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Apr 22 2024

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY  
Court of Common Pleas

The Honorable James B. Jackson, Jr., Master-in-Equity

Case No. 2020-001254

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Feb 21 2024

SC Court of Appeals

Kacey Green and Charinrath Green, ..... Appellants-Respondents,

v.

Mervin Lee Johnson, ..... Respondent-Appellant.

**REPLY TO APPELLANT-RESPONDENTS' RETURN TO PETITION FOR REHEARING**

**I. THE COURT OF APPEALS NEVER OBTAINED JURISDICTION OVER APPELLANTS' NOTICES OF APPEAL.**

There is no dispute that the Greens served their notice of appeal after timely filing a Rule 59(e) motion to reconsider. There is only one permitted response in this situation. Upon notice, the Clerk of the Court of Appeals is required to dismiss the untimely appeal without prejudice. Despite receiving notice from Johnson, this did not happen. The Greens could have cured their deficient notice of appeal after their Rule 59(e) motion was ruled upon on March 8, 2021. They did not do so. Instead, they filed an amended notice of appeal 43 days later, on April 20, 2021. The Court

overlooked this fundamental, jurisdictional error in reaching its decision in this matter. Accordingly, the Court should grant Johnson's Petition for Rehearing.<sup>1</sup>

**A. Johnson Raised the Issue of the Greens' Defective Appeal on No Less than Seven Occasions.**

One thing the Greens do not challenge in their return is Johnson's persistence in arguing to the Court of Appeals that it lacked jurisdiction over the Greens' appeal. Johnson raised this issue to the Court's attention on seven occasions. As required by *Hudson v. Hudson*, 290 S.C. 215, 216, 349 S.E.2d 341, 341–42 (1986), Johnson, in his Notice of Cross Appeal filed on October 5, 2020, informed the Clerk of the Court of the defective appeal. He also argued the issue in his Motion to Hold Appeals in Abeyance, filed on December 9, 2020. The issue was raised in Johnson's status updates to the Court dated March 5, 2021, and April 2, 2021. After the Rule 59(e) motion was resolved, Johnson provided a lengthy explanation in his letter of May 7, 2021, which provided as follows.

Judge Jackson issued a Form 4 Order on March 8, 2021, denying [the Greens'] Rule 59(e) motion. Therefore, the Greens' motion is now resolved and the Parties' issues with the trial court's orders are ripe for appeal. Consistent with his arguments to date, Johnson timely served a Notice of Appeal from the trial court order denying the Greens' Rule 59(e) motion. This Notice of Appeal was timely filed with the Court of Appeals on April 16, 2021. Although this is a new appeal, the Clerk of Court has not yet assigned a new Appeal Case Number.

Johnson also filed today his Initial Brief of Appellant for the new appeal. Because this is a new appeal, Johnson is listed as Appellant. Also, this Initial Brief bears the circuit court's civil action number because no new appeal number was assigned.

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<sup>1</sup> The Court may be reluctant to find that the Greens' appeal is untimely. However, even if "this conclusion appears to elevate form over substance and, in turn, may be viewed as harsh ... we believe it is legally correct..." *Limehouse v. Hulsey*, 404 S.C. 93, 108, 744 S.E.2d 566, 575 (2013) (determining the Court of Appeals erred in finding the state court had jurisdiction to conduct default damages proceedings after remand because the federal district court's certified order was not entered by the circuit court clerk).

In response to the Master's Form 4 Order, [the Greens] served and filed a motion to amend their Notice of Appeal and a motion for an extension of time to serve and file such notice. In light of these procedural issues, Johnson respectfully requests the Court decide his Motion to Dismiss Appeal Case No. 2020-001254 prior to resuming the briefing schedule, which was paused by this Court's order granting Johnson's Motion to Hold Appeals in Abeyance.

Status Update, pgs. 1-2. As set forth in that letter, Johnson filed a Motion to Dismiss arguing that the Greens' Notice of Appeal "was premature and this Court lacks subject matter jurisdiction over the issues raised by the Greens." Mot. to Dismiss, at pg. 1. Finally, Johnson argued the issue in § II, A of his Return to the Greens' Final Brief, dated October 19, 2021. It is unlikely that Johnson could have done more to prevent the Court from overlooking or misapprehending this issue.

**B. The Greens' Rule 59(e) Motion was Timely and Required to Challenge the Master's Amended Order.**

In opposition to Johnson's dogged efforts to address the Greens' untimely appeal, they argue only that their "Rule 59(e) did not stay the time to file their notice of appeal." Greens' Return to Mot. to Dismiss, at pg. 3. If this is the Court's justification for declining to find that the Greens' appeal was untimely, that rationale is at odds with the Court's unpublished opinion.

The Greens argued that the master-in-equity erred in considering Johnson's Rule 59(e) motion because the Master's November 4, 2019, order denying the previous Rule 60 motion was a "final unmodifiable order ... by operation of law." Greens' Final Brief, at pgs. 5-6. Therefore, argue the Greens, Johnson's only option was to notice an appeal. This Court correctly disagreed with this analysis and held that Johnson's Rule 59(e) motion was timely and appropriate manner to request the trial judge to reconsider matters properly encompassed in a decision on the merits.

Unpublished Opinion, at pgs. 6-7. Similarly, the Greens' Rule 59(e) motion<sup>2</sup> was a timely, and mandatory, method to challenge the master's amendments to the damages order.

Instead of setting forth a valid defense to their untimely appeal the Greens argue that Johnson "admits<sup>3</sup> the Greens' initial Notice of Appeal was timely." Return to Pet. for Rehearing, at pg. 1. This is plainly incorrect. In the fourth sentence of his abeyance motion, Johnson argued that "Appellants' appeal is untimely." Abeyance Mot., at pg. 1. Johnson further argued that the Greens' Notice of Appeal, served before their Rule 59(e) motion was resolved, "was premature." *Id.*, at pg. 3.

Moreover, Johnson was not obligated to seek the dismissal of the Greens' appeal in his abeyance motion. That duty fell to the Clerk of the Court of Appeals upon notification in Johnson's Notice of Cross Appeal that the Greens' appeal was untimely due to their unresolved Rule 59(e) motion. See *Hudson*, 290 S.C. at 216, 349 S.E.2d at 341-42 ("IT IS ORDERED that in the event timely post-trial motions are filed under Rule 59, ... the appellant shall notify the Clerk of this Court in writing. Upon receipt of such notice, the appeal shall be dismissed without prejudice."). The Greens admit that their Rule 59(e) motion was filed contemporaneously with their initial Notice of Appeal on or about September 14, 2020. Amend. Notice of Appeal, filed April 20, 2021.

The purpose of Johnson's abeyance motion was to cure the defect imposed by the Greens' erroneous, initial notice of appeal, which they filed after a timely Rule 59(e) motion. Once that defect was corrected, the Greens should have filed a timely notice of appeal on or before April 7, 2021. Apparently, this did not occur to the Greens until April 20, 2021, when they filed a Motion

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<sup>2</sup> The Greens characterized their motion as "not necessary and superfluous to the issues already sufficiently vetted and considered by the lower court." Return to Johnson's Mot. to Dismiss, at pgs. 5-6.

<sup>3</sup> Even if Johnson had "admitted" such a thing, a party's admission cannot overcome this jurisdictional defect.

for Extension of Time to File Amended Notice of Appeal. Because they did not serve this amended notice of appeal within the 30-day deadline, this notice of appeal was outside the jurisdiction of the Court of Appeals.

In opposition to Johnson's abeyance motion, the Greens argued "their Rule 59 motion was made in an abundance of caution to timely and fully preserve their rights to address the lower court's Amended Order on Damages." Return to Abeyance Mot., dated December 18, 2020. The Greens' intent in filing that Rule 59(e) motion has no bearing on its effect to stay the deadline for serving a notice of appeal.

In any case, Johnson's abeyance motion could not salvage the Greens' untimely initial Notice of Appeal. An "abeyance" is a "temporary inactivity" or "suspension." Black's Law Dictionary (7th ed. 1999). By granting the abeyance motion, the Court of Appeals merely suspended the operation of any proceedings over which it had jurisdiction. Once their Rule 59(e) motion was dismissed, the Greens had every opportunity to serve a timely notice of appeal. However, they failed to do so. Forty-three days after the trial court denied the Greens' Rule 59(e) motion, the Greens filed a motion for an extension of time to file an "Amended Notice of Appeal." Greens' Mot., dated April 20, 2021. Once again, the Greens were acting out of "an abundance of caution." *Id.*, at pg. 2. The Court should not rescue the Greens' appeal.

## **II. THE COURT ERRONEOUSLY CONCLUDED THAT THE GREENS PRESERVED OBJECTIONS TO THE ADMISSION OF EVIDENCE AT THE HEARING ON JOHNSON'S RULE 59(E) MOTION.**

In return, the Greens argue that their objection to evidence offered at the Rule 59(e) motion was preserved because the Master "considered Plaintiff's proposed order." Return to Pet. for Rehearing, at pg. 5. However, there is persuasive authority that this Court will not find an issue preserved if it is raised in a proposed order, but not in a motion to reconsider. In an appeal from a

dispute between a landlord and tenant over the division of a compensation award from a partial taking of leased property by condemnation, this Court considered whether the tenant preserved his objection to the master-in-equity applying a contract analysis instead of an equity analysis. *S.C. Dep't of Transp. v. M & T Enterprises of Mt. Pleasant, LLC*, 379 S.C. 645, 660, 667 S.E.2d 7, 15 (Ct. App. 2008). In footnote seven, the Court noted that “although arguably raised in its proposed order submitted in lieu of a brief to the trial court, Tenant never filed a motion under Rule 59, SCRPC, asking the court to address the issue.” *Id.*, 379 S.C. 645, 559 n. 7, 667 S.E.2d 7, 15 n. 7.

### **III. THE COURT OVERLOOKED THE MASTER’S FAILURE TO PROVIDE ANY FACTUAL FINDINGS SUPPORTING THE EXCESSIVE PUNITIVE DAMAGES AWARD.**

The Greens incorrectly argue that Johnson raises the issue the absence of any facts supporting the Master’s punitive damages award for the first time in his Petition for Rehearing. Return, at pg. 5. Respondent argued in his Final Appellant Brief that “neither the Master’s June 5, 2019, order, nor his August 14, 2020, Amended Order, contain any factual findings that Johnson’s misconduct was willful, wanton, or in reckless disregard of the plaintiff’s rights.” Return to Greens’ Final Brief, at pg. 16. Moreover, Johnson’s return highlighted that they admitted to this deficiency when they sought “clarification on the findings of fact which support the award’ of punitive damages” in their Rule 59(e) motion. *Id.*, at pg. 13.

For these reasons, the Court should grant Johnson's Petition, rehear these appeals, withdraw its order of January 17, 2024, and issue an order accounting for the arguments heretofore overlooked.

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By: *s/ Todd Russell Flippin*

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February 21, 2024

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Case No. 2020-001254

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v.

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**PROOF OF SERVICE**

The undersigned hereby certifies that on the 21<sup>st</sup> day of February, 2024, he has served counsel for Respondents with a copy of the **REPLY TO APPELLANT-RESPONDENTS' RETURN TO PETITION FOR REHEARING** together with all enclosures in this matter by electronically mailing copies of the same to the following addresses:

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February 21, 2024

**VIA ELECTRONIC MAIL ONLY [ctappfilings@sccourts.org](mailto:ctappfilings@sccourts.org)**

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

RE: *Kacey Green v. Mervin Lee Johnson*  
App. Case No. 2020-001254  
Our File No. 15580

Dear Ms. Kitchings:

Enclosed please find the Reply to Appellant-Respondents' Return to Petition for Rehearing, along with a Proof of Service for the same.

By copy of this letter and the attached enclosures, I am hereby serving by email other counsel of record with the enclosed filings.

If you need anything further from our office, please do not hesitate to contact me.

Sincerely,

*s/Todd R. Flippin*

Todd R. Flippin

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