

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Oct 27 2022

SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS
HON. G.D. MORGAN, JR.
Circuit Court Judge

Appellate Case No.: 2022-001432

Michael Gene Putnam,Appellant,

vs.

Robert Henry Purkerson, Respondent.

RESPONDENT'S MOTION TO DISMISS

Pursuant to Rule 240, SCACR, Respondent respectfully submits this motion to dismiss this case for failure to comply with Rules 203(b) and 262(a), SCACR, controlling the service of the Notice of Appeal. In support of this motion, Respondent submits that the Notice of Appeal was not timely filed because it was not served on Respondent until October 11, 2022, and was served, therefore, one day late. (see Exhibits A & B, attached)

Accordingly, pursuant to Rule 260(a), Respondent requests the Clerk of Court to issue an Order dismissing Appellant's appeal.

[signature on following page]



Wesley J. Shull

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Attorney for Respondent Robert Henry Purkerson

October 27, 2022

Greenville, South Carolina

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PROOF OF SERVICE

I certify that I have served **Respondents Motion to Dismiss** by electronic mail and by depositing a copy of same in the United States regular mail, postage prepaid, on October 27, 2022, on the Honorable Jenny Abbott Kitchings, Clerk of Court of the South Carolina Court of Appeals, and on T. Jeff Goodwyn, Esq. Appellant’s counsel, at:

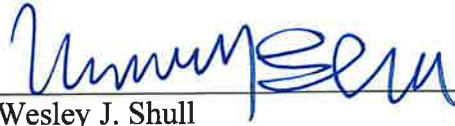
T. Jeff Goodwyn, Jr., Esq.
2309 Devine Street
Columbia, SC 29205
jgoodwyn@goodwynlaw.com

and

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O.Box 11629
1220 Senate Street, Columbia, SC 29201
Columbia, SC 29211
ctappfilings@sccourts.org

[signature on following page]

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SC Court of Appeals

VIA REGULAR MAIL AND EMAIL (ctappfilings@sccourts.org):

The Honorable Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: Michael Gene Putnam v. Robert Henry
Appellate Case No: 2022-001432

Dear Ms. Kitchings:

I represent Robert Purkerson in the above-referenced matter. I received the Plaintiff's Notice of Appeal from the Court of Common Pleas via regular U.S. mail on Friday, October 14, 2022. After a few days of deliberation, I am writing to notify you that this Notice of Appeal was not timely filed. Please find enclosed Respondent's Motion to Dismiss, along with proof of service for same, as well as the required Fifty and 00/100 Dollar (\$50.00) filing fee for this Motion.

The Appellant's Notice of Appeal's proof of service states that it was deposited into the United States mail, postage prepaid, on October 10, 2022; however, the postmark date printed on the envelope, despite attempts to redact it by covering it with white-out, is still legible and states that the Notice of Appeal was placed into the mail on October 11, 2022, making it one day late. I have attached pictures of same as Exhibits to my Motion. Unfortunately, the postmark date is not as discernable when printed onto paper. For this reason, I am sending this Motion, with attachments, via email and via regular mail so that you will be able to view the pictures of the envelope on your monitor, which clearly show the date of October 11, 2022, through the white-out.

The parties received notice of the judgment that is the subject of the appeal on September 8, 2022, when Judge Morgan's Form 4 Order dismissing Plaintiff's Motion to Amend or Alter was

issued and electronically filed on the Public Index. Therefore, Plaintiff's Notice of Appeal was required to be served on me by October 8, 2022. Since that date fell on a Saturday, Appellant had until Monday, October 10, 2022, to serve his Notice of Appeal. The Notice of Appeal postmarked October 11th was filed one day too late.

In order to support my position, I reference Rule 203(b)(1), SCACR, which states that the notice of appeal must be served on all respondents within 30 days after written notice of entry of order or judgment. If a timely post-trial motion is made, the time for appeal runs from receipt of written notice of entry of the order denying the motion. Filing and service are defined by Rule 262, SCACR. Service may be accomplished by delivery or by mailing. If service is made by mailing, such service is complete upon mailing. Either method requires proof of service to be attached.

Our courts have held that service of the notice of appeal is jurisdictional, and the time period may not be extended, either by the courts or by agreement of the parties. "The time prescribed by these Rules for performing any act or taking any action may not be extended by agreement of the parties." Rule 263, SCACR. Under this case law, even if good cause is shown, service of the notice of appeal remains jurisdictional, thus barring consideration of the case if it is not timely filed.

It is critical that the notice be timely served because unlike the filing of the notice, the time for serving the notice may not be extended by the appellate court. See Rule 234(b), SCACR ("The time prescribed by these Rules for performing any act except the time for serving the notice of appeal under Rules 203 and 227 may be extended..."). Service of the notice of appeal is a jurisdictional requirement, and the Supreme Court [and Court of Appeals] has no authority to extend or expand the time in which the notice of intent to appeal must be served. *Mears v. Mears*, 287 S.C. 168, 337 S.E.2d 206 (1985); *McCray v. State*, 271 S.C. 185, 246 S.E.2d 230 (1978) (in absence of a notice of appeal having been given and timely served, the Supreme Court has no jurisdiction over an appeal).

Jean Hoefler Toal et al., *APPELLATE PRACTICE IN SOUTH CAROLINA* (SC Bar CLE, 1999). "Service of the notice of appeal is a 'jurisdictional requirement, and this [c]ourt has no authority to extend or expand the time in which the notice of intent to appeal must be served.'" *Camp v. Camp*, 386 S.C. 571 574-75, 689 S.E.2d 634, 636 (2010).

Under Rule 263(a), SCACR, the day Judge Morgan's order was issued and filed on the Public Index (September 8, 2022) is not included in the 30-day time period for serving the Notice of Appeal. If the deadline falls on a weekend or holiday, the party has until the following business day to file. See, e.g., *Walton v. Canal Ins. Co.*, 331 S.C. 636, 503 S.E.2d 727, 731 (1998); *Lindsey v. S.C. Tax Comm'n*, 323 S.C. 57, 448 S.E.2d 577, 579 n.3 (Ct. App. 1994). Rule 263, SCACR, rather than Rule 6, SCRPC, controls time on appeals. "[B]ecause we are concerned with an appellate procedure, that is, the service of a notice of appeal, the South Carolina Appellate Rules control; therefore, the South Carolina Rules of Civil Procedure are inapplicable to the outcome of this case." *Wells Fargo Bank, N.A.*, 422 S.C. at 215, 810 S.E.2d at 858. If an opposing party mails a notice of appeal, as opposed to delivering or emailing it, service is complete upon mailing. See, e.g.,

Wiggins v. Todd, 296 S.C. 432, 434, 373 S.E.2d 704, 705 (Ct. App. 1988). "Rule 6(e), SCRPC, does not provide an additional five days to file a notice of intent to appeal." *Witzig v. Witzig*, 325 S.C. 363, 366, 479 S.E.2d 297, 299 (Ct. App. 1996). It is a pleadings rule and only applies when the service is effective upon mailing. *Id.* (citing James F. Flanagan, SOUTH CAROLINA CIVIL Procedure 52 (2d ed. 1996)). Any notice of the order from the court or counsel will trigger the 30-day clock. See *Canal Ins. Co. v. Caldwell*, 338 S.C. 1, 524 S.E.2d 416 (Ct. App. 1999).

Prior to my receiving the Notice of Appeal on October 14, 2022, I was not served in any other fashion. Since the Notice of Appeal was untimely served, I respectfully request that this Court issue an order dismissing the appeal.

With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.



Wesley J. Shull

WJS/lct
Enclosures

cc: Ms. Nicole Schalow
Mr. Robert Purkerson