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Jun 04 2024

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.

Roshana Robins.....Appellant.

MOTION TO DISMISS AND MEMORANDUM IN SUPPORT

Respondent, by and through her undersigned counsel, hereby moves this Court for an Order dismissing this matter. This motion is based upon the papers and pleadings on file and Rules 203, 240 and 260, SCACR.

Background

This case arose over a dispute regarding real property boundaries. The Respondent filed a summons and complaint against the appellant, alleging, *inter alia*, causes of action for trespass and nuisance. The Appellant, for close to two years, defended the case *pro se*. On or about April 12, 2023, the Respondent was awarded summary judgment by the Circuit Court on all causes of action alleged.

Thereafter, and by email dated April 24, 2023, Counsel for the Appellant 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 to the Respondent. Counsel for the Appellant confirmed that the Appellant received notice of the Court's order on April 15, 2023, via United States mail.

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").

On or about May 25, 2023, the Court issued an order dismissing the Appellant's Motion, asserting it was not timely. 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, SCRCF, 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.

On June 1, 2023, the Court issued an order vacating its prior order dismissing the Appellant's Motion to Reconsider. 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.

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. The same was filed on July 31, 2023.

Thereafter, the Parties submitted to the Court their respective initial briefs and designations of matter to be included in the record on appeal. Subsequently, on or about January 12, 2024, the Appellant filed and served the original Record on Appeal (hereinafter, "ROA"). Notably missing from the ROA, however, were various documents designated by both parties. Moreover, the Appellant included various documents which were designated by neither of the

Parties. After the undersigned corresponded with counsel for the Appellant, the Parties agreed that an amended ROA would be filed and served no later than close of business on Wednesday, January 24, 2024. No amended record was filed or served at that time. Thereafter, and on January 24, 2024, the Respondent filed a Motion to Strike the record assembled by the Appellant.

On February 14, 2024, and while the Respondent's Motion to Strike was pending, this Court sent correspondence to the Parties indicating that this matter would be held in abeyance until the Court made a decision on Respondent's Motion (Exhibit A). However, on February 16, 2024, and while the case was held in abeyance, the Appellant filed a Motion to Amend the Record on Appeal, along with Appellant's purported amended Record (hereinafter, "amended ROA").

By order dated March 28, 2024, this Court granted the Respondent's Motion to Strike, and accepted the amended ROA as filed by the Appellant on February 16, 2024. (Exhibit B) The Court ordered that the Parties shall file their Final Briefs within 20 days of the date of that Order, which would be on or about April 17, 2024.

On or about April 1, 2024, the Respondent filed and served a second Motion to Strike, this time seeking an order striking the amended ROA filed by the Appellant. No return was filed by the Appellant. On or about April 29, 2024, this Court granted the Respondent's second motion to strike and ordered that the Appellant file and serve a second amended record on appeal in compliance with Rule 210, SCACR within 30 days of the date of that Order. The Court further ordered that failure to do so would result in the dismissal of the appeal. (Exhibit C). Thirty days from the entry of that order is May 29, 2024. As of the date of this present motion, no second amended record on appeal has been filed nor served. The Appellant now seeks an order from this Court dismissing the appeal.

Argument

The Appeal Was Not Timely Perfected

The Respondent initially contends the issue here is whether Rule 6, SCRCPC, 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. The Respondent respectfully submits that it does not.

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. This issue was initially raised in the Respondent's Initial Brief. The Circuit Court's first Order Dismissing the Appellant's Motion to Reconsider, dated May 25, 2023, was legally sound, since the Appellant's motion was not timely, even when considering Rule 6. (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, SCRCF, 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.

The Appellant’s Failure to Comply with the S.C. Appellate Court Rules has Caused Prejudice to the Respondent, and the Appeal Should Therefore be Dismissed

Counsel for the Respondent has had to review *two* separate records on appeal submitted by the Appellant. Both were legally deficient. The Court’s most recent Order, dated April 29, 2024, states that failure to file a second amended record on appeal within 30 days would result in the dismissal of the appeal. (Exhibit C). At the time of filing this motion, no second amended record has been filed. As this Court is aware, Rule 260, SCACR, provides that should a party fail to comply with the requirements of these Rules, “the clerk shall issue an order of dismissal.”

The Respondent has waited patiently for nearly a year merely to obtain a true and correct record on appeal so that final briefs can be submitted and this matter can come to a conclusion. The Respondent has had to incur costs and fees while the Appellant ignores the Rules and the various Orders of this Court. The Appellant’s patience has worn thin. This appeal should be dismissed.

Conclusion

Based on the foregoing, the undersigned submits that the Appellant's appeal was not timely perfected and / or, in the alternative, that the Appellant has failed to comply with the S.C. Appellate Court Rules, and further requests that this Court

1. Dismiss the appeal, with prejudice;
2. Award attorney fees and costs, pursuant to Rule 222, SCACR, or grant leave to the Respondent to submit a proper motion for costs and attorney fees under Rules 222 and 240, SCACR; and
3. Order any such other and further relief that the Court deems just and fair.

Respectfully submitted,

McCANTS & McCANTS

s/ Clarke W. McCants, IV
Clarke W. McCants, IV
Post Office Box 2881
Aiken, South Carolina 29802
(803) 649-6200 Ext. 3
Clarkemccants4@gmail.com
S.C. Bar No. 103228
Attorney for Respondent

Dated: June 4, 2024



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

CATHERINE S. HARRISON
CHIEF DEPUTY CLERK

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COLUMBIA, SOUTH CAROLINA 29201
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February 14, 2024

Mr. Clarke Wardlaw McCants, IV, Esquire
218 Newberry Street SW
Aiken SC 29801

Re: Da'Nita White v. Roshana Robins
Appellate Case No. 2023-001222

Dear Counsel:

This Court is in receipt of the respondent's motion to strike. This appeal will be held in abeyance pending the Court's decision on the motion.

Very truly yours,

Catherine Harrison, deputy

CLERK

cc: Shalonda Cherise Wilburn, Esquire

The South Carolina Court of Appeals

Da'Nita White, Respondent,

v.

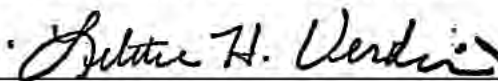
Roshana Robins, Appellant.

Appellate Case No. 2023-001222

ORDER

On January 12, 2024, Appellant served and filed the record on appeal. On January 24, 2024, Respondent moved to strike the record on appeal, arguing the record did not include everything designated by the parties and included matters not designated by the parties. After careful consideration, we grant the motion to strike the record on appeal filed on January 12, 2024.

On February 16, 2024, Appellant filed a motion to amend the record on appeal and conditionally filed an amended record on appeal. On February 26, 2024, Respondent filed a return, requesting this court deny the motion to amend the record on appeal or hold the motion in abeyance pending resolution of the motion to strike. After careful consideration, we grant the motion to amend the record on appeal. We accept the amended record on appeal as filed. Within twenty days of the date of this order, the parties shall serve and file their final briefs.



FOR THE COURT

Columbia, South Carolina

FILED
Mar 28 2024

cc:

Shalonda Cherise Wilburn, Esquire

Clarke Wardlaw McCants, IV, Esquire

The South Carolina Court of Appeals

Da'Nita White, Respondent,

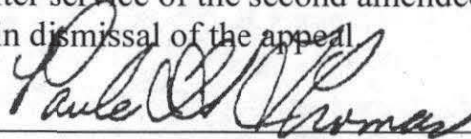
v.

Roshana Robins, Appellant.

Appellate Case No. 2023-001222

ORDER

On April 1, 2024, Respondent moved to strike the amended record on appeal filed on February 16, 2024, arguing it failed to contain all designated matters and included matters not designated. Appellant did not file a return. After careful consideration, Respondent's motion to strike the amended record on appeal filed on February 16, 2024, is granted. Within thirty days of the date of this order, Appellant shall serve and file a second amended record on appeal that complies with Rule 210 of the South Carolina Appellate Court Rules. Final briefs shall be served and filed within twenty days after service of the second amended record on appeal. Failure to comply will result in dismissal of the appeal.



FOR THE COURT

Columbia, South Carolina

FILED
Apr 29 2024

cc:

Shalonda Cherise Wilburn, Esquire
Clarke Wardlaw McCants, IV, Esquire

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v.

Roshana Robins.....Appellant.

PROOF OF SERVICE

I certify I have served the Respondent’s Motion to Dismiss on counsel for the Appellant, Shalonda Wilburn, Esquire on June 4, 2024, by electronic mail via the email address on record with AIS, at scwilburn@wilburnlawfirm.com.

McCANTS & McCANTS

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Dated: June 4, 2024