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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE YORK COUNTY COURT OF COMMON PLEAS

Daniel Hall, Circuit Court Judge

Case No. 2024-001311

Ina Shtukar Appellant,

v.

Erie Insurance Group Respondent.

RESPONDENT'S REPLY TO APPELLANT'S RETURN IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS

The Appellant claims that the Respondents Memorandum in Support struck a "false note" and was "flatly contradicted" by the cited cases. The Respondent is confident that, upon review of those cases, this Court will quickly determine which party's memorandum is at odds with the applicable law. The Appellant raised new issues in her reply that require a response. This is particularly true with respect to

her null Rule 59(e) motion filed twelve (12) days after her own notice of appeal removed jurisdiction from the trial court. This Rule 59(e) motion attempts to re-litigate the same issues argued at the July 31 hearing and in the supplemental briefs of both parties, which were the basis of the court's Final Order and Appellant's original appeal. For the reasons detailed below and in the Respondent's Memorandum in Support[1], both the Final Order and Appellant's Rule 59(e) motion are nullities, due to Appellant's previously filed and served notice of appeal.

PROCEDURAL HISTORY

The procedural history of this case is a mess. The following timeline reflects the order of events relevant to Respondent's Motion to Dismiss.

- **August 6, 2024**: The Circuit Court issues a Form 4, forecasting his decision to grant Respondent's Motion to Dismiss and deny Appellant's Motion for Default. The Form 4 requests Respondent to prepare the final formal order. That afternoon, ten days before the Circuit Court entered a final formal order, Appellant filed and served her notice of this appeal.
- **August 16, 2024**: The Circuit Court entered the final formal order granting Respondent's motion to dismiss, and denying Appellant's motion for default ten days after the Appellant had filed her Notice of Appeal with respect to the Form 4.

[1] Respondent incorporates its memorandum in support of its motion to dismiss previously submitted with this Court herein in its entirety.

- **August 18, 2024**: Twelve days after Appellant had filed her notice of appeal of the Form 4 order, Appellant files a Rule 59(e) motion with respect to the Final Order.
- **August 29, 2024**: The Circuit Court denies Appellants Rule 59(e) motion.
- **September 13, 2024**: Appellant files her Initial Brief with this Court.
- **September 19, 2024**: Respondent files its Motion to Dismiss the Appellant's Appeal.
- **September 20, 2024**: Appellant filed her amended notice of appeal or in the alternative, second notice of appeal of the Final Order and order denying her Rule 59(e) motion.

ARGUMENT

By attempting to appeal an unappealable Form 4 order, Appellant has created a procedural quagmire. The consequence of that procedural quagmire is to deprive this Court of jurisdiction and require dismissal of her appeal. In her return to Respondent's Motion to Dismiss, Appellant argues contrary to established law that the Form 4 Order is a final, appealable order. It is not.

Appellant further argues that Respondent's Motion to Dismiss was made moot by her amended notice of appeal which references the Final Order and the denial of her Rule 59 motion. Both of these were entered by the Circuit Court *after* the Trial Court was divested of jurisdiction by Appellant's appeal of the unappealable Form 4. Because the Appellant's attempted appeal of the Form 4 divested the Circuit Court

of jurisdiction to enter the Final Order and consider Appellant's Rule 59 motion, she cannot at this stage appeal the entry of these orders either. Thus, her appeal must be dismissed.

I. Appellant's Position that the Form 4 is a Final Appealable Order is Contrary to Established Law and Her Appeal Must Be Dismissed.

Under the Analysis adopted by this Court in Cloyd, the Form 4 is not an appealable Final Order.

> **IF** the Form 4 order is **NOT** efficacious as a final order, the circuit court will specifically and with certitude signify:
> (1) a more formal order will be filed; **OR**
> (2) the final order will be prepared by Attorney _____; **OR**
> (3) through the use of words and phrases what action will follow.

Cheap-O's Truck Stop, Inc. v. Cloyd, 350 S.C. 596, 605, 567 S.E.2d 514, 518 (Ct. App. 2002). When comparing the language in Judge Hall's Form 4, and the language in the Cloyd decision, it is clear Judge Hall included all three indicia outlined by the Court of Appeals, indicating that the Form 4 was not final[2]. Here, Judge Hall's Form 4 stated, "After careful consideration, Defendant's Motion to dismiss is GRANTED. The Court instructs Attorney Martineau to prepare and file a formal order." Resp't's Mem. in Supp., Ex. A. This language tracks the language used in Cloyd, combining the first and second options and all together indicating what further actions was to be taken. Based on this court's holding in Cloyd and the language contained in the

[2] As in every other instance where the Appellant is confronted with facts or case law she cannot refute, she attempts to discredit the Respondent by accusing it of misrepresenting the law or 'surprising her' with a "Perry Mason move/act." She otherwise deflects, confuses, or muddles the issues and rules instead of addressing them directly. See Appellant's Return, p. 5; Appellant's Initial Brief, p. 21; T. p. 8 l. 21-25. See generally Plaintiff's Reply Brief to Defendant's Supplemental Memorandum, Second Supplemental Brief in Opposition to Defendant's Motion to Dismiss (filed after the hearing on the motion and not requested by the court).

Form 4 issued by Judge Hall, the Form 4 was not a final order, could not be appealed, and therefore Appellant's appeal of that order should now be dismissed.

Federal Law is inapplicable because there is no corresponding state rule and the analysis is controlled by the Cloyd decision. Federal law can be persuasive in the absence of prior state law on an issue. *See* Unisun Ins. v. Hawkins, 342 S.C. 537, 539, 537 S.E.2d 559, 561-2 (Ct. App. 2000). *See also* Dunbar v. Vandermore, 295 S.C. 493, 497, 369 S.E.2d 150, 152 (Ct. App. 1988) (finding federal case law persuasive in interpreting the federal rules) [3]. Both case cited by Appellant to support her reference to federal law are inapplicable in this situation. There is no SCACR rule analogous to Fed. R. App. R. 4. Further, the Cloyd decision is directly on point and set out the appropriate analysis for determining whether a Form 4 is a final appealable order. Thus, there is no need for the Court to turn to Federal Court's application of a Federal Rule of Appellate Procedure that has no analogue under South Carolina's Appellate Court Rules. In light of the Cloyd decision and the lack of a parallel in the SCACR to Fed. R. App. R. 4, federal law is not persuasive in this case and this court should disregard Appellant's arguments based on federal law.

Whether or not findings were required by the circuit court is irrelevant to whether the Form 4 was a Final Order in light of its clear direction that a Formal

[3] This is yet another tactic Respondent has become all too familiar with throughout this litigation. Repeatedly, Appellant has attempted to apply federal rules and cases where there already exists South Carolina rules and cases directly on point where the South Carolina law does not support her position. Beginning with her insistence that all motions at the trial level be accompanied by a brief to her present assertion that no South Carolina cases exist addressing what happens when an appellant appeals an interlocutory Form 4 order.

Order would follow. Rule 52(a) of the SCRCP states, Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56. . . ." Rule 52, SCRCP. The language of the Cloyd decision does not depend on whether or not findings of fact are necessary. If a Form 4 indicates that it is not a final order using the language outlined in Cloyd it is not final, regardless of whether the Formal Order required findings of fact or not. Application of this Court's analysis in the Cloyd decision does not depend on whether findings by the circuit court were necessary. It is irrelevant to whether the Form 4 directing further action was a final order. Therefore, this court should disregard Appellant's arguments based on Rule 52(a).

Instead of addressing the appealability of an interlocutory Form 4, Appellant doubles down on her argument that the Form 4 was a final order, even in light of the language in Cloyd. Appellant does not argue the interlocutory Form 4 involved the merits of the case or affected a substantial right, abandoning these arguments. This court is empowered to dismiss any appeal or error proceeding on its own motion where it appears from the record that the court is without jurisdiction or that the judgment sought to be reviewed is not final." Levi v. N. Anderson County EMS, 409 S.C. 374, 379, 762, S.E.2d 44, 47 (Ct. App. 2014) (quoting Berry v. Zahler, 220 S.C. 86, 89, 66 S.E.2d 459, 460 (1951)). In light of the arguments made above, the interlocutory nature of the Form 4, and Appellant's failure to argue the Form 4 was an appealable interlocutory order, this court should dismiss Appellant's appeal.

II. Neither Appellant's Amended Notice of Appeal, nor the Addition of Appellant's Null Rule 59(e) Motion Can Rescue Appellant's Current Appeals.

SCAR 205 provides that, once an appeal is filed, the circuit court is divested of jurisdiction over any matters affected by the appeal. Per Rule 205, the moment Appellant served her notice of appeal, the circuit court no longer had jurisdiction to issue its final order, or entertain Appellant's Rule 59(e) motion. Id. Appellant argues that her Rule 59(e) motion, filed twelve (12) days after her notice of appeal, falls within the definition of "matters not affected by the appeal." Id. Appellant attempts to justify this argument by pointing *only* to Metts v. Mims, where the Supreme Court held that an appeal of a contempt decision did not divest the trial court of jurisdiction to hear a motion for summary judgment. 384 S.C. 491, 498, 682 S.E.2d 813, 817 (2009).

In Metts, the matter on appeal was a contempt order resulting from a discovery dispute. Id. at 496, 816. Subsequent to the appeal, the trial court granted the Defendant's summary judgment motion. Id. On appeal, the Petitioner argued that since this summary judgment motion was made after the notice of appeal, that the trial court did not have jurisdiction, and therefore could not grant the motion to dismiss. Id. Here, as evident from the trial record and Appellant's Initial Brief, the issues underlying Appellant's first notice of appeal and the Rule 59(e) motion are the

same. In fact, the parties thoroughly briefed and argued these issues before, during, and after the July 31 hearing.[4]

Because the first notice of appeal and the Rule 59(e) motion encompass the same issues, and the notice of appeal was served prior to the Final Order, all procedural acts that took place after the August 6, 2024 are procedurally null. This includes Appellant's Rule 59(e) motion **and** the Final Order issued on August 16, 2024. The Appellant cannot create a right to appeal she would not otherwise have by filing a motion the circuit court did not have jurisdiction to hear.

CONCLUSION

This entire procedural mess could have been avoided, if Appellant had simply waited for the trial court to issue its final order **before** filing and serving her notice of appeal. Instead of waiting for the trial court's Final Order as explicitly allowed under Rule 203(b)(1), SCRAP, Appellant served her notice of appeal the very same afternoon the trial court issued its Form 4. *See* Notice of Appeal. Appellant is now asking this court to extricate her from a procedural mess of her own making by acting in contravention of this Court's Rules and jurisdictional requirements. The Court should decline her request and dismiss her pending appeal.

[SIGNATURE PAGE TO FOLLOW]

[4] *See generally* Plaintiff's Reply Brief to Defendant's Supplemental Memorandum, Second Supplemental Brief in Opposition to Defendant's Motion to Dismiss.

Respectfully submitted on this the 27th day of September, 2024.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that Respondent's Reply to Appellant's Return in Opposition to Respondent's Motion to Dismiss was served on all counsel of record pursuant to Appellate Case Number 2022-000029 and SCACR Rule 262 via e-mail: addressed as follows:

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[SIGNATURE PAGE TO FOLLOW]

On this the 27th day of September, 2024

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