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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Courtney Clyburn Pope, Circuit Court Judge

C/A No. 2021CP0202344
Appellate Case No. 2023-001222

Da'Nita White……..Respondent,

v.

Roshanda Robins……Appellant.

INITIAL BRIEF OF THE RESPONDENT

McCANTS & McCANTS

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Dated: October 20, 2023

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STATEMENT OF ISSUES ON APPEAL

The Respondent respectfully submits that the following issues are presented for the Court's consideration in this matter:

1. DOES THE COURT OF APPEALS LACK SUBJECT MATTER JURISDICTION TO REVIEW THIS APPEAL FROM AN ORDER GRANTING SUMMARY JUDGMENT TO THE RESPONDENT, WHEN THE APPELLANT DID NOT TIMELY FILE ITS NOTICE OF APPEAL?

2. DID THE CIRCUIT JUDGE ERR AS A MATTER OF LAW WHEN SHE GRANTED SUMMARY JUDGMENT TO THE MOVING PARTY, WHEN THE PAPERS AND PLEADINGS ON FILE SHOW THAT NO GENUINE ISSUE AS TO ANY MATERIAL FACT EXISTED, AND THE MOVING PARTY WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW?

   A. The Respondent met the standard of Rule 56, SCRCP, while the Appellant did not show that a genuine issue of material fact existed.

   B. The Appellant raised issues in its Rule 59(e), SCRCP Motion, which were not timely raised to the Trial Judge.

STATEMENT OF THE CASE AND FACTUAL BACKGROUND

On May 6, 2019, the Appellant purchased real property involved in this case located at 419 Hamburg Road, North Augusta, South Carolina 29841 (hereinafter, "Appellant's property"), along with the manufactured home thereon. (Defendant's Supplemental Documents). In August of 2020, the Respondent purchased the neighboring real property, 421 Hamburg Road, North Augusta, South Carolina 29841 (hereinafter "Respondent's property") (Exhibit A to Complaint). The Respondent then commissioned her own survey of her real property, which revealed that the Appellant's manufactured home crosses the property line between the two tracts, which is an illegal encroachment onto Respondent's property. (Exhibit B to Complaint)

After initial settlement negotiations failed, the Respondent initiated the present matter by filing a Summons and Complaint, dated November 5, 2021, alleging legal theories of trespass and nuisance. (Plaintiff's Complaint). The Respondent also alleged that the current placement of the manufactured home also violates the Aiken County Code of Ordinances. (Plaintiff's Complaint, ¶ 12). The Appellant timely filed a *pro se* Answer. (Answer of Defendant). In her Answer, the Appellant does not deny that the current placement of the manufactured home encroaches onto the Respondent's property. (Id.)

After a lengthy discovery period in which the then *pro se* Appellant refused to participate[1], the undersigned was substituted for original counsel for the Respondent.

On November 4, 2022, the Respondent moved for summary judgment, the hearing for which was held on March 27, 2023. (Respondent's Motion for Summary Judgment, dated November

[1] In fact, the Appellant was ordered to provide discovery responses to the Respondent's discovery requests by October 17, 2022. She has failed to do so, and by the terms of that order now owes Respondent $450 in attorney fees. See Order Compelling Appellant to Provide Discovery, dated August 22, 2022.

4, 2022). At the hearing on the Respondent's motion, the undersigned appeared on behalf of the Respondent. Ms. Robins, the Appellant, appeared *pro se*.

Prior to the hearing, the Respondent timely served and submitted various exhibits in support of her Motion. (See Affidavit of Da'Nita White, dated March 23, 2023; see also, Plaintiff's Exhibits A and B to Motion for Summary Judgment). At the hearing, the Appellant neither testified that she disputed the boundary line nor did she submit any documents on her own behalf. (Transcript of Hearing). However, at the conclusion of the hearing, the Circuit Court allowed the Appellant to submit whatever documents she would like the Court to consider before making any ruling. (Id.). Per the Circuit Court's ruling on the record, any such documents the Appellant wanted to submit would be due no later than 5:00 p.m. on the day after the hearing. (Id.). The Appellant did submit some supplemental documents, which, in essence, were receipts from Aiken County evidencing tax payments made on her property, as well as the deed to her property. (Defendant's Supplemental Documents). The Respondent has never disputed that the Appellant owns her property. Furthermore, at no point did the Appellant deny or dispute that a fixture on her property did not encroach onto the Respondent's property.

The Circuit Court granted the Respondent's Motion for Summary Judgment on April 12, 2023. (Form 4 Order Granting Respondent's Motion for Summary Judgment, dated April 12, 2023). Thereafter, and by email dated April 24, 2023, attorney Shalonda Wilburn, of Aiken, South Carolina, notified the Court that she had been retained by the Appellant, and that it was her intent to file a motion to reconsider the Court's order granting summary judgment for the Respondent. (Email from Counsel for the Appellant, dated April 24, 2023). Ms. Wilburn confirmed that the Appellant received notice of the Court's order on April 15, 2023, via United States mail. (Id.)

On April 27, 2023, the Respondent received a Notice of Appearance along with

Appellant's "Motion to Reconsider Alter, and Amend Order Granting Respondent's Motion for Summary Judgment" (hereinafter, "Appellant's Motion to Reconsider" or "Appellant's Motion") (Appellant's Motion to Reconsider, dated April 27, 2023).

On or about May 25, 2023, the Court issued an order dismissing the Appellant's Motion, asserting it was not timely. (Order, dated May 25, 2023). By email dated May 30, 2023, Counsel for the Appellant emailed the Court, asking that the Court either respond with its interpretation of Rule 6, SCRCP, or issue a new order addressing the operation of Rule 6 and whether the time period in which to file her Motion to Reconsider was enlarged. (Email from Counsel for the Appellant, dated May 30, 2023).

On June 1, 2023, the Court issued an order vacating its prior order dismissing the Appellant's Motion to Reconsider (Circuit Court Order, dated June 1, 2023). After the Respondent submitted a memorandum of law in opposition to the Appellant's Motion, the Circuit Court then entered an order denying the relief sought by the Appellant. (Order of June 22, 2023).

On or about July 21, 2023, which was 100 days after the Court entered summary judgment for the Respondent, the Appellant served her Notice of Appeal upon Counsel for the Respondent. (Notice of Appeal and Proof of Service, dated July 21, 2023). The same was filed on July 31, 2023. (Id.)

ARGUMENTS

I. DOES THE COURT OF APPEALS LACK SUBJECT MATTER JURISDICTION TO REVIEW THIS APPEAL FROM AN ORDER GRANTING SUMMARY JUDGMENT TO THE RESPONDENT WHEN THE APPELLANT DID NOT TIMELY SERVE AND FILE ITS NOTICE OF APPEAL?

The Respondent initially contends the issue here is whether Rule 6, SCRCP, and the

Appellant's receipt of the Court's Order granting summary judgment by mail operated to enlarge the time to file her Motion to Reconsider and therefore, perfect an appeal to the Court of Appeals.

At the outset, only a party aggrieved by an order may appeal. Rule 201, SCACR; see also, Beaufort Realty Co. v. Beaufort County, 246 S.C. 298, 551 S.E.2d. 588 (Ct. App. 2001) (holding that a party may not appeal from a decision which does not affect his interests). Even though the Circuit Court found that the Appellant's Motion to Reconsider was timely, since the Respondent was ultimately not aggrieved by the Circuit Court's order, the Respondent would argue and preserve for this Court that the Appellant's Motion was in fact untimely and therefore deprived the Circuit Court of its jurisdiction to rule on the issues presented. The Circuit Court's Order Dismissing the Appellant's Motion to Reconsider was legally sound, since the Appellant's motion was not timely, even when considering Rule 6. (Order of May 25, 2023). (See Rule 59(e) ("A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order.")).

In fact, Rule 6 itself specifically states the time for Rule 59 motions may not be enlarged and are not affected by the "mailing rule":

> When by these rules or by notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the time may be extended by written agreement of counsel for an additional period not exceeding the original time provided in these rules, or the court for cause shown may at any time in its discretion (1) with or without written motion or notice order the period enlarged if request therefor is made before the expiration of the period as originally prescribed or extended or (2) upon motion made after the expiration of the specified period, for good cause shown, permit the act to be done. *The time for taking any action under rules 50(b), 52(b), 59, and 60(b) may not be extended except to the extent and under the conditions stated in them.* The time for filing notice of intent to appeal is jurisdictional and may not be extended by consent or order. (emphasis added)

Rule 6(b). Even though the Appellant received the Order Granting Summary Judgment by mail, the

language in Rule 6(b) states the time to file a motion under Rule 59 cannot be enlarged. Therefore, if the Appellant received the Court's Order Granting Summary Judgment to Respondent on April 15, 2023, confirmed both in the email sent by Appellant's Counsel as well as in its Initial Brief, the Appellant's Motion to Reconsider would have been due no later than April 25, 2023.

There are multiple cases in South Carolina addressing this exact issue. See Witzig v. Witzig, 325 S.C. 363, 479 S.E.2d 297 (1996) (Rule 6(e) is a pleadings rule). See also, Elkachbendi v. Elkachbendi, 2012 WL 10862490 (Ct. App. 2012) ("…Rule 6, SCRCP, does not extend the time for filing and serving a Rule 59(e) motion.") (citing Witzig at 366, 479 S.E.2d at 299).

While Elkachbendi is an unpublished opinion and is not mandatory authority on this Court, the policy (and the Court's interpretation of Rule 6(b)) is sound.

Failure to timely file a Rule 59 motion deprives the Circuit Court of its subject-matter jurisdiction to further hear the matter. Ackerman v. 3-V Chemical, Inc., 349 S.C. 212, 216, 562 S.E.2d 613, 615 (2002) (citing Leviner v. Sonoco Products Company, 339 S.C. 492, 530 S.E.2d 127 (2000)). Therefore, the Respondent very respectfully asserts that the Circuit Court's order dated June 22, 2023, addressing the merits of the Appellant's Motion to Reconsider was improper. See Leviner at 494, 530 S.E.2d at 128 (2000) (holding that when no timely Rule 59 motion is made, the trial judge loses jurisdiction over the matter).

Untimely post-trial motions do not stay the time for perfecting the appeal. See Canal Ins. Co. v. Caldwell, 338 S.C. 1, 524 S.E.2d 416 (Ct. App. 1999) (finding that the appellate court lacks appellate jurisdiction where the notice of appeal was untimely inasmuch as the motion to alter or amend did not stay the time for appeal). Therefore, the time-period in which to perfect the appeal would have started the day of receipt of the Circuit Court's Order: April 15, 2023. The 30-day period would have ended on May 16, 2023—over two months before the Appellant served its Notice of

Appeal. Respectfully, this Court has lost the ability to hear this appeal. The Circuit Court's form order, dated April 12, 2023, should stand, and this appeal dismissed with prejudice.

> II. DID THE CIRCUIT JUDGE ERR AS A MATTER OF LAW WHEN SHE GRANTED SUMMARY JUDGMENT TO THE RESPONDENT, WHEN THE PAPERS AND PLEADINGS ON FILE SHOW THAT NO GENUINE ISSUE AS TO ANY MATERIAL FACT EXISTED, AND THE RESPONDENT WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW?

If, however, the Court finds that the Appellant's Motion to Reconsider, and therefore, the Notice of Appeal, were timely filed and perfected, this Court should affirm the judgment of the Circuit Court.

A. The Respondent met the standard of Rule 56, SCRCP, while the Appellant did not show that a genuine issue of material fact existed

Under Rule 56(c), SCRCP, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact" and the moving party is entitled to a judgment as a matter of law. Along with the Respondent's Motion for Summary Judgment, the Respondent submitted a deed evidencing her ownership of the property, a survey evidencing the Appellant's encroachment, and an affidavit of sworn testimony, all in support of her case. Prior to and during the hearing, the Appellant submitted nothing in opposition to the Respondent's claims.[2] Moreover, Rule 56 does not mention that testimony during the actual motion hearing should be considered by the presiding judge. Regardless of whether any survey was recorded at the Register of

[2] As stated above, at the conclusion of the hearing, the presiding Judge requested that the *pro se* Appellant submit any documentary evidence she would like the Court to consider. (Transcript of Hearing). The Appellant then filed several documents with the Court; however, none of the Appellant's submissions contradicted the Respondent's claims. (Appellant's Supplemental Documents).

Mesne Conveyances for Aiken County, the exhibits submitted by the Respondent were properly considered by the Court and—importantly—were not challenged at any point by the Appellant.

The Appellant cites a myriad of cases in her argument, and provides a brief on each one; however, none of these cases affect the case at bar. The Appellant relies initially on Beneficial Financial I, Inc. v. Windham, 431 S.C. 256, 847 S.E.2d 793 (2020). However, in Windham, the Court actually affirmed the granting of summary judgment to the moving party when that party put forth enough evidence in the pleadings and papers on file to prove the elements of the Plaintiff's violation of the South Carolina Unfair Trade Practices Act. Id. at 270, 847 S.E2d at 801. The Court reversed the granting of summary judgment as to the remainder of the Defendant's counterclaims, but solely because the Defendant did not prove the elements of those claims. Id. In the present case, the Respondent met her burden on all elements related to both trespass and nuisance, and the Circuit Court correctly entered judgment for the Respondent.

Similarly, in Standard Fire Co. v. Marine Contracting and Towing Co., another case relied upon by the Appellant, the South Carolina Supreme Court reversed the granting of summary judgment where "the record [was] devoid of pleadings and affidavits…" 301 S.C. 418, 422, 392 S.E.2d 460, 462 (1990). Such is not the case here, and the holding in Standard Fire simply is not relevant.

The Appellant also relies on Hancock v. Mid-S. Mgmt. Co., 381 S.C. 326, 673 S.E.2d 801 (2009) and Anders v. S.C. Farm Bureau Mut. Ins. Co., 307 S.C. 371, 415 S.E.2d 406 (Ct. App. 1992) for the standard to be used in motions for summary judgement. However, Hancock was overruled, and the holding in Anders abrogated in August of this year. See Kitchen Planners, LLC v. Friedman, Opinion No. 28173 (S.C. Sup. Ct. filed Aug. 23, 2023). In Friedman, the Supreme Court articulated the new standard:

> We now clarify that the "mere scintilla" standard does not apply under Rule 56(c). Rather, the proper standard is the 'genuine issue of material fact' standard set forth in the text of the Rule. As we stated in Town of Hollywood v. Floyd, "it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." 403 S.C. at 477, 744 S.E.2d at 166. To the extent what we said in Hancock is inconsistent with our decision today, Hancock is overruled.

Even so, in Anders, significant discovery (including depositions) had taken place, whereas here, the Defendant refused to answer even basic written discovery.

The Appellant also notes that she should be given leeway for proceeding *pro se*, or that the Circuit Judge should have applied a more lenient standard to her. It is imperative to note that the Appellant answered the Complaint herself and had full opportunity to hire counsel for over a year prior to the hearing for summary judgment. She failed to do so. The Appellant's lack of diligence cannot be held against the Respondent. (See Cohen v. Cohen, 438 S.C. 9, 19, 881 S.E.2d 650, 655 (Ct. App. 2022) ("Pro se litigants have a duty to remain up-to-date on the progress of their case and comply with court orders.") (citing Hill v. Dotts, 345 S.C. 304, 310, 547 S.E.2d 894, 897 (Ct. App. 2001) ("[A] party has a duty to monitor the progress of his case. Lack of familiarity with legal proceedings is unacceptable and the court will not hold a layman to any lesser standard than is applied to an attorney.")).

Moreover, in the Appellant's Brief, she makes reference to the Appellant's Answer filed as part of this case, and contends that it disputes the factual and legal allegations contained in the Respondent's Complaint. The Respondent, upon yet another review of the Appellant's Answer, can find nothing other than admissions of the Appellant's encroachment on the Respondent's real property. (Answer).

The Appellant's contention that the Court failed to apply case law in her Order Granting Summary Judgment fails equally. Again, Rule 56 states that if there is no genuine issue as

to any material fact, then the moving party is entitled to judgment as a matter of law. The Circuit Court based its ruling on current South Carolina precedent. If, as the case law makes clear, a boundary line location is a factual question, the Appellant should have submitted her own survey[3], or, at a minimum, some evidence disputing the Respondent's claims. See Bodiford v. Spanish Oak Farms, Inc., 317 S.C. 539, 544, 455 S.E.2d 194, 197 (Ct. App. 1995) ("A boundary dispute is an action at law…and the location of a disputed boundary line is a question of fact.").

The Appellant's reliance on Hammond v. Lindsay, 277 S.C. 182, 284 S.E.2d 581 (1981) is similarly misplaced. In Hammond, the Supreme Court of South Carolina determined that when a deed incorporates a property description, that description must control. Id. at 184, 284 S.E.2d at 582. Hammond stands for more of an estoppel theory, which is neither alleged nor relevant in this matter. In the present case, the encroachment has been proven by the Respondent and never disputed by the Appellant. The Appellant has submitted no evidence that her mobile home is not encroaching on the Respondent's property. Therefore, Hammond is easily distinguished from this case.

The Respondent alleges theories of nuisance and trespass against the Appellant. A nuisance is a real injury to a man's lands and tenements and a private nuisance is anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another. Babb v. Lee Cnty. Landfill SC, LLC, 405 S.C. 129, 747 S.E.2d 468 (2013); see also, Blanks v. Rawson, 296 S.C. 110, 370 S.E.2d 890 (Ct. App. 1988) ("A nuisance has been defined as 'anything which works hurt, inconvenience, or damages; anything which essentially interferes with the enjoyment of life or property.'").

Similarly, "[t]o constitute actionable trespass…there must be an affirmative act,

[3] Even though it would be improper at this stage of the proceeding, notably missing in any of the Appellant's submissions throughout this litigation is a new survey disputing the boundary line.

invasion of land must be intentional, and harm caused must be the direct result of that invasion." Snow v. City of Columbia, 305 S.C. 544, 553, 409 S.E.2d 797, 802 (Ct. App. 1991); see also, Mack v. Edens, 320 S.C. 236, 464 S.E.2d 124 (Ct. App. 1995). For a trespass action to lie, "the act must be affirmative, the invasion of the land must be intentional, and the harm caused by the invasion of the land must be the direct result of that invasion." Mack, 320 S.C. at 240, 464 S.E.2d at 127.

Simply, the evidence presented can only show that the encroachment by the Appellant is an ongoing trespass and nuisance. The Respondent has proved the elements of both theories. There is no encroachment agreement in the public record granting the Appellant permission to leave the manufactured home in its current placement. The Respondent did not consent to this encroachment, and the Respondent has not been compensated by the Appellant for the encroachment onto her real property. Clearly, as shown at the summary judgment hearing of this matter, in the Appellant's own motion, and yet again in the Appellant's Brief, there is no dispute—genuine or otherwise—of any material fact, and the Court properly granted summary judgment to the Respondent under Rule 56, SCRCP.

B. The Appellant raised issues in its Rule 59(e), SCRCP Motion, which were not timely raised to the Trial Judge

The Appellant asserts that there is evidence that should have been submitted to the court prior to the entrance of Summary Judgment. This is not the standard of Rule 59(e) motions. The Appellant fails to offer any reason or excuse as to why any evidence was not submitted timely.

First, the Appellant argues that the Circuit Court erred in granting summary judgment when it should have made further inquiry into the facts of this matter. In the same breath, the Appellant also argues that further discovery is warranted. This logic is refuted in the record itself, where it is clear that the Appellant refused to participate in discovery, yet an order compelling her to

provide discovery responses has gone unheeded. (Order Compelling Appellant to Provide Discovery Responses, dated August 22, 2022). Even so, that order is interlocutory, and could not have been appealed. Allowing a party to refuse to complete discovery, then requesting that a judgment be reversed due to the lack of discovery defies reason.

Secondly, the Appellant attempted to raise new issues in her Motion to Reconsider. This was improper, especially when this information was readily available at the time of the hearing of the Motion for Summary Judgement. The whole purpose of a Rule 59(e) motion is that the presiding Judge did not rule on an issue that was properly before her. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000). In this case, the *pro se* Appellant failed to introduce any relevant exhibits or testimony. Furthermore, the Appellant's Answer does not deny that there is an encroachment on the Respondent's real property, and there has been no motion to amend the pleadings in this case. Failure to deny an allegation is considered an admission of the same. Rule 8(d), SCRCP. The Appellant did not submit any affidavits at the Motion Hearing, nor—although it would be inappropriate—did she submit any affidavits of any parties or witnesses in her Motion to Reconsider. Allowing a party to use Rule 59(e) to continually add evidence, or revisit legal argument, undercuts the purpose of Rule 56. See Patterson v. Reid, 318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1995) (holding that a party may not use a post-trial motion to raise an issue that could have been raised at trial); see also Kiawah Prop. Owners Group, Inc. v. Pub. Service Commission of S.C., 359 S.C. 105, 597 S.E.2d 145 (2004) (finding that the issue on appeal was not properly preserved for appellate review where party raised the argument for the first time in its petition for rehearing).

CONCLUSION

For the reasons stated above, the Respondent respectfully submits that the Court of Appeals should either dismiss the Appellant's appeal, or affirm the judgment of the Circuit Court.

Very Respectfully Submitted,

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