run as to both Case 3708 and Case 3709 on June 23, 2022, when Appellants' counsel received the NEF for the circuit court's order denying the Motion to Reconsider in Case 3708; therefore, Appellants' notice of appeal, which was "filed" more than 30 days thereafter on "July 27, 2022," is untimely as to both cases—even though, admittedly, it was within 30 days after Appellants' counsel received the NEF for the circuit court's order denying the Motion to Reconsider in Case 3709 on June 27, 2022. (*See* Pl.'s Mot. to Dismiss as to Case 3708; Pl.'s Mot. to Dismiss as to Case 3709.)[6] According to Plaintiff, notwithstanding the fact that the order denying the Motion

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[4] (App. pp. 290–96.)

[5] (App. pp. 297–303.)

[6] To be clear, although it was not stamped "received" by the Court until July 27, 2022, Appellants' original notice of appeal (App. pp. 290–96) was in fact served and filed via email on July 26, 2022. *See* Rule 262, SCACR (regarding filing and service); Order No. 2022-05-06-03 (S.C. Sup. Ct. filed May 6, 2022) (regarding Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules). And Appellants' amended notice of appeal (App. pp. 297–303) was then served and filed, as well as stamped "received" by the Court, on July 27, 2022. Appellants do, however, acknowledge that, while they were both within 30 days of June 27, 2022, July 26 and 27, 2022, were both more than 30 days after June 23, 2022.

to Reconsider was not entered in Case 3709 until June 27, 2022, "Appellants certainly had notice that the Order was entered in both cases on June 23, 2022 by the entry [in Case 3708] of the Order denying their [Motion to Reconsider] that bore both case numbers 2019-CP-42-03708 and 2019-CP-42-03709," and "[i]t would be disingenuous to assert that the Appellants were not aware that the Order was being entered in both cases." (Pl.'s Mot. to Dismiss as to Case 3709 at 5.)

ARGUMENT

I. Without question, Appellants' notice of appeal is timely as to Case 3709.

The time to serve a notice of appeal from the Court of Common Pleas is addressed in Rule 203(b)(1), SCACR, which, in pertinent part, provides as follows[7]:

> A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of

[7] *Service* and *filing* are materially different concepts under the South Carolina Appellate Court Rules. *See* Rules 203 and 262, SCACR. Although this distinction is somewhat muddled in Plaintiff's motions to dismiss (*e.g.* Pl.'s Mot. to Dismiss as to Case 3708 p. 3 (citing Rule 203(b) regarding the time for *service* of the notice of appeal but then asserting that Appellants' notice of appeal is untimely because it was "*filed* . . . on July 27, 2022 – thirty-four days after the entry of the Judge's Order.") (emphasis added); Pl.'s Mot. to Dismiss as to Case 3709 (same)), it is clear enough that Plaintiff's point is to challenge this appeal as untimely *served*, not as untimely *filed*. Accordingly, this return focuses on *service*, not *filing*. Out of an abundance of caution, however, Appellants would note that the time for *filing* a notice of appeal is "within ten (10) days after the notice of appeal is *served*," Rule 203(d)(2)(B), SCACR (emphasis added), and without question, Appellants' original (App. pp. 290–96) and amended (App. pp. 297–303) notices of appeal were timely *filed*, because they were both *filed* the same day they were *served*.

> entry of the order or judgment. When a timely . . . motion to alter or amend the judgment (Rule[] . . . 59, SCRCP) has been made, . . . the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion.

See also Rule 59(f), SCRCP ("The time for appeal for all parties shall be stayed by a timely motion under this Rule and shall run from the receipt of written notice of entry of the order granting or denying such motions.").

"An order is not final until it is entered by the clerk of court; and until the order or judgment is entered by the clerk of the court, the judge retains control of the case." *Upchurch v. Upchurch*, 367 S.C. 16, 22, 624 S.E.2d 643, 646 (2006), *overruled on other grounds by Miles v. Miles*, 393 S.C. 111, 711 S.E.2d 880 (2011). The time to appeal an order does not begin to run until "written notice that the order has been entered into the record by the clerk of court has been received." *Id.* at 24, 624 S.E.2d at 647.

As Plaintiff admits, the order denying the Motion to Reconsider was not entered in Case 3709 until June 27, 2022. Nonetheless, Plaintiff asserts that, by virtue of the entry of the order denying the Motion to Reconsider in Case 3708 on June 23, 2022, "the Order *was entered* in both cases on June 23, 2022" and Appellants were "aware that the Order *was being entered* in both cases." (Pl.'s Mot. to Dismiss as to Case 3709 at 5 (emphasis added).) This is just not so. As a

matter of logic and law[8] (and, for that matter, equity[9]), the most that can be said of Appellants' awareness upon the entry of the order denying the Motion to Reconsider in Case 3708 on June 23, 2022, is that Appellants were aware the order *was entered* in Case 3708 but *was not yet entered* in Case 3709. Obviously, Appellants were not aware that the order denying the Motion to Reconsider *was entered* in Case 3709 until in fact the order *was entered* in Case 3709, which was not until June 27, 2022.

Without question, Appellants' original notice of appeal, served July 26, 2022, and Appellants' amended notice of appeal, served on July 27, 2022, were both served within 30 days of June 27, 2022. *See* Rule 263(a), SCACR (regarding computation of time).[10] Thus, without question, Appellants' notice of appeal is timely as to Case 3709.

II. Rather than showing why this appeal should be dismissed as to both cases, Plaintiff's argument shows why Appellants' notice of appeal is timely as to both cases.

To be sure, Case 3708 and Case 3709 are inherently linked by their subject matter, and indeed, the circuit court took up both cases together in deciding the

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[8] *Upchurch*, 367 S.C. at 22, 624 S.E.2d at 646.

[9] *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 25, 602 S.E.2d 772, 780 (2004) ("[C]ivil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party . . . ."); Rule 1, SCRCP (civil procedure rules "shall be construed to secure the just, speedy, and inexpensive determination of every action").

[10] June is a 30-day month. Respectively, July 26 and 27, 2022, were the 29th and 30th days after June 27, 2022.

Principal Motions and the Motion to Reconsider. Appellants agree with Plaintiff that the time for appeal should begin to run at the same time for both cases—but this means that the time for appeal cannot begin to run until the receipt of notice of the last entry of the last appealed order in both cases.

Again, Plaintiff argues that the time for appeal began to run as to both of these companion cases at a time before the last appealed order in the cases, i.e., the order denying the Motion to Reconsider, was even entered in one of the cases. (*See* Pl.'s Mot. to Dismiss as to Case 3709.) Besides its reliance on the sort of procedural trap our law disfavors,[11] Plaintiff's argument contravenes established law that "[a]n order is not final until it is entered by the clerk of court; and until the order or judgment is entered by the clerk of the court, the judge retains control of the case." *Upchurch*, 367 S.C. at 22, 624 S.E.2d at 646.

In arguing that the order denying the Motion to Reconsider "was entered in both cases on June 23, 2022" because it "bore both case numbers" in its caption,[12] Plaintiff ignores the plain fact that the very same order was filed on June 27, 2022, too. Because it was expressly drafted so as to be filed in both of these two companion cases, Appellants submit that the order denying the Motion to Reconsider is analogous to a check made out to both of two payees, and that it is

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11 *See Elam*, 361 S.C. at 25, 602 S.E.2d at 780; Rule 1, SCRCP.

12 (Pl.'s Mot. to Dismiss at to Case 3709 p. 5.)

neither logical nor lawful[13] nor equitable[14] for the time to appeal to begin to run before the order is in fact filed in both cases.

And in any event, as explained above, without question, Appellants' notice of appeal is timely as to Case 3709, because, without question, Appellants' original notice of appeal, served July 26, 2022, and Appellants' amended notice of appeal, served on July 27, 2022, were both served within 30 days of June 27, 2022. Thus, without question, the appealed orders, i.e., the order denying the Principal Motions and the order denying the Motion to Reconsider, which are in fact the same orders in both cases, are properly before this Court for review.

Moreover, even assuming, *arguendo*, this appeal only proceeds as to Case 3709, the underlying right of arbitration which the Facility seeks to vindicate is the same and covers the entirety of Plaintiff's claims against it in both cases, such that if the Facility is successful in obtaining reversal of the circuit court's denial of the Motion to Compel Arbitration in Case 3709, and Plaintiff is therefore compelled to arbitration with the Facility, it will preclude Plaintiff's prosecution of Case 3708 against the Facility by virtue of the doctrine of election of remedies. *See Save Charleston Foundation v. Murray*, 286 S.C. 170, 176–77, 333 S.E.2d 60, 64 (1985) ("The invocation of one remedy constitutes an election of remedies that will bar another remedy consistent therewith where the suit upon the remedy first invoked

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[13] *Upchurch*, 367 S.C. at 22, 624 S.E.2d at 646.

[14] *See Elam*, 361 S.C. at 25, 602 S.E.2d at 780; Rule 1, SCRCP.

reached the stage of final adjudication. . . . The [plaintiff] clearly [obtained a recovery arising out of its dispute with the defendants] as a result of the arbitration proceeding. . . . [H]aving obtained through arbitration a recovery on its claim against [the defendants], [the plaintiffs] can no longer sue [the defendants] for fraud, notwithstanding the [plaintiff's] attempt to preserve its fraud cause of action by agreeing to its dismissal 'without prejudice.' . . . A party cannot agree to submit a claim to arbitration, receive a final and conclusive arbitration award, and then relitigate the claim employing a different theory of recovery.").

CONCLUSION

For the foregoing reasons, Appellants asks this Honorable Court to deny Plaintiff's motions to dismiss this appeal.

<SIGNED ON THE FOLLOWING PAGE>

Respectfully submitted,

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