

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF GREENVILLE )  
 )  
IN THE MATTER OF: )  
Estate of Florence Petrak Mensch )  
 )  
Sterling Raymond Mensch, III, individually, )  
as former Personal Representative of the )  
Estate of Florence Petrak Mensch and in )  
the former capacity as Agent under a )  
Power of Attorney for Florence Petrak )  
Mensch )  
 )  
Appellant, )  
 )  
vs. )  
 )  
Shauna M. Waddell, individually and as )  
Personal Representative of the Estate of )  
Florence Petrak Mensch and )  
John R. Mensch, )  
 )  
Respondent. )  
 )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
THIRTEENTH JUDICIAL CIRCUIT  
  
C.A. No.: 2022-CP-23-01064

ORDER

**RECEIVED**  
**May 27 2022**  
**SC Court of Appeals**

This matter came before the Court for a hearing on April 27, 2022 pursuant to Petitioner’s Motion to Dismiss Respondent’s “Appeal” of the Orders of the Honorable Debora A. Faulkner entered on January 26, 2022 and February 17, 2022. In addressing the motion before the court, the court has reviewed Judge Faulkner’s two Orders, the underlying Motion to Alter or Amend filed with the probate court as well as Memoranda submitted by counsel for both parties and in considering the arguments of counsel at the hearing, I find Respondent’s Motion should be granted.

**Factual Summary**

On May 15, 2019, the Respondents filed a Petition with the probate court alleging numerous causes of action against the Appellant. On July 29, 2021, the probate court entered an

Order granting Respondent's Motion for Summary Judgment on breach of fiduciary duty, violation of the S.C. Uniform Power of Attorney Act and conversion. A four-day damages hearing was held on August 17 and 18 and September 16 and 17 of 2021. On January 26, 2022, the probate court found in favor of Respondents and awarded nine hundred eighty-four thousand seven hundred sixty-three and 00/100 dollars (\$984,763.00) in favor of the Estate of Florence Mensch. On February 2, 2022, Appellant filed a Motion to Alter or Amend Judge Faulkner's Order dated January 26<sup>th</sup>, 2022. The Honorable Debora A. Faulkner in her Order dated February 17<sup>th</sup>, found that Appellant failed to comply with the mandates of SCRCP Rule 7(b)(1) by failing to state any grounds that would entitle Respondent to relief. Not only did Appellant fail to state any grounds whatsoever in the Motion to Alter or Amend, but Appellant also failed to state the relief or order sought as required under SCRCP Rule 7(b)(1). Respondent argues that the legal effect of Appellant's failure to specify the grounds of his motion is that the filing of the motion to alter or amend did not stay the time for appeal pursuant to Rule 59(f), SCRCP.

**I. Appellant's Argument that the Appeal filed by Appellant was not timely**

After review of Appellant's Memorandum in Opposition and arguments made by Appellant's counsel, Appellant is arguing that their appeal should be dismissed as untimely because they allege that the January damages Order was not a final order. Appellant argued at the hearing that **his appeal** was untimely because Judge Faulkner's Order for damages **against Appellant** included a reduction of the judgment amount allocated to 2018 taxes, penalties and interest (\$40,314.00), based on whether the IRS forgives penalties and interest which are currently being appealed by Shauna Waddell as Personal Representative of the Estate of Florence Mensch.

Judge Faulkner emphasized in her Order dated February 17, 2022 that the January 26, 2022 Order was a **final Order**. The Order awarding damages was issued following a four-day trial on damages, and such was clearly intended by Judge Faulkner to be a final Order in the case. The Court previously granted summary judgment in favor of Petitioners and the January Order was the final Order awarding damages after the trial. The Order discusses the filing of supplemental proceedings, and disposes of every cause of action in the case. There is nothing in the Order which says the Order will be amended at a later date, nor that further proceedings are necessary in the probate court after the IRS rules on the Appeal. The Order states that the \$40,314.00 **will be** reduced by the 2018 penalties and interest if the appeal of those penalties and interest is successful. Clearly, there is nothing further for the probate court to do. An IRS appeal could take a substantial amount of time, and it would be inequitable to require completion of the IRS appeal before the court can issue a final order in the case, and before the Estate can collect any amount of the judgment, especially given the fact that the amount subject to that appeal is some portion of \$40,314.00, which is a small percentage of the overall judgment of \$984,763.00.

In addition, Appellant did not allege that the January Order for damages was not a final order in his Motion to Alter or Amend the Order, nor at any time prior to filing the notice of appeal. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). It is clear that the issue was not raised as Appellant did not state any grounds for the Motion to Alter or Amend and they did not request any specific relief. An issue cannot be raised for the first time on appeal, and therefore Appellant's argument that this is not a final Order cannot be raised at this time. The IRS appeal

is a good example of a ground that could have been stated in a motion to alter or amend. If that were stated as a ground then Judge Faulkner could have dealt with the issue at the time, but rather Appellant is just now stating this ground for the very first time on appeal. The Court in *Elam v. South Carolina Department of Transportation* found, “A party must file a Rule 59(e) motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.” *Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). Appellant did not state any grounds in the Motion to Alter or Amend, and certainly did not raise the issue that the January Order for damages was not a final order.

This Court finds that Judge Faulkner’s January 26, 2022 Order was a final order, and therefore Appellant’s request that the case be remanded to probate court is DENIED.

## **II. Respondent’s Motion to Dismiss the Appeal**

Respondent’s Counsel argues that the legal effect of Appellant’s failure to specify the grounds of his Motion to Alter or Amend is that the filing of the motion did not stay the time for appeal pursuant to Rule 59(f), SCRPC. Therefore, Appellant’s notice of appeal was untimely. As such, Appellant has failed to comply with the provisions of S.C. Code Ann. §62-1-308(a) by appealing in a timely fashion the probate court’s Order for damages dated January 26<sup>th</sup>, 2022.

The substance of Appellant’s Motion to Alter or Amend filed on February 2, 2022 stated:

“Respondent...move pursuant to Rule 59 of the South Carolina Rules of Civil Procedure to alter or amend the Order granting Petitioner damages. WHEREFORE, Respondent respectfully requests this court to alter or amend its January 26, 2022, Order.”

In *Camp v. Camp*, the Court of Appeals stated, “A timely post-trial motion, including a motion to alter or amend the judgment pursuant to Rule 59(e), SCRPC, stays the time for an appeal for all parties until receipt of written notice of entry of the order granting or denying such

motion.’ ” Camp v. Camp, 386 S.C. 571, 575, 689 S.E.2d 634, 636 (2010) (quoting Elam v. South Carolina Dep’t of Transp., 361 S.C. 9, 15, 602 S.E.2d 772, 775 (2004)); Rule 203(b)(1), SCACR; Rule 59(f), SCRCP. “Rule 7(b)(1), SCRCP requires that motions ‘**shall state with particularity the grounds therefor, and shall set forth the relief or order sought.**’ ” Camp, 386 S.C. at 575, 689 S.E.2d at 636. “The particularity requirement ‘is to be read flexibly in recognition of the peculiar circumstances of the case.’ ” Id. (quoting Cambridge Plating Co., Inc. v. Napco, Inc., 85 F.3d 752, 760 (1st Cir.1996)). “ ‘By requiring notice to the court and the opposing party of the basis for the motion, rule 7(b)(1) advances the policies of reducing prejudice to either party and assuring that the court can comprehend the basis of the motion and deal with it fairly.’ ” [401 S.C. 132] Id. (quoting Calderon v. Kansas Dep’t of Soc. & Rehab. Servs., 181 F.3d 1180, 1186 (10th Cir.1999)). The Court in Camp v. Camp further stated, “The purposes of insufficient and successive post-trial motions appear to be the same: both attempt to buy time without asserting a meritorious claim. These tactics further neither justice nor efficiency, and we cannot facilitate their use. *Id.*”

The holding in Camp v. Camp was overruled by the Supreme Court, but for reasons that do not exist in the present case. The Supreme Court held that “we do not believe applying the particularity requirement in an overly technical fashion **in this case** would serve the purpose behind the rule.” Camp v. Camp, 386 S.C. 571, 576, 689 S.E.2d 634, 636-37 (2010). However, the Supreme Court goes on to state that it is not necessary to apply the particularity requirement in that case because (1) neither party was prejudiced and (2) the court was able to both comprehend the motion and deal with it fairly. *Id.* Therefore, the Supreme Court found in **that particular case** that the lower court was able to deal with the motion for reconsideration fairly. *Id.*

However, unlike cases in which the court and the parties can comprehend the basis of the motion and deal with it fairly, in this case Judge Faulkner specifically found in her Order dated February 23, 2022 “the bare request to the Court to amend the Order under Rule 59 fails to give notice to the Court and opposing counsel of the relief being requested of the Court.” In the February Order, Judge Faulkner referenced the S.C. Supreme Court Order of February 4, 2022 regarding the operation of trial courts during the Coronavirus Emergency which directs that hearings on motions should be minimized. The Order directs trial judges to dispose of motions without merit without waiting on a return or other response from opposing counsel.<sup>1</sup> Therefore, **in this case** Appellant did not state sufficient grounds or relief sought and the court was unable to comprehend the motion or deal with it fairly.

Judge Faulkner’s Order denying the motion to alter or amend is consistent with the spirit and letter of Rule 7(b)(1). No overly technical application of the Rule is being applied. It was incumbent upon Appellant to comply with the requirements of Rule 7(b)(1) in order to trigger the stay provided by Rule 59(f). SCRCF Rule 1 admonishes both the court and the parties to a case to construe, administer and employ the Rules to secure the just, speedy and inexpensive determination of every action and proceeding. “The Rules governing civil procedure exist for a reason and Plaintiff has failed to show good cause for not complying with those rules.” Sapphire Enters v. Allstate Ins. Co. (D. S.C. 2020).

The legal effect of Appellant’s failure to specify the grounds of his motion is that the filing of the motion did not stay the time for appeal pursuant to Rule 59(f), SCRCF. Therefore, Appellant’s notice of appeal was untimely. As such, Appellant has failed to comply with the

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<sup>1</sup> See <https://sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=2655>

provisions of S.C. Code Ann. §62-1-308(a) by appealing in a timely fashion the probate court's Order for damages dated January 26<sup>th</sup>, 2022.

Based on the foregoing, this Court dismisses the appeal of the underlying Orders from the probate court as there exist no appellate jurisdiction of this Court.

The Court hereby orders as follows:

1. This Court finds that Judge Faulkner's January 26, 2022 Order was a final order, and Appellant's request that the case be remanded to probate court is **DENIED**.
2. Respondent's Motion to Dismiss the appeals of the Probate Court Orders is **GRANTED**.

IT IS SO ORDERED.

[electronic signature page to follow]



Greenville Common Pleas

**Case Caption:** Sterling Raymond Mensch VS Shauna M Waddell , defendant, et al  
**Case Number:** 2022CP2301064  
**Type:** Order/Dismissal

So Ordered

s/Alex Kinlaw, Jr., #2763