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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
R. Keith Kelly, Circuit Court Judge
Trial Court Case No. 2022CP0701598

APPELLATE CASE NO. 2024-00759

James Ware, Alisa Ware, Jason DuBose, and Amanda DuBose,

Appellants,

v.

Beaufort County Zoning Board of Appeals and Robert Merchant,
in his Capacity as Planning Director of Beaufort County

Respondents.

FINAL JOINT BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

| | Page |
|--|-----------|
| Table of Authorities..... | ii |
| Counter-Statement of Issues on Appeal | 1 |
| Statement of the Case | 2 |
| Standard of Review | 5 |
| Arguments | 6 |
| | |
| I. THE CIRCUIT COURT PROPERLY APPLIED THE CLEAR AND SPECIFIC TIME LIMITATIONS OF S.C. CODE § 6-29-820(A) TO DISMISS AS UNTIMELY APPELLANTS' APPEAL TO CIRCUIT COURT FROM THE COUNTY ZONING BOARD..... | 6 |
| | |
| II. THE CIRCUIT COURT PROPERLY DENIED APPELLANTS' MOTION TO FILE A SUPPLEMENTAL NOTICE OF APPEAL MADE AFTER THE TIME FOR APPEAL HAD RUN..... | 9 |
| | |
| III. THE CIRCUIT COURT PROPERLY DENIED APPELLANTS' RULE 59(e) MOTION AND ITS NEW ARGUMENT THAT MISSED FILING DEADLINES WERE THE EQUIVALENT OF TYPING OR SPELLING ERRORS..... | 10 |
| | |
| Conclusion..... | 12 |

TABLE OF AUTHORITIES

CASES

| | Page |
|---|------|
| <u>Austin v. Board of Zoning Appeals</u> , 362 S.C. 29, 606 S.E. 2d 209 (Ct. App. 2004)..... | 5 |
| <u>Charleston Lumber Company, Inc. v. Miller Housing Corporation</u> , 318 S.C. 471, 458 S.E. 2d 431 (Ct. App.1995) | 11 |
| <u>Dortch v. City of Columbia Planning & Development Services/ Zoning Division</u> , Op. No. 2015-UP-535, 2015 WL 7686970 (S.C. Ct. App. filed Nov. 25, 2015)..... | 9-10 |
| <u>Gartside v. Gartside</u> , 383 S.C. 35, 677 S.E.2d 621 (Ct. App. 2009)..... | 10 |
| <u>Moody v. Dickinson</u> , 54 S.C. 526, 32 S.E. 562 (1899)..... | 11 |
| <u>Sadisco of Greenville, Inc. v. Greenville County Board of Zoning Appeals</u> , 340 S.C. 57, 530 S.E.2d 383 (2000) | 5,6 |
| <u>State v. Scott</u> , 351 S.C. 584, 571 S.E.2d 700 (2002)..... | 11 |
| <u>Vulcan Materials Company v. Greenville County Board of Zoning Appeals</u> , 342 S.C. 480, 536 S.E.2d 892 (Ct. App. 2000) | 7-8 |
| <u>Ware, et al v. Beaufort County, et al</u> , Op. No. 2025-UP-001 (S.C. Ct. App. filed January 2, 2025)..... | 2 |

STATUTES

| | |
|---|--------|
| S.C. Code § 6-29-820(A)..... | Passim |
| 1994 S.C. Acts 4010, 1994 Act No. 355, §§ 2 and 3 | 8 |

COURT RULES

| | |
|-------------------------------|---------|
| Rule 6(e), SCRCF | 9-10 |
| Rule 15(a), SCRCF..... | 5 |
| Rule 59(e), SCRCF..... | 5, 9,11 |
| Rule 60 (b), SCRCF..... | 6,11 |
| Rule 208(b)(1)(C), SCACR..... | 2 |
| Rule 208 (b)(2), SCACR | 2 |

COUNTER- STATEMENT OF ISSUES ON APPEAL

- I. **DID THE CIRCUIT COURT PROPERLY APPLY THE CLEAR AND SPECIFIC TIME LIMITATIONS OF S.C. CODE § 6-29-820(A) TO DISMISS AS UNTIMELY APPELLANTS' APPEAL TO CIRCUIT COURT FROM THE COUNTY ZONING BOARD?**

- II. **DID THE CIRCUIT COURT PROPERLY DENY APPELLANTS' MOTION TO FILE A SUPPLEMENTAL NOTICE OF APPEAL MADE AFTER THE TIME FOR APPEAL HAD RUN?**

- III. **DID THE CIRCUIT COURT PROPERLY DENY APPELLANTS' RULE 59(e) MOTION AND ITS NEW ARGUMENT THAT MISSED FILING DEADLINES WERE THE EQUIVALENT OF TYPING OR SPELLING ERRORS?**

STATEMENT OF THE CASE

Appellants' Statement of the Case, contrary to Rule 208(b)(1)(C), SCACR, contains contested matter and disputed facts. Because Respondents do not wish to be bound by Appellants' Statement of the Case, Respondents Beaufort County Zoning Board of Appeals ("the ZBA") and Robert Merchant, in his capacity as Planning Director of Beaufort County ("the Planning Director") (Respondents together referred to as "the County") submit their own Statement of the Case pursuant to Rule 208(b)(2), SCACR.

This case represents an effort by four of the 35 Plaintiffs in the related Beaufort County Common Pleas case of James Ware, et al v. Beaufort County, et al,¹ filed on June 11, 2021, to exhaust available administrative remedies on the issue of the legality under the County's own zoning code of the County's operation of the Daufuskie Island public ferry from a commercial dock in the Buckingham Landing area of the County. After the filing of this related case, the four plaintiffs, by their counsel's letter of September 15, 2021 (R. pp. 31-32), requested a zoning interpretation from the County Planning Director on the propriety of the County's use of the property. The Planning Director, by letter dated April 21, 2022 (R. p. 33), responded with a written determination (also called an interpretation) that the County's use of the commercial dock as a ferry landing conformed to the original zoning permit issued on May 4, 2009, and was a legal use under the County zoning code.

On May 29, 2022, Appellants filed an appeal to the Beaufort County ZBA of the Planning Director's written determination. The ZBA held its first hearing on the appeal on July 28, 2022.

¹ This related case is Beaufort County Common Pleas Number 2021-CP-07-01078, in which 35 plaintiffs seek injunctive, declaratory, and monetary relief for the County's use of nearby property for a public ferry landing. A preliminary injunction requiring the County to cease use of the property as a public ferry landing was reversed by the Court of Appeals in an unpublished opinion. Ware, et al v. Beaufort County, et al, Op. No. 2025-UP-001 (S.C. Ct. App. filed January 2, 2025).

(R. p. 118). At the conclusion of the presentation of evidence at the July hearing, a motion was made to overturn the Planning Director's interpretation but the motion failed, for lack of a majority of votes, by a vote of three-to-three. (R. p. 121). According to the ZBA's subsequent Decision and Order, the failure of the motion resulted "in the Interpretation being upheld." ²

Following the first ZBA hearing, and before issuance of the ZBA Decision and Order, Appellants filed with the ZBA, on August 2, 2022, a Petition for Reconsideration which included a reassertion of Appellants' original grounds for appeal. (R. p. 121). On August 8, 2022, the County Zoning Administrator advised Appellants' counsel of the scheduling of a hearing on Appellants' Petition for Reconsideration for August 25, 2022. (R. pp.139-141).

However, prior to the scheduled hearing on Appellants' Petition for Reconsideration, Appellants filed in the circuit court, on August 23, 2022, a Notice of Appeal and Petition from the first ZBA hearing held on July 28. (R. pp. 16-33). The Notice of Appeal stated on its face that it was being filed within thirty days of Appellants "having learned of the decision" of the ZBA on the tie vote denying the reversal of the Planning Director determination. (R. p.16).

At the ZBA meeting on August 25, the Zoning Board considered the Petition for Reconsideration and its points of argument, and by majority vote, denied the Petition. (R. pp. 118-121). By operation of the Board's Rules of Procedure, the effect of a vote denying a petition for Reconsideration was that the vote was considered to be the Board's final action on the matter. (R. p. 121, n. 2).

² The ZBA's Conclusions of Law in its Decision and Order included as Conclusion 2:

"Since the Appellants had the burden of proof and persuasion, the Chair of the Board interpreted the failure of the motion to overturn as a basis for denial of the appeal, and ruled that the appeal was denied. Neither the Board nor the attorney for the Appellants challenged or otherwise objected to this ruling at the July hearing. The attorney for the Appellants specifically agreed at that hearing with the ruling of denial as the effect of the failure of the motion to overturn." (R. p. 121).

The ZBA issued its written Decision and Order, with Findings of Fact and Conclusions of Law, under date of September 16, 2022, with a date of mailing of September 20, and with receipt by Appellants' counsel on September 24. (R. p. 122; R. p. 36). The Board affirmed the Planning Director's interpretation of the County's legal use of the property as a ferry landing as "correct and proper" and denied Appellants' appeal. (R. pp. 118-122).

In the circuit court case, the Planning Director, on October 23, 2022, filed a Motion to Dismiss Appellants' Notice of Appeal and Petition on the grounds that the Notice, as pleaded on its face, was filed prior to the mailing of the Zoning Board decision and was contrary to S.C. Code § 6-29-820(A), that the Court lacked jurisdiction over the subject matter of the appeal, and that the Notice failed to state facts sufficient to constitute a cause of action. (R. pp. 51-52). The Planning Director also filed on that date a Response to the Notice with an Amended Response filed on October 28. (R. pp. 53-58; R. pp. 59-64).

On October 24, 2022, Appellants filed a Motion to Serve Supplemental Pleading with an attached Exhibit of a Supplemental Notice of Appeal and Petition. The Motion and the Exhibit referenced the ZBA's Decision and Order received by Appellants' counsel on September 24. (R. pp. 36-50). Appellants did not attempt to serve or file an Amended Notice of Appeal pursuant to Rule 15(a) within thirty days of the service of the Planning Director's Motion to Dismiss or Response.

After receipt of notice from the Court of the scheduling of the hearing on the two pending Motions, all parties filed supporting/opposing memos. (R. pp. 70-73; R. pp. 65-68; R. p. 69). The hearing on both the Planning Director's Motion to Dismiss and Appellants' Motion to Serve Supplemental Pleading was held on April 18, 2023, before the Honorable R. Keith Kelly, Circuit Court Judge. (R. pp. 97-117).

By Order filed May 17, 2023, the circuit court denied Appellants' Motion to Serve Supplemental Pleading and granted the Planning Director's Motion to Dismiss the action. (R. pp. 3-9). Appellants filed a Rule 59(e) Motion to Alter or Amend the Order Dismissing Case on May 25, 2023 (R. pp. 74-76), and subsequently, on June 8, 2023, filed a supporting Memorandum. (R. pp. 77-89). On June 15, 2023, and June 16, 2023, respectively, the Planning Director and the ZBA each filed a Memorandum in Opposition to Appellants' Rule 59(e) Motion. (R. pp. 90-94; R. pp. 95-96). The circuit court filed an Order Denying Appellants' Rule 59(e) Motion on April 8, 2024. (R. pp. 10-15). Appellants filed a timely appeal to this Court on May 7, 2024.

STANDARD OF REVIEW

The timeliness of an appeal from the decision of a zoning board to the circuit court is a jurisdictional requirement. Sadisco of Greenville, Inc. v. Greenville County Board of Zoning Appeals, 340 S.C. 57, 59, 530 S.E.2d 383, 384 (2000).

The procedures governing appeals of zoning board decisions to the circuit court are prescribed by statute. When reviewing a zoning board decision, the circuit court sits as an appellate court. The policy of freely allowing amendments of pleadings in civil trial litigation does not apply to the court in its appellate capacity after the expiration of the statutory period for filing the appeal. Austin v. Board of Zoning Appeals, 362 S.C. 29, 37-39, 606 S.E. 2d 209, 213-214 (Ct. App. 2004).

ARGUMENTS

I. THE CIRCUIT COURT PROPERLY APPLIED THE SPECIFIC TIME LIMITATIONS OF S.C. CODE § 6-29-820(A) TO DISMISS AS UNTIMELY APPELLANTS' APPEAL TO CIRCUIT COURT FROM THE COUNTY ZONING BOARD.

In establishing the time limitations for filing an appeal to circuit court from a zoning board decision, the language of S.C. Code § 6-29-820(A) is plain and clear: "The appeal must be filed within thirty days after the decision of the board is mailed." (Emphasis added). In Sadisco of Greenville, Inc. v. Greenville County Board of Zoning Appeals, 340 S.C. 57, 59, 530 S.E.2d 383, 384 (2000), the State Supreme Court observed that: "this Court has consistently stated that service of the Notice of Appeal is a jurisdictional requirement, and this Court has no authority to extend or expand the time in which the Notice of Appeal must be served."

Sadisco involved dismissal by the circuit court of an appeal from a county zoning board for failure to timely file and serve the Notice of Appeal. The appealing party then moved in the circuit court under Rule 60(b)(1), SCRCP, for relief from judgment through excusable neglect and inadvertence. In affirming the circuit court's denial of the Rule 60 motion for relief from judgment, the Supreme Court observed that, if it were to grant the motion when the party failed to timely serve a Notice of Appeal, "this Court would be exceeding its jurisdictional limits by allowing a party to extend or expand the time in which a Notice of Appeal may be served." Id.

In our case, Appellants filed their Notice of Appeal and Petition (R. pp. 16-33) on August 23, 2022, after the first of the two Zoning Board hearings, but before the mailing of the Zoning Board decision on September 20, 2022. Because this filing preceded the mailing of the Zoning Board's decision, it was premature, and, under the rationale of Sadisco, was insufficient to create jurisdiction in the circuit court.

After the second of the Zoning Board hearings on August 25, 2022, Appellants subsequently received the Zoning Board decision by mail to counsel on September 24, 2022, with knowledge of its mailing date (R. p. 36), but failed to file a new or amended Notice of Appeal within thirty days of the mailing of the decision. On October 24, 2022, thirty-four days after the mailing of the Zoning Board decision, Appellants filed a Notice of Motion and Motion to Serve Supplemental Pleading (with an attached Exhibit A of a Supplemental Notice of Appeal and Petition)(R. pp. 36-50).

In the two Orders ending the case (by granting the County's motion to dismiss, and by denying Appellants' Motion to Serve a Supplemental Pleading), the circuit court determined that Appellants failed to timely file their appeal to circuit court within the thirty-day time frame established by Section 6-29-820(A) and that their proffered excuses for that failure to file were unavailing. The circuit court's determinations as to lack of timely filing were correct.

Despite citation to Vulcan Materials Company v. Greenville County Board of Zoning Appeals, 342 S.C. 480, 536 S.E.2d 892 (Ct. App. 2000), at the outset of their argument in Brief (Initial Brief pp. 11-12), Appellants cannot reasonably claim that the issue of timeliness involved in our case depends upon whether the pre-1994 version or post-1994 version of the Code section on appeal applies. In Vulcan, it was necessary for the court to determine whether the pre-1994 version of the appeal section (providing for filing of the appeal in circuit court within thirty days after the Zoning Board decision was "rendered") applied or the post-1994 version (providing for filing of the appeal in circuit court within thirty days after the Zoning Board decision was "mailed") applied. Vulcan, at 342 S.C. 488-491, 536 S.E. 2d 896-898.

Here, Appellants' zoning appeal issue arose in 2022, more than twenty years after the State Legislature's 1999 mandatory imposition of the 1994 Local Government Comprehensive Planning

Enabling Act. See 1994 S.C. Acts 4010, 1994 Act No. 355, §§ 2 and 3, discussed in Vulcan, at 342 S.C. 490, 536 S.E.2d at 897. Moreover, Appellants clearly had knowledge of the required statutory appeal time period. Appellants' Notice of Appeal and Petition quoted Code section 6-29-820(A) and its language on the time for filing of an appeal: "The appeal must be filed within thirty days after the decision of the board is mailed." (R. p. 17). Appellants also clearly had knowledge of the date of mailing of the Zoning Board decision and received the Decision within thirty days of mailing. Appellants' Motion to Serve Supplemental Pleading provides, on its page 1, that " the Defendant Beaufort County Zoning Board of Appeals issued a written Decision and Order. . .dated September 16, 2022, mailed on September 20, 2022, and received by the undersigned counsel on September 24, 2022." (R. p. 36). Appellants make no claim that they were misled or misinformed about the statutory time period for appeal.

To further attempt to excuse the untimely filing both before and after the mailing of the Zoning Board decision, Appellants also argued in their Memorandum in Support of Their Rule 59(e) Motion (R. pp. 84 and 86-87), and in their Brief to this Court (Initial Brief pp. 12-13 and 14-15), that the County was "on notice" of an appeal from the Zoning Board and that the County was not prejudiced by the untimely filing. Such arguments, of course, if legally valid, could avoid all time limits and limitations period and become exceptions that consumed the rule. In its second Order that denied Rule 59(e) relief, the circuit court succinctly disposed of these arguments:

Knowledge of an opposing party's attempt to undertake an appeal is not a waiver of the Respondents' legal rights. Similarly, Respondents plainly are prejudiced if the court were to allow an untimely appeal to continue against them, and particularly when the Court, because of the untimely appeal, lacked subject matter jurisdiction. (R. pp. 13-14).

II. THE CIRCUIT COURT PROPERLY DENIED APPELLANTS' MOTION TO FILE A SUPPLEMENTAL NOTICE OF APPEAL MADE AFTER THE TIME FOR APPEAL HAD RUN.

At the hearing, and in Appellants' Memorandum for the hearing (R. pp. 70-73), counsel for Appellants argued, based on the unpublished opinion of the Court of Appeals in Dortch v. City of Columbia Planning & Development Services/ Zoning Division, Op. No. 2015-UP-535, 2015 WL 7686970 (S.C. Ct. App. filed Nov. 25, 2015), that Rule 6(e), SCRCF, applied to the calculation of the time for appeal pursuant to §6-29-820(A) so as to allow five additional days (for a total of thirty-five days from the date of mailing of the Zoning Board decision) for filing of an appeal from the Zoning Board. Under Appellants' argument, the thirty-five days would have extended the time for filing of an appeal from October 20 to October 25, so that their Notice of Motion and Motion to Serve Supplemental Pleading, filed on October 24, would have been filed timely. (R. p.106, line 3- p. 107, line 18). Appellants argued to the circuit court that, by reason of this purported in-time filing of the Motion, any jurisdictional defect in filing prematurely was "cured." by a timely amendment after the mailing of the Zoning Board decision. Id.

The circuit court, in its Order filed May 17, 2023 (R. pp. 6-7), considered Dortch but correctly concluded that the case did not hold that Rule 6(e) applied to the calculation of the statutory time period for appeal from a zoning board. Rather, the circuit court interpreted the result in Dortch as merely remanding that case to the lower court for a ruling, in light of Rule 6(e) and other authorities, on a motion to reconsider not previously ruled on by the lower court. The result of the remand in Dortch was not presented to the circuit court and was not revealed by Appellants in their Brief. The circuit court also noted that Dortch had not been cited by any subsequent reported cases for "any such holding as urged by Appellants." (R. p. 7). Appellants, in their Brief

to this Court, also fail to indicate any subsequent authorities citing Dortch (or any other cases) on any application of Rule 6(e) to §6-29-820(A).

Additionally, as understood by counsel, the purpose of the allowance of five days "extra" time in Rule 6(e) is to accommodate delays or vagaries of mail delivery. However, §6-29-820(A), which expressly contemplates delivery by mail, makes no allowance beyond the thirty-day period. It seems clear, from the language of the statute, that the Legislature intended to provide for mailing as the starting point for calculating the appeal period and also intended that starting point to apply without allowance for additional time for mailing.

Moreover, as the circuit court observed in its Order, even if Rule 6(e) did apply to render timely Appellants' pleading, the pleading was not itself a Supplemental Notice of Appeal but was a mere Motion requesting that the court allow it to serve and file a Supplemental Notice of Appeal. (R. p. 7). This means that, even if considered as timely, Appellants' Motion to Serve Supplemental Pleading was not the equivalent of an amended Notice of Appeal. This circumstance was acknowledged by counsel for Appellants at the April 2023 hearing: "We ask for permission of the Court to file our amended, basically, appeal." (R. p. 107, lines 13-14)..

III. THE CIRCUIT COURT PROPERLY DENIED APPELLANTS' RULE 59(e) MOTION AND ITS NEW ARGUMENT THAT MISSED FILING DEADLINES WERE THE EQUIVALENT OF TYPING OR SPELLING ERRORS

In their Memorandum in Support of Rule 59(e) Motion, filed June 8, 2023 (R. pp. 77-89), the Appellants presented to the circuit court , for the first time,³ their argument, by way of reference to three cited cases, that the error in the timing of the filing of the Motion to Serve

³ A party cannot use a motion to alter or amend a judgment to present to the lower court an issue the party could have raised prior to judgment but did not. See, for example, Gartside v. Gartside, 383 S.C. 35, 677 S.E.2d 621 (Ct. App. 2009).

Supplemental Pleading was equivalent to a "clerical error." (R. pp. 84-86). Appellants reiterate this argument, nearly verbatim, in their Brief to this Court (Initial Brief pp. 8-10). Each of these cases was discussed, and ultimately distinguished, by the circuit court in its Order Denying Appellants' Rule 59(e), SCRCF, Motion to Alter or Amend, filed April 8, 2024 (R. p. 13).

The cases cited by Appellants included Moody v. Dickinson, 54 S.C. 526, 32 S.E. 562 (1899), in which the error was "a mere clerical error in the title of the notice" of appeal to the appeals court, and Charleston Lumber Company, Inc. v. Miller Housing Corporation, 318 S.C. 471, 458 S.E. 2d 431 (Ct. App.1995), in which the court allowed the appellant to continue its appeal despite "a mere clerical error" in failing to list one of five related cases in the notice of appeal. The third case cited by Appellants was State v. Scott, 351 S.C. 584, 571 S.E.2d 700 (2002), in which the "clerical error" was the listing of the wrong County (Richland rather than Lexington) in the notice of appeal. After citing these cases, Appellants argued, in both their Memorandum in Support of their Rule 59(e) Motion (R. p. 86), and in their Brief to this Court (Initial Brief pp.14-15), that the "too early" filing was "at worst, a good faith clerical error." While recognizing in its Order denying Rule 59(e) relief that the three cited cases involved "clerical errors", the circuit court determined that no situation of "clerical error" was presented in our case by the untimely filing before or after the mailing of the Zoning Board decision. (R. p. 13). Appellants, as observed by the circuit court, made no direct claim of clerical error and offered no explanation of how a typing error equated to untimely filing. The County also notes that Appellants asserted no claim under Rule 60(b), SCRCF, for relief for mistake, inadvertence, or excusable neglect.

Despite the citations to cases of "clerical error", it appears that Appellants impliedly argue that the reason for the initial untimely appeal filing was intentional. At the hearing before the circuit court, counsel for Appellants argued that he filed the initial Notice of Appeal as part of

Appellants' efforts to be "very cautious" (R. p. 106, lines 9-15). Counsel for Appellants further explained, in Appellants' Brief in this Court, that the initial Notice of Appeal was filed in circuit court "in an abundance of caution" because almost thirty days had passed since the first Zoning Board hearing and no written decision had been issued (Initial Brief p. 6). Finally, Appellants offered the reasoning that the initial filing "was reasonable" in order to avoid a subsequent claim by the County that Appellants, contrary to the clear language of §6-29-820(A), should have filed their appeal within thirty days of the date the Zoning Board decision was "rendered" at the hearing (R. p. 84, and Initial Brief p.12) . As determined by the circuit court, Appellants' excuses for untimely filing are insufficient to justify alteration of the clear language of § 6-29- 820(A).

CONCLUSION

The circuit court correctly applied the clear and specific time limitations for appeal from a zoning board to circuit court as provided by S.C. Code § 6-29-820(A).

For the reasons stated above, for the reasons stated by the circuit court in its Orders, and for any additional reasons apparent to the Court from the record, the Respondents urge that this Court affirm the Orders of the circuit court granting the motion to dismiss, and denying Appellants' motion to file a supplemental Notice of Appeal, with the effect of ending the case.

Respectfully submitted,

February 20 , 2025

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PROOF OF SERVICE

I certify that I have this date served the Final Joint Brief of Respondents on Thomas C. Taylor, Esquire, Appellants' attorney of record, by electronic mail to his AIS e-mail address of tom@thomastaylorlaw.com.

February 20, 2025

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