

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

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Dec 27 2023

SC Court of Appeals

Appeal from Charleston County
Court of Common Pleas

Jean Toal, Specially Appointed Judge

Appellate Case No. 2023-001789

J. Bradford McIlvain, Appellant,

v.

The Town of Kiawah Island, Respondent.

**APPELLANT'S OPPOSITION TO MOTION TO DISMISS
APPEAL FOR LACK OF JURISDICTION**

Appellant J. Bradford McIlvain ("Appellant" or "Mr. McIlvain") opposes Respondent Town of Kiawah Island's ("Respondent" or "TOKI") Motion to Dismiss Appeal for Lack of Jurisdiction ("Motion to Dismiss"). At its core, Respondent argues this appeal should be dismissed because it received a copy of the Notice of Appeal via email earlier than it would have had it been served via US Mail.

FACTUAL BACKGROUND

This action involves a South Carolina Freedom of Information Act (“FOIA”) request made by Appellant on June 6, 2023 and denied by Respondent the very next morning. Specifically, on July 21, 2023, Appellant filed an action for injunctive and declaratory relief in the Court of Common Pleas for Charleston County seeking production of a 25-page memorandum created by TOKI Town Attorney (and counsel in this matter) Joseph Wilson (“the Wilson Memo”) as part of a year-long “audit” of a development agreement to which Respondent was a party. Affidavit of J. Bradford McIlvain, attached hereto as Exhibit 1 (“Appellant Affidavit”) at ¶4. Service of the Summons and Complaint was effected on July 24, 2023 and the Affidavit of Service was filed the next day on July 25, 2023. *Id.* at ¶5.

On August 1, 2023, Mr. Wilson notified Appellant of his entry of appearance by email. *Id.* at ¶¶6-8 and Exhibit A thereto. The next day, Mr. Wilson served an entry of appearance for both counsel on Appellant by email. *Id.* at ¶9 and Exhibit B thereto. Although the pleadings were not closed, on August 2, 2023 Respondent also filed a Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment (“Respondent’s Motion”). Respondent’s Motion was served by email. *Id.* at ¶10 and Exhibit C thereto. Thereafter,

Appellant had a number of communications with Respondent's counsel and the Lower Court, all of which were by email. *Id.* at ¶¶11-14 and Exhibit D thereto.

On August 10, 2023, Respondent filed its Answer to the Complaint. Respondent served the Answer by email. *Id.* at ¶17 and Exhibit E thereto. Also, on August 10, 2023, the Lower Court notified the parties, by email, that it would conduct an *ex parte* hearing on Respondent's Motion on August 14, 2023. *Id.* at ¶¶15-16 and Exhibit E thereto. Following this notification, Appellant had email exchanges with the Lower Court. *Id.* at ¶¶18-19 and Exhibit E thereto.

At the conclusion of the August 14, 2023 *ex parte* hearing, the Lower Court denied Appellant's request for the Wilson Memo but stated it was not ruling on Respondent's Motion. In its subsequent Order dated August 17, 2023, the Lower Court found that the Wilson Memo was protected by both the attorney-client privilege and the work product doctrine. *Id.* at Exhibit F thereto, p. 5 #2. As a result of the *ex parte* proceeding, the Lower Court further determined that the Respondent Town Council's explicit waiver of privilege on May 2, 2023 did not effect a waiver for any portion of the Wilson Memo itself. *Id.*, ##3-4. The Lower Court also ruled against Appellant even though Respondent's Town Council had never invoked any exemption under FOIA. The Lower Court served a copy of its August 17, 2023 Order by email. *Id.* at ¶22 and Exhibit F thereto.

On August 28, 2023, Appellant filed his Motion for Reconsideration of the August 17, 2023 Order. *Id.* at ¶23. This Motion was likewise served via email. *Id.* and Exhibit G thereto. The Motion for Reconsideration was granted by the Lower Court on August 29, 2023 and a “rehearing” was scheduled for September 13, 2023. *Id.* at ¶25. Mr. Wilson served Appellant with notice of the Lower Court’s August 29, 2023 Order by email. *Id.* and Exhibit I thereto. On September 7, 2023, Appellant filed his Opposition to Respondent’s Motion and on September 8, 2023, Respondent filed a Reply Memorandum in Support of Respondent’s Motion. These filings were served by email. *Id.* at ¶¶26-27 and Exhibits J-K thereto.

On September 13, 2023, the Lower Court conducted a hearing on Respondent’s Motion. *Id.* at ¶28. At the conclusion of that hearing, the Lower Court requested additional briefing on whether FOIA and applicable case law required the Lower Court to review and analyze the Wilson Memo to determine whether it contains any non-exempt material which should be produced to Appellant. *Id.* Appellant’s additional brief was submitted and served on September 25, 2023. Service was effected by email. *Id.* at ¶29 and Exhibit L thereto. Respondent’s additional brief was submitted and served on September 29, 2023. Respondent served its additional brief by email. *Id.* at ¶31 and Exhibit N thereto.

By Order dated October 13, 2023, the Lower Court granted Respondent’s Motion “for the reasons set forth in the Order dated August 17, 2023”-viz. the *ex parte* hearing Order. *Id.* at Exhibits O and P thereto. Appellant received notice of the Order on that same day by email from Mr. Wilson. *Id.* at ¶32 and Exhibit O thereto.

Appellant timely served the Notice of Appeal on Respondent’s counsel on November 10, 2023.¹ *Id.* at ¶35. Service was effected in the same manner as the parties had effected service throughout the case -- by email. *Id.* The email address used for Respondent’s counsel Mr. Appel is the email address listed in the Attorney Information System (“AIS”) - ross@mklawsc.com. *Id.* at ¶36. The email address used for Respondent’s counsel Mr. Wilson is the email address he used to serve by email through this case - joew@kiawahisland.org. *Id.* On November 13, 2023, the Notice of Appeal was filed with both the Lower Court and this Court.

By letter dated November 17, 2023, Appellant was advised by the Clerk of this Court that service of the Notice of Appeal had to be “accomplished by hand delivery or U.S. mail.” *Id.* at ¶40 and Exhibit Q thereto. The letter provided further that “any deficiency must be corrected within ten (10) days of the date of

¹ Under the applicable Appellate Rules, Appellant’s Notice of Appeal had to be served on or before November 13, 2023. Rule 263(a), SCACR.

this letter.” *Id.* Consistent with the November 17, 2023 letter, on November 27, 2023 Appellant served the Notice of Appeal, with corrected Certificate of Service, by depositing same in the US Mail, in envelopes properly addressed and bearing sufficient postage.² *Id.* at ¶41 and Exhibit R thereto.

On December 11, 2023, Appellant filed and served the Initial Brief of Appellant. On that same day Appellant spoke with the clerk assigned to this matter to discuss a notice issued regarding the transcript in the Lower Court. *Id.* at ¶42. In that conversation, Appellant was advised to submit an electronic filing to ctappfilings@sccourts.org which addressed the fact that no transcript order was required. *Id.* In that same call, Appellant was advised by the case clerk that sending Respondent’s counsel a copy of that filing by US Mail was unnecessary if the parties agreed to service by email. *Id.*

On December 13, 2023, Respondent filed the instant Motion to Dismiss Appeal For Lack of Jurisdiction (“Motion to Dismiss”) claiming that service of the Notice of Appeal was improper because it was first made by email and, thereafter, by US Mail. *Id.* at ¶43. Notably, while now complaining a *pro se* party cannot participate in service by email, Respondent served Appellant with the Motion to

² While Respondent complains this transmission was not postmarked until November 28, service by mail is complete upon mailing and does not depend on postmarking. Rule 262(c)(2), SCACR (Service upon the attorney shall be made by “Depositing a copy in the U.S. mail, properly addressed to the person at that person’s last known address with sufficient first class postage attached ... Service by mail is complete upon mailing....”)

Dismiss by email.³ *Id.* The next day, Respondent filed and served, by email, a Petition for Extension of Time. *Id.* at ¶44.

ARGUMENT

In this matter, Respondent claims that service of the Notice of Appeal by email was improper under the Rules of Appellate Procedure and, therefore, this Court lacks subject matter jurisdiction. Notably, none of the cases cited by Respondent holds that email service to counsel's AIS registered email defeats subject matter jurisdiction. Respondent also fails to provide a single case which finds email service improper where the parties have been serving each other by email since the commencement of the litigation. *Id.* at ¶¶9, 10, 23, 26, 27, 29, 31, 35, 43, 44.

Respondent's argument also ignores Section 14-8-260 of the S.C. Code which specifically addresses the "Notice of intent to appeal" and mandates only that "the notice of appeal must be filed with the court of appeals in the manner provided by the South Carolina Appellate Court Rules." S.C. Code §14-8-260 (2013).⁴ Indeed, Respondent does not reference any statutory provision addressing, much less requiring, service of the Notice of Appeal to be effected in a

³ Respondent also mailed a copy of the Motion to Dismiss to Appellant. That transmission was not received until December 21, 2023-two days before any opposition would be due. Ex. 1, Appellant Affidavit at ¶46.

⁴ There is no argument advanced that the filing of the Notice of Appeal was untimely nor could there be. Rule 262(a)(2), SCACR.

particular manner. Because jurisdictional appealability issues are governed by statute, and there is no claim that the Notice of Appeal violated a statute, this Court has jurisdiction over this dispute and, therefore, should deny the Motion to Dismiss. *Skinner v. Westinghouse Elec. Corp.*, 380 S.C. 84, 668 S.E.2d 795, 797 (S.C. 2008). *See also Paschal v. Price*, 380 S.C. 419, 440, 670 S.E.2d 374, 385-86 (Ct. App. 2008), *aff'd* 392 S.C.128, 708 S.E. 2d 771 (S.C. 2011), *overruled in part on other grounds Wilkinson v. Palmetto State Transp.*, 382 S.C. 295, 676 S.E.2d 700 (S.C. 2009) (SC Supreme Court Order requiring a cover sheet to accompany a Notice of Appeal was not a basis to dismiss appeal; cover sheet requirement was not statutory and, therefore, was not “essential to invoke appellate jurisdiction of the circuit court.”)

It is equally obvious that dismissal should not be granted where, as here, Respondent was timely served with the Notice of Appeal and then re-served with the Notice of Appeal in accordance with this Court’s directive. “The sole purpose of a notice of appeal is to inform the court and the opposing party that the party appealing is dissatisfied with and seeks to appeal from the decision rendered.” *Coleman v. S.C. Dep’t of Employment and Workforce*, Docket No. 12-ALJ-22-0252-AP (Mar. 17, 2014) at 4. Consistent with this objective, “a mere clerical error in a Notice of Appeal does not warrant dismissal of the appeal,” particularly where the complaining party cannot show prejudice. *Weatherford v. Price*, 340

S.C. 572, 577-78, 532 S.E.2d 310, 313 (Ct. App. 2000). *Accord In re Estate of Hinson*, 2011-MO-039 (S.C. Dec. 19, 2011); *Charleston Lumber Co., Inc. v. Miller Housing Corp.*, 318 S.C. 471, 478, 458 S.E.2d 431, 436 (Ct. App. 1994) *citing Moody v. Dickinson*, 54 S.C. 526, 32 S.E. 563 (1899).

Here, Respondent clearly was timely informed that Appellant was dissatisfied with and appealing the decision rendered by the Lower Court on October 13, 2023. In addition, Respondent was timely advised it was a party to the appeal within the time frame required to file an appeal. Indeed, although Respondent complains Appellant served the Notice of Appeal in the manner in which service had theretofore been effected by both sides -- by email -- Respondent does not dispute that it received the Notice of Appeal on November 10, 2023.⁵

That service by a means other than as set for in the Rules of Appellate Procedure is akin to a clerical error which should not defeat jurisdiction is also clear. This conclusion follows from the fact that this Court permitted Appellant to re-serve the Notice of Appeal by US Mail on or before November 27, 2023, rather than simply dismissing the appeal for improper service. It is also consistent with S.C. Code §18-1-100 (2018) which provides “When a party shall give, in good

⁵ Respondent acknowledges that lawyers can serve each other by email but posits that *pro se* parties cannot. Motion to Dismiss, p. 2. The argument that this Court is not open to *pro se* parties on the same conditions as other litigants implicates the equal protection guarantees of the Fourteenth Amendment of the United States Constitution and Article I, §3 of the Constitution of the State of South Carolina.

faith, notice of appeal from a judgment or order and shall omit, through mistake, to do any other act necessary to perfect the appeal or to stay proceedings the court may permit an amendment on such terms as may be just.” That email service is not fatal to this Court’s jurisdiction is likewise evident from the fact that email service is permitted in the South Carolina Rules of Appellate Procedure and the case clerk’s statement that email service is acceptable if the parties choose to serve documents in that manner. Ex.1, Appellant Affidavit at ¶42. Here, the parties have served almost all the filings in this matter by email, including the Motion to Dismiss now before this Court. *Id.*, ¶¶9, 10, 11, 17, 23, 26, 27, 29, 31, 35, 43, 44 and Exhibits B, C, E, G, J, K, L, N, P, T, U thereto. Moreover, because email notice of the entry of order or judgment is sufficient to commence the time to appeal (*see* Motion to Dismiss pp. 2-3), it also logically flows that email service of the Notice of Appeal is sufficient.

It is equally clear that Respondent would not suffer any prejudice from the determination that jurisdiction exists here. *Charleston Lumber Co.*, 318 S.C. at 478, 458 S.E.2d at 436 (“Charleston Lumber does not allege any prejudice as a result of the omission and there can be no doubt that Charleston Lumber had notice that the Millers had appealed all the cases.”); *Weatherford*, 340 S.C. at 576, 532 S.E.2d at 313 (“Attorney demonstrates no prejudice as a result of the omission.”). *See also Mason v. Mason*, 412 S.C. 28, 60, 770 S.E.2d 405, 422 (Ct. App. 2015)

“the appeal was proper because Accountant [omitted party] at least had notice that he was a party to the appeal within the time frame required to file an appeal from the special referee's decision.” Indeed, it is apparent that Respondent was provided with the Notice of Appeal sooner than it would have been if it had originally been served by US Mail. *See, e.g.*, Ex. 1, Appellant Affidavit at ¶46. Absent any allegation of prejudice, Respondent’s Motion to Dismiss should be denied.

That the re-served Notice of Appeal was apparently postmarked on November 28, 2023 does not require a different conclusion. Indeed, the rules dictate that service is complete upon placing a properly addressed document in US Mail, with the required postage. Rule 262(c)(2), SCACR. As set forth in the accompanying affidavit, Appellant re-served the Notice of Appeal in accordance with the Clerk of Court’s directive by placing the Notice of Appeal in the US Mail in properly addressed envelopes to Respondent’s counsel, with proper postage, on November 27, 2023. Ex. 1, Appellant Affidavit at ¶41. The rules simply DO NOT define service as being dependent on, or not effective until, a document is postmarked. Rule 262(c)(2), SCACR (“Service is complete upon mailing.”). Because the Notice of Appeal was re-served in accordance with this Court’s directive and applicable rules, dismissal is inappropriate on this basis as well.

Respondent’s argument that the Notice of Appeal in somehow incomplete is also not sustainable. Motion to Dismiss, p. 4. In particular, Respondent argues

that the Lower Court Order of August 17, 2023, which Order derived from the *ex parte* hearing, should have been specifically identified in the Notice of Appeal. *Id.* The notion that the August 17, 2023 Order had to be appealed ignores the fact that the August 17, 2023 Order was interlocutory and not a final appealable Order. Indeed, the Order of August 17, 2023 specifically contemplated, and invited, the filing of a Motion for Reconsideration which Motion was timely filed and promptly granted. *See* Ex. 1, Appellant Affidavit at Exhibit F thereto at p. 5, #6. *See also Ex parte Wilson*, 367 S.C. 7, 12, 625 S.E.2d 205, 208 (2005) (an order reserving an issue or leaving open the possibility of further action by the trial court before the rights of the parties are resolved, is interlocutory.); *Tillman v. Tillman*, 420 S.C. 246, 249, 801 S.E.2d 757 (Ct. App. 2017) (same). As such, the August 17, 2023 Order was not then, and is not now, a final Order from which an appeal could be taken.

The idea that Appellant had to appeal an earlier interlocutory order also fails to credit the fact that the Order appealed from incorporates the earlier order into its body. Ex. 1, Appellant Affidavit at Exhibit P thereto. In other words, the reasoning in the earlier order is already before this Court through the Order appealed from. Respondent's position also ignores the Court's power to review any intermediate order involving the merits and affecting the Lower Court's judgment. S.C. Code §18-1-130 (2022). Insofar as Appellant appealed from the

Lower Court's final order, this ground for the Motion to Dismiss should also be rejected.

CONCLUSION

For all the foregoing reasons, Appellant prays that this Honorable Court deny Respondent's Motion to Dismiss Appeal for Lack of Jurisdiction.


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