

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Georgetown County
Court of Common Pleas

The Honorable Benjamin H. Culbertson

Case No. 2012-CP-22-00971

RECEIVED
JUN 05 2013
SC Court of Appeals

In the Matter of the Estate of Willie Rogers Deas

Carolyn Deas.....Respondent,

v.

Marvadine Giles a/k/a Marvdine Giles, Willie Deas, Jr.,
Michelle Deas, Rodney Branton, Moya Branton, Whitney
Beaufort.....Respondents/Appellants,

Of whom Marvadine Giles a/k/a Marvdine Giles isAppellant.

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STATEMENT OF ISSUES ON APPEAL

WAS THE CIRCUIT COURT CORRECT TO DISMISS THE APPELLANT'S APPEAL FROM THE PROBATE COURT BECAUSE THE NOTICE OF APPEAL WAS NOT FILED IN THE CIRCUIT COURT WITHIN THE TIME PROSCRIBED BY STATUTE AND THEREFORE LACKED APPELLATE JURISDICTION?

STATEMENT OF THE CASE

On August 28, 2012, the Honorable Ralph Waldo Maring, Probate Court Judge for Georgetown County, issued an Order ruling that the Respondent, Carolyn Deas, was the surviving spouse of Willie Rogers Deas and had priority for appointment as Personal Representative of the Estate of Willie Rogers Deas. R. pp. _____. (August 28, 2012 Order).

Appellant received written notice of the entry of the Probate Court's Order on August 29, 2012, thereby making September 8, 2012 the deadline for serving and filing the notice of intention to appeal in the Probate Court and Circuit Court. Since September 8, 2012 fell on a Saturday, Appellant's notices of intention to appeal had to be served on the parties and filed in both courts no later than Monday, September 10, 2012. R. pp. _____. (February 26, 2013, Order).

Appellant filed a Notice of Intention to Appeal in the Probate Court on September 7, 2012. Concurrently, on September 7, 2012 Appellant served a Rule 59, SCRPC Motion, seeking alteration, amendment, and/or reconsideration of the Probate Court's Order. Appellant served and filed these documents under copy of a cover letter to the Probate Court dated September 6, 2012. Appellant further served and filed the Notice of Intention to Appeal to the Circuit Court under copy of a cover letter to the Georgetown County Circuit Court, dated September 5, 2012. Appellant's Notice of Intention to

Appeal was stamped received by the Georgetown County Clerk of Court's office on September 14, 2012.

On November 15, 2012, Respondent filed a Motion to Dismiss the Appeal on the basis the Notice of Intent to Appeal was untimely served on the Circuit Court, which lacked jurisdiction over the Appeal as a result. R. pp. _____. (November 15, 2012, Motion to Dismiss).

Appellant presented evidence that the Notice of Intention to Appeal was placed in the Clerk of Court's mailbox on September 10th and picked up by the Clerk of Court's courier on September 11, 2012. R. pp. _____. The Honorable Alma White, Clerk of Court for Georgetown County confirmed that it was received in the Clerk of Court's office on September 11, 2012. R. pp. _____.

On February 26, 2013, The Honorable Benjamin H. Culbertson signed an Order granting Respondent's Motion to Dismiss based on the strict interpretation of S.C. Code, Ann. § 62-1-308, which requires that a notice of appeal be filed within ten days of the Appellant's receipt of written notice of the entry of the Order. R. pp. _____. (February 26, 2013, Order). Judge Culbertson held that § 62-1-308 must be read for its clear and unambiguous terms, and, thus, the Circuit Court lacked appellate jurisdiction over the appeal. R. pp. _____. (February 26, 2013, Order).

ARGUMENT

Appellant's Appeal was untimely filed with the Circuit Court as it was filed after the ten day deadline provided in S.C. Code Ann. § 62-1-308. In the alternative, and as an additional sustaining ground, the Notice of Appeal was untimely filed and is rendered moot since it was not filed after the Probate Court's Order denying Appellant's Rule 59 Motion, and the unappealed Order denying the Rule 59 Motion is the law of the case.

I. The Circuit Court Was Correct To Deny Appellant's Claim As the Notice of Intent to Appeal was Untimely Filed with the Circuit Court

The Circuit Court was correct to dismiss the Appellant's appeal from the Probate Court as the Notice of Intent to Appeal was untimely filed outside of the ten day window allowed by statute. The procedure for initiating an appeal from the Probate Court to the Circuit Court is governed by S.C. Code Ann. § 62-1-308. When appealing to the Circuit Court, "the notice of intention to appeal to the circuit court must be filed in the office of the circuit court and in the office of the probate court and a copy served on all parties within ten days after receipt of the appealed from order . . . of the probate court." § 62-1-308(a). By its plain language, § 62-1-308 requires both the service of the notice of intention to appeal and dual filing in the office of the Probate Court and the Circuit Court within ten days of receipt of written notice of the entry of the final order. The requirement of dual filing can also be found in Rule 74, SCRPC, but the timeframe for doing so is governed by applicable statute.

Although appeals from Probate Court are governed by § 62-1-308, formal proceedings in the Probate Court are also subject to the South Carolina Rules of Civil Procedure, pursuant to S.C. Code Ann. § 62-1-304. Section 62-1-304 affords a party to a formal action the right to file certain post-trial motions in the same manner as an action tried in Circuit Court. As a result, post trial procedures in the Probate Court are subject to the effect of the rules of civil procedure.

Appellant does not dispute that her deadline to file the Notice of Intent to Appeal was September 10, 2012. Further, Appellant presents evidence that the Notice of Intent to Appeal was not in the office of the Georgetown County Clerk of Court until September 11, 2013 when retrieved from the Clerk's post office box. Accordingly, Appellant's

claim that she timely the Notice of Intent to Appeal fails at the outset as the Appeal was not timely perfected, and the Circuit Court has no appellate jurisdiction to continue proceedings. *State v. Brown*, 358 S.C. 382, 596 S.E.2d 39 (2004) (the failure to comply with procedural requirements for an appeal divests a court of appellate jurisdiction).

Appellant's argument hinges on a request for an exception to the deadline outlined above. The Circuit Court was correct to hold the filing was untimely as: (1) the definition of filing is clear and unambiguous and does not allow placement in a post office box to constitute filing; (2) Appellant accepted the risk when she left the filing entirely up to the U.S. Postal Service; and (3) the courts lack authority to enlarge the time for filing, even if they should accept her reasons for delay.

A. Filing is not achieved under § 62-1-308 by placing the notice of intent to appeal in the clerk of court's post office box.

The Circuit Court correctly held that placement in a post office box assigned to the Clerk of Court's office did not constitute filing. South Carolina law is unambiguous as to the definition of filing. "It is clear under South Carolina law that mailing does not constitute filing. When a statute requires the filing of a paper or document, it is filed when delivered to and received by the proper officer." *Gary v. State*, 347 S.C. 627, 557 S.E.2d 662 (2001) (emphasis added) (citing *Fox v. Union-Buffalo Mills*, 226 S.C. 561, 86 S.E.2d 253 (1955)); *See also, United States v. Lombardo*, 241 U.S. 73, 36 S.Ct. 508, 60 L.Ed. 897 (1916) ("A paper is filed when it is delivered to the proper official and by him received and filed."); *Estate of Cretzmeyer*, 365 S.C. 12, 615 S.E.2d 116 (2005); *King v. Atlantic Coast Line R. Co.*, 86 S.C. 510, 68 S.E. 769 (1910); *Townsend v. Sparks*, 50 S.C. 380, 27 S.E. 801 (1897); *Archer v. Long*, 46 S.C. 292, 24 S.E. 83 (1896). Placement in a post office box does not meet the definition of delivered and received.

Section 62-1-308(a) must be read for its clear and unambiguous terms. *Estate of Cretzmeier*, 365 S.C. 12, 615 S.E.2d 116 (2005) (holding that mailing does not constitute filing). Appellant attempts to distinguish *Cretzmeier* since it involved regular mail and the Appellant used certified mail with a tracking number. In *Cretzmeier*, the South Carolina Supreme Court made no distinction based on the mode of delivery. Instead, the Court “[declined] Appellant’s invitation to construe the statute in a manner inconsistent with its unambiguous terms.” *Id* at 116. Plainly, Section 62-1-308(a) requires the Notice of Appeal be filed in the office of the circuit court. It is unambiguous that mailing should not constitute filing. Counsel is aware of no authority indicating that the placement of a parcel of mail in a post office box belonging to a clerk of court means the parcel was delivered to the proper official and by him received and filed. *United States v. Lombardo*, 241 U.S. 73, 36 S.Ct. 508, 60 L.Ed. 897 (1916). As even noted by Appellant, the parcel was not delivered to the proper official on the due date because no authorized recipient was available to retrieve the parcel from the post office box in which it was placed. R. pp. _____. (Hearing Exhibit F).

Appellant, in her own Brief, agrees with the definition of filing as set forth above, and cites the very same language as Respondent. Yet, Appellant argues that her filing should be subject to an exception based on the increased technology available to track packages—which technology actually proves Appellant’s parcel was not indeed filed as that term is defined by precedent. Based upon such precedent, Appellant’s argument should be dismissed, as it would require the Court to reinterpret the statute in a manner opposite of its clear and unambiguous meaning. Placement in a post office box does not constitute filing under any authority.

B. Appellant had the opportunity to remedy the delayed filing since she had access to postal service tracking information.

With access to the tracking information, Appellant had the opportunity to remedy the mistakes in mailing, and ensure the Notice of Intent to Appeal was filed on time. The blame for failure to file in a timely fashion cannot be shifted to a third party, namely the Clerk of Court or the U.S. Postal Service. Based on the evidence presented, both the Clerk of Court and the U.S. Postal Service performed their duty and acted in a timely fashion.

According to the United States Postal Service, First Class mail is delivered in three days or less in most cases. United States Postal Service, <https://www.usps.com/send/first-class.htm> (last visited June 3, 2013). As evidenced by the proof provided by Appellant, the Notice of Appeal was placed in the Clerk of Court's post office box within three days of mailing. It is reasonable that mail sent on September 7, 2012 may not reach its destination until September 11, 2012, especially with the intervening weekend as occurred in this case.

While it appears little authority exists that is on point from South Carolina courts, the Federal Courts have directly addressed the issue. Mail delay has been found a reason for excusable delay when the mailing party is in jail. *Thompson v. E.I. DuPont de Nemours & Co., Inc.*, 76 F.3d 530 (4th Cir. 1996). In such a situation the prisoner has no ability to remedy errors in the mailing system. In contrast, "an unincarcerated litigant who decides to rely on the vagaries of the mail must suffer the consequences if the notice of appeal fails to arrive within the applicable time period." *Id* at 534. *See also, Houston v. Lack*, 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed. 245 (1988) ("if [unincarcerated] litigants do choose to use the mail, they can at least place the notice directly into the hands of the

[postal service] and they can follow its progress by calling the court to determine whether the notice has been received and stamped, knowing that if the mail goes awry they can personally deliver notice at the last moment . . .”).

As Appellant explains in her Brief, she had access to postal service tracking information throughout the duration of the mailing. Once it was seen that the mail was not going to be delivered on time or something had gone awry in the delivery, Appellant had the opportunity and ability to deliver the notice to the Clerk of Court’s office to ensure it’s timely delivery. Appellant had the duty to ensure she satisfied all statutory requirements to perfect the appeal and further had the opportunity to avail herself of the various tools available to her to ensure the same was done.

C. Courts do not have the power to enlarge the filing deadlines provided by statute.

Even if the Circuit Court felt the desire to allow Appellant’s late entry based on the alleged extraordinary circumstances, the Circuit Court was powerless to do so. “The time prescribed by statute within which notice of appeal must be given cannot be enlarged or extended by the courts.” *Palmer v. Simons*, 107 S.C. 93, 95, 92 S.E. 23, 23 (1917). The Circuit Court has no power to allow more time to serve notice of intent to appeal than that allowed by statute. *See Gibbes v. Beckett*, 84 S.C. 534, 66 S.E. 1000 (1910) (“The law requiring appeals to be taken within a fixed time may sometimes produc  hardship, but it is important to the administration of justice that there will be no uncertainty.”).

II. AS AN ADDITIONAL SUSTAINING GROUND, BECAUSE THE NOTICE OF APPEAL WAS FILED BEFORE THE PROBATE COURT’S ORDER DENYING APPELLANT’S RULE 59 MOTION, THE NOTICE OF APPEAL IS RENDERED MOOT AND THE UNAPPELAED ORDER DENYING APPELLANT’S RULE 59 MOTION IS THE LAW OF THE CASE.

Since the Notice of Appeal was filed simultaneously with the Appellant's Rule 59 Motion, the Notice of Appeal is of no effect according to precedent. The Appellant's subsequent failure to file a notice of appeal following the Probate Court's Order denying her Rule 59 motion now renders the probate matter incapable of appeal and the unappealed Rule 59 order is now the law of the case.

A timely and permissible Rule 59 motion stays the time period for filing the notice of intention to appeal until the entry of an Order on the Rule 59 motion. *See* Rule 59(f), SCRPC. Although the time for filing the Notice of Appeal was technically tolled by Rule, Appellant simultaneously served and filed both a Notice of Appeal and a motion pursuant to Rule 59, SCRPC. The Notice of Appeal at issue in this case raises the procedural oddity of both a tardy notice of appeal and a premature notice of appeal—Appellant was late in filing her Notice of Appeal to the August 28, 2012 Order, and she never filed a subsequent or amended Notice of Appeal following entry of an Order denying her Rule 59 motion. The tardiness of Appellant's Notice of Appeal cannot be salvaged by the effect of tolling under Rule 59 when there is no authority in the State courts allowing the ripening of such a Notice after entry of an Order denying the Rule 59 motion. *Cf.* Fed. R. App. P. 4. The Supreme Court has acknowledged the effect of simultaneously filing both a Rule 59 motion and a notice of appeal:

We are aware that a party may attempt to file both a Rule 59 motion and a notice of appeal. If this does occur, one or the other will be inappropriate depending on whether the motion is both timely under Rule 59 and permissible under our ruling today. *Cf. Hudson v. Hudson*, 290 S.C. 215, 349 S.E. 2d 341 (1986) (holding that when a timely post-trial motion is pending before the lower court, any notice of appeal will be dismissed without prejudice as premature). It is, of course, the party's responsibility to determine whether a Rule 59 motion or notice of appeal is appropriate under the facts of the case, and we caution parties not to attempt to avoid

this responsibility by the simple expedient of filing both. *Elam v. SCDOT*, 362 S.C. 9, 602 S.E.2d 772 (2004). (emphasis added).

There is no question that Appellant's Rule 59 Motion in the Probate Court was both timely and permissible. However, the simultaneous filing of the Rule 59 Motion with the Notice of Appeal rendered the Notice of Appeal a nullity unless Appellant refiled the Notice following entry of an Order denying the Rule 59 Motion. *Id.* While the authority cited refers to appeals from the Circuit Court to the State's appellate courts, it is the argument of Respondent that the Circuit Court, when sitting in an appellate capacity, should not deviate from such precedent in its application, particularly where the trial and post-trial proceedings of the Probate Court are subject to the same rules of civil procedure that led to the adoption of such precedent.

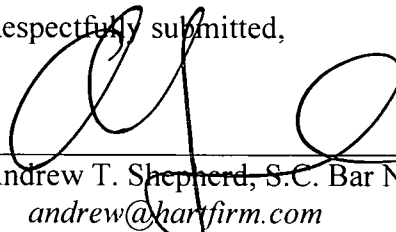
Because the Appellant's Rule 59 Motion was pending, the Notice of Appeal is rendered moot and the appellate matter was properly dismissed. There is neither a provision of law nor a rule of procedure in the State courts that allows for the ripening of a premature notice of appeal following a trial court's ruling on an appellant's Rule 59 motion. In this case there was no appeal properly before the Circuit Court, and the unappealed Order denying Appellant's Rule 59 Motion is the law of the case and must be affirmed. "It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling. Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal. The unchallenged ruling, right or wrong, is the law of the case and requires affirmance." *First Union Nat. Bank of SC v. Soden*, 333 S.C. 554, 511 SE 2d 372 (Ct. App. 1998) (citing *Lindsay v. Lindsay*, 328 S.C. 329, 491 S.E.2d 583 (Ct. App. 1997), *cert. denied* (June 18, 1998) (internal citations omitted)). Accordingly, the Order of the Circuit Court

dismissing the appeal of the Appellant should be affirmed, and the unappelaed Order of the Probate Court denying Appellant's Rule 59 Motion should be affirmed as the law of the case—that there exists no basis to alter or amend the findings of fact or conclusions of law of the Probate Court's August 28, 2012 Order.

CONCLUSION

Based on the foregoing, the Respondents respectfully request this Court affirm the ruling of the Circuit Court dismissing the Appellant's Appeal to the Circuit Court as improperly filed.

Respectfully submitted,



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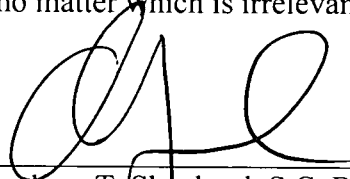
**RESPONDENT'S DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL**

Respondent Carolyn Deas proposes that the following documents be included on
the Record on Appeal:

1. August 28, 2012, Order;
2. Respondent Giles' Notice of Motion and Motion to Amend or Alter
the Order of the Court, dated September 5, 2012;
3. October 19, 2012, Order denying Motion to Amend or Alter;
4. Petitioner Deas' Notice of Motion and Motion to Dismiss Appeal,
dated November 15, 2012;
5. Transcript of Record of January 22, 2013, hearing on Motion to
Dismiss;

6. Brief of Respondents, with Exhibits A-F, dated January 22, 2013; and
7. February 26, 2013, Order dismissing appeal;

I certify that this designation contains no matter which is irrelevant to this appeal.



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Beaufort.....Respondents/Appellants,

of whom Marvadine Giles a/k/a Marvdine Giles isAppellant.

CERTIFICATE OF SERVICE

I certify that I have served the Respondent's Initial Brief and Respondent's Designation of Matter to be Included in the Record on Appeal, on the Appellants, by depositing a copy of it in the United States Mail, postage prepaid, on June 3, 2013, addressed to their attorneys of record, Malcolm M. Crosland, Esquire, Charles S. Goldberg, Esquire, and J. Kevin Holes, Esquire, Post Office Box 9, Charleston, SC 29402.



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