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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Appellate Case No. 2023-001360

Case No. 2022-CP-42-01677

Taylor Chasey Robertson

Appellant,

v.

South Carolina Department of Public Safety, South Carolina Highway Patrol, and Patrick J. Goshorn,

Respondents.

RETURN MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTION TO STRIKE

BACKGROUND[1]

On October 6, 2022, Respondents South Carolina Department of Public Safety and South Carolina Highway Patrol filed a Motion to Dismiss Appellant's Complaint because they believed Appellant failed to timely and properly serve them. On October 6, 2022, Respondent Trooper Patrick J. Goshorn also filed a Motion to Dismiss pursuant to Sections 15-78-60 and 15-78-70 of

[1] At first glance, Appellant's recitation of the Background may look identical to Respondents'. However, Appellant is including facts and dates that are eminently relevant and integral to the understanding of this matter.

the South Carolina Tort Claims Act. The motions were heard on February 23, 2023. On March 21, 2023, a Form 4 Order—NOT a Final Order—was filed by the trial court judge and it indicated that a formal order was to be filed by the Respondents.

On May 24, 2023, over two months later, having yet to see a Formal Order filed or signed, Appellant filed an admittedly premature and perhaps mis-titled Motion for Reconsideration (to be known henceforth as the "*Pre-Final Order MTR*") addressing the decisions Appellant anticipated would be made per the Form 4 Order. A few weeks later, Respondents filed a proposed Final Order to the Court.

Over a month after the "*Pre-Final Order MTR*" was filed, the Trial Court granted Defendants' Motions by formal order filed on June 27, 2023 (which was three months after the Form 4 Order was issued). On June 30, 2023, Appellant filed an (again, possibly mis-titled) *Amended* Motion for Reconsideration (to be known henceforth as the "*Post-Final Order MTR*"). This "*Post-Final Order MTR*" was heard on August 14, 2023. By order filed on August 16, 2023, the Trial Court denied Appellant's "*Post-Final Order MTR*". Appellant filed Notice of Appeal on August 25, 2023.

Shortly after filing its Initial Brief, Respondents filed a Motion to Strike five (5) different documents from the Designation of Matter to be included in the Record on Appeal. These documents are:

8. Defendants' Motion to Allow Delayed Filing filed on October 17, 2022

15. Defendants' discovery requests to Plaintiff

16. Email from Defendants regarding discovery responses of March 3, 2023

19. Email from Process Server regarding experience at SCDPS address

20. Affidavit of Personal Service of SCDPS via Paula Davis on June 30, 2023

ARGUMENT

The Documents Respondents Want to Strike are Already a Part of a Document They Did Not Move to Strike and Should Not be able to Strike

Respondents' Motion to Strike must fail because the documents in question are already part of another document that is one of the most central documents to this appeal—the "*Pre-Final Order MTR*". Rule 10 of the South Carolina Rules of Civil Procedure addresses this issue. *To wit*:

> RULE 10. **FORM OF PLEADINGS**
> (c) Adoption by Reference; Exhibits. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any plat, photograph, diagram, document, or other paper which is an exhibit to a pleading is a part thereof for all purposes if a copy is attached to such pleading.

(emphasis added); See *Brazell v. Windsor*, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009) ("A copy of a document which is an exhibit to a pleading is a part of the pleading for all purposes if a copy is attached to such a pleading."); *HHHunt Corp. v. Town of Lexington*, 389 S.C. 623, 630, 699 S.E.2d 699, 702 (Ct. App. 2010) ("We presume that when Appellants attached a copy of the easement document as an exhibit to the complaint, they intended for it to be incorporated into the complaint even though they did not specifically indicate that they were incorporating the document by reference to it."); *Burns v. Gardner*, 328 S.C. 608, 614 n.2, 493 S.E.2d 356, 359 n.2 (Ct. App. 1997) ("Because [a document] was attached to and incorporated in the amended complaint, we may consider it when ruling on the defendants' motion to dismiss.")

While a Motion is not a "Pleading" per the Rules of Civil Procedure 7(a), the Rules applicable to Pleadings nevertheless apply to Motions as well. SCRCP 7(b)(2) ("The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.")

Despite Respondents statement to the contrary, the documents they seek to strike were

not "new materials". In fact, all the documents Respondents have moved to strike were included as exhibits in BOTH the "*Pre-Final Order MTR*" and the "*Post-Final Order MTR*" (albeit with slightly different exhibit numbers). Respondents did not seek to strike either MTR—nor should they ever be able to given the issues on appeal.

Further, the documents Respondents want to strike are not only applicable to the various arguments made throughout the admittedly lengthy and wordy MTRs (as more fully explained later in this Return), but those documents are—and should remain—part of the record given their incorporation into the Motions. In other words, it is Appellant's position that both MTRs are not merely a pair of forty-something page documents. Rather they are a pair of approximately 200-page documents, when accounting for the incorporated Exhibits.

Appellant recognizes that these documents share many of the same Exhibits (albeit with different Exhibit Numbers) and those exhibits were listed separate from the MTRs in the Designation of Matter. However, this was done for the sake of efficiency. Given Respondents' position on this matter, and assuming their Motion to Strike is denied, Appellant would be inclined to include all pages of each MTR within its Designation of Matter (rather than a chart directing the Court or reader as to which Exhibit is referring to). Even though such action would be duplicative and voluminous, Appellant finds it necessary for the sake of accurate and consistent representation.

An Order is Not Always a *Final* Order

It is well-founded law in South Carolina that an order is only "final" once the circuit court indicates that nothing else remains to be done after it is signed. *Cheap-O's Truck Stop, Inc. v. Cloyd*, 350 S.C. 596, 605, 567 S.E.2d 514, 518 (Ct.App. 2002). When fewer than all claims

have been adjudicated, "the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Rule 54(b), SCRCP. See *Culbertson v. Clemens*, 322 S.C. 20, 23, 471 S.E.2d 163, 164 (1996) (a decree leaving some further act to be done by the court is not final).

Appellant disagrees with Respondents' contention that certain pieces of evidence present in both MTRs—not just the one filed after the Final Order was signed—should not be considered. The "*Pre-Final Order MTR*" was, in many ways, a *Motion to Reconsider the Anticipated Ruling* rather than a reconsideration of a Final Order. This is a nuanced situation, as generally Motions to Reconsider are filed after the final order is signed. Appellant's counsel may have failed to word the title of the document in a manner more fitting, but the spirit of the "*Pre-Final Order MTR*" was that it was raising every possible issue before a Final Order was even proposed, much less signed. Given the fact that this "*Pre-Final Order MTR*" was the likely catalyst for Respondents to finally draft and file the Proposed Order and given that approximately a month passed before the Proposed Order was sent to the judge, Respondents had ample time to consider and address the arguments raised in the "*Pre-Final Order MTR*" and were in no way prejudiced by the issues raised.

To be clear, Appellant recognizes the "*Pre-Final Order MTR*" was premature. It was filed when it was due to the over two-month delay by Respondents in drafting and filing the proposed order, as previously requested by the circuit court judge. The appellant noted within that "*Pre-Final Order MTR*" that she understood the premature nature of the "*Pre-Final Order MTR*" and reserved the right to amend once the judge signed the Final Order.

The cases cited by the Respondent in their Motion to Strike discuss Rule 59(e) Motions in the sense that they were made after a final order was signed—in other words: *POST-Final*

Order. *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 563, 762 S.E.2d 293 (2014) and *Smith v. Fedor*, 422 S.C. 118, 809 S.E.2d 612 (Ct. App. 2017) both indicate arguments must be before the court prior to the court issuing its Order. Curiously, Respondents also cite *Green v. Johnson*, No. 2020-001254, 2024 WL 180690, (S.C. Ct. App. Jan. 17, 2024) which involves the court declining to consider documents filed for the first time with a Rule 59(e) motion.[2] This is hardly relevant to this case (aside from the case's lack of precedential value), in that there was an opportunity to present this evidence when a previously filed motion to set aside default was considered. *Id*. Of note, the Respondents point to the term "attachments" to the motion as being the basis for the Court's refusal to consider. *Id*. In the present case, the documents were not submitted as attachments, but as Exhibits.

Given that Appellant's arguments—or more specifically, the documents Respondents seek to strike—were raised before the Court issued its Final Order, they should be considered.

The Documents Respondents Seek to Strike are Germane to Issues Raised in Respondents' Initial Brief and are Necessary for Appellant's Reply

- **8. Defendants' Motion to Allow Delayed Filing filed on October 17, 2022**
- **15. Defendants' discovery requests to Plaintiff**
- **16. Email from Defendants regarding discovery responses of March 3, 2023**

In addition to the fact that the issues in this matter were raised prior to a Final Order being issued, Respondents address the issue of personal jurisdiction on page 11 of their Initial Brief, when they cite *Yarborough and Co. v. Schoolfield Furniture Industries, Inc.*, 275 S.C. 151, 268 S.E.2d 42 (1980) and summarize the issue in that case by saying "the plaintiff has the burden to establish that the Court has personal jurisdiction over the defendant." Accordingly, they have

[2] The court didn't refuse to consider the documents simply because they were submitted as an attachment to the 59(e) Motion—that was a case the *Green* court cited to for support to make their finding. See *Spreeuw v. Barker*, 385 S.C. 45, 68-69, 682 S.E.2d 843, 855 (Ct. App. 2009).

opened the door to discussion of the same.

Personal jurisdiction is a court's authority to rule and enforce a decision over the parties of a lawsuit. *Limehouse v. Hulsey*, 404 S.C. 93, 104, 744 S.E.2d 566, 572 (2013). Pursuant to Rule 4(d) of the South Carolina Rules of Civil Procedure, "[v]oluntary appearance by defendant is equivalent to personal service." South Carolina courts have held that where a defendant appeared and asserted claims which went to the merits, in addition to his jurisdictional objection, the defendant had waived personal jurisdiction. *Smalls v. Weed*, 291 S.C. 258, 353 S.E.2d 154 (Ct. App. 1987). In order to address this statement, the documents listed above are necessary.

Documents 15 and 16 are directly connected to the issue of personal jurisdiction in this matter, specifically in that they are arguably actions going to the merits of the case—which is evidence of waiver of personal jurisdiction. Further, given that Respondents "opened the door" to this argument, Appellant should be allowed the opportunity to address the same in her Reply Brief as appropriate. As for Document 8, perhaps Respondents are concerned that this Motion could act as a waiver to personal service given that it was a procedural misstep—a technicality, perhaps—and in essence a submission to the authority of the Court in moving to allow the Court to allow the delayed filing. Appellant is aware that technicalities can sometimes derail the pursuit of justice. However, it remains relevant to the issue of personal jurisdiction, and Appellant should be allowed to address the same.

- **19. Email from Process Server regarding experience at SCDPS address**

Respondent also seeks to strike an email from a process server hired by Appellant to specifically serve someone located at the Department of Public Safety (Document 19.). It is obvious why the Respondents want this document stricken—it hurts their case. However, this document is consistent with the vague and confusing setup of the lobby of 10311 Wilson Blvd

Blythewood SC 29016—a point that has been argued from the beginning. Additionally, the lack of discerning and identifiable information pertaining to said lobby and the desk in the middle of the same (the desk is actually closer to the SCDPS side than the SCDMV area) is a fact that the Appellant believes this Court can take judicial notice of—and Appellant would ask that the Court do so.[3]

Further, this email contains the name of a witness previously unknown to the Appellant—and presumably, unknown to the Respondents. Because upon information and belief, there was no one named Grayson that was employed specifically with the SCDPS on the date referenced in the email. See PLT's Motion for Reconsideration of Form 4 Order filed on 05/24/2023 (aka "*Pre-Final Order MTR*"), p. 14, and PLT's Amended Motion for Reconsideration filed on 06/30/2023 (aka "*Post-Final Order MTR*"), p. 14. Appellant would also ask the Court to take judicial notice of this fact as well.

- **20. Affidavit of Personal Service of SCDPS via Paula Davis on June 30, 2023**

As for the remaining document, the Affidavit of Personal Service of SCDPS via Paula Davis on June 30, 2023 (Document 20), the entire purpose of having once again attempted service on the SCDPS was so that there would be universal agreement that the SCDPS was served, even by Respondents' own standards. Appellant recognizes, of course, that this particular service was not within 120 days after filing. However, Appellant had come across caselaw (which she is presently unable to locate) wherein the court had admonished the appealing party for the fact that service was never re-attempted or completed once it became clear that there may have been a problem with the initial service. Accordingly, Appellant wanted to ensure that such an argument could not be made against her.

[3] Appellant is happy to provide photographic proof of the lack of discerning and identifiable information pertaining to the 10311 Wilson Blvd. lobby and the placement of the desk relative to the surrounding hallways.

CONCLUSION

For these reasons, especially for the reason that these documents are a part of the whole of the MTRs, Appellant Robertson asks this court to deny Respondents' Motion to Strike.

Dated this 7th day of May, 2024

s/Nicolas J. Baughman
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PROOF OF SERVICE

I certify that I have served the RETURN MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTION TO STRIKE on South Carolina Department of Public Safety, South Carolina Highway Patrol, and Trooper Patrick J. Goshorn electronically by email to their attorneys of record to their email addresses listed below on May 8, 2024.

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May 8, 2024

Respectfully Submitted,

s/ Nicolas J. Baughman

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