

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2013-CP-10-0893

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JUL 07 2014

SC Court of Appeals

Shannon C. McGrath and the Shannon C McGrath 2005 Trust,

Appellants,

v.

Thomas J. McGrath, TD Ameritrade, Inc., E*Trade Securities, LLC and E*Trade
Clearing, LLC, Defendants,

Of whom Thomas J. McGrath is the Respondent.

RETURN TO RESPONDENT THOMAS J. MCGRATH'S MOTION TO DISMISS
APPEAL

Brian C. Duffy
Julie L. Moore
Duffy & Young, LLC
96 Broad Street
Charleston, SC 29401
Attorneys for Appellants

July 1, 2014

Appellants Shannon C. McGrath and the Shannon C. McGrath 2005 Trust hereby respond to the motion of Respondent Thomas J. McGrath to dismiss this appeal for lack of appellate jurisdiction. Because Appellants' Notice of Appeal was timely filed, Respondent's motion should be denied.

PROCEDURAL BACKGROUND

The trial court signed an order dismissing Respondent Thomas J. McGrath from the underlying action for lack of personal jurisdiction on May 8, 2014. The Charleston County Clerk of Court's Office mailed written notice of the entry of the trial court's order on May 13, 2014. (Exhibit A: Notice of Entry of Judgment).

The crux of Respondent's argument that the Notice of Appeal was not timely filed is centered on an email sent by the paralegal of Respondent's trial counsel to Appellants' trial counsel at 3:30PM on May 14, 2014. The subject line of the email included the title of case and case number; the body of the email only stated: "Please see attached. Thank you;" and the attachment was titled "2139_001.pdf." Respondent offered no proof of if or when this email was actually received by Appellant but claims that the act of sending this email constitutes providing written notice of entry of the trial court's order.

On May 15, 2014, the following day, Appellants' trial counsel received written notice of entry of the trial court's order from the Charleston County Clerk of Court's office via first class mail. (Exhibit B: Date Stamped Envelope). After properly receiving notice of the order, Appellants timely served the Notice of Appeal on Respondent on June 16, 2014. Respondent filed the instant motion to dismiss the appeal on June 25, 2014. Appellants file this Return to Respondent's motion.

A plain reading of our procedural rules regarding the service of notice of entry of

an order is dispositive of Respondent's motion. Rule 77(d) and Rule 5 of the South Carolina Rules of Civil Procedure both require notice of entry to be served, and Respondent's May 14, 2014 email does not constitute service. The paralegal's email to Appellant's trial counsel, therefore, did not trigger the time period during which Appellants were required to serve notice of an appeal. Accordingly, Appellants' Notice of Appeal was timely. Appellants are entitled to proceed with the merits of their appeal and Respondent's motion should be denied.

ARGUMENT

I. BECAUSE SOUTH CAROLINA PROCEDURAL RULES DO NOT COUNTENANCE SERVICE BY EMAIL, APPELLANTS RECEIVED NOTICE OF ENTRY ON MAY 15, 2014.

Notice of entry of an order must be served in accordance with procedural rules that govern civil actions: The requirement that a party receive notice of entry of an order may be satisfied when: 1) the Clerk's Office shall serve notice via first class mail; and, additionally, 2) another party may serve notice pursuant to Rule 5 of the South Carolina Rules of Civil Procedure. Because Respondent failed to properly serve notice of entry of the order pursuant to Rule 5, service by the Clerk's Office on May 15, 2014 was the first and only proper service of notice of entry of the trial court's order.

A. Rule 77(d) of the South Carolina Rules of Civil Procedure requires notice of entry to be served on parties to the action.

Rule 77(d), entitled "Notice of Orders or Judgments," requires that notice of entry of an order be served on parties to the action by the Clerk's Office. This rule also provides that, while a party is not required to provide notice of entry of an order to another party, a party choosing to provide notice of entry must serve it in accordance with

Rule 5. Specifically, Rule 77(d) states, in part:

Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by first class mail upon every party affected thereby who is not in default for failure to appear, and shall make a note in the case file or docket sheet of the mailing. Such mailing shall not be necessary to parties who have already received notice. Such mailing is sufficient notice for all purposes for which notice of the entry of an order or judgment is required by these rules; but any party may in addition serve a notice of entry on any other party in the manner provided in Rule 5 for the service of such papers.

Rule 77(d), SCRPC (emphasis added).

To determine whether a party that chose to serve notice of entry on another party did so properly, Rule 5 must be consulted. This rule provides, in part: “all . . . written orders . . . [and] written notices . . . shall be served upon each of the parties of record.”

Rule 5, SCRPC (emphasis added). Service may only be made by:

delivering a copy to him or by mailing it to him at his last known address, or, if no address is known, by leaving it with the clerk of court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there be no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving a copy at his dwelling place or usual place of abode with some person of suitable age and discretion then residing therein.

It is undisputed that proper service of notice of entry of the order was effectuated by the Charleston County Clerk’s Office on May 15, 2014. Further, there is no question that an email from the office of Respondent’s counsel does not constitute service or delivery as defined by Rule 5—Respondent fails to even make an argument that he effectuated service in accordance with the requirements of this rule.

B. Rule 410 of the South Carolina Rules of Appellate Procedure does not modify existing rules for notice or service.

Respondent ignores Rules 5 and 77(d) and, instead, asks this Court to dismiss an entire appeal based on Rule 410(e) of the Appellate Court Rules. This argument is disingenuous and does not support a ruling that this Court lacks appellate jurisdiction.

Rule 410 belongs to a category of court rules falling under the broad topic: “RULES GOVERNING THE PRACTICE OF LAW.” Specifically, Rule 410 is titled “SOUTH CAROLINA BAR” and establishes the existence of the South Carolina Bar organization, details the duties and powers of membership, provides for annual license fees and penalties for late and non-payment, and describes the Attorney Information System (AIS). Though Rule 410—much like our Rules of Professional Conduct, for example—is listed as an Appellate Court Rule, this rule does not apply to or modify any rules that relate to appellate procedure—much less service of papers required by our Rules of Civil Procedure for matters pending with a trial court.

Respondent specifically points to Rule 410(e) which states: “The mailing and e-mail address shown in the AIS shall be used for the purpose of notifying and serving the member.” Rule 410(e), SCACR. This sub-rule does not define or explain the phrase “notifying and serving.” A reasonable reading of Rule 410(e) suggests that this provision refers to communications to and from the South Carolina Bar—such as notices regarding CLE credit compliance forms and annual license renewal forms.

Respondent also cites the Supreme Court’s 2011 Order announcing the creation of the AIS. If the Supreme Court intended, as a result of the creation of the AIS, for email to be included as an additional means of providing notice or service of pleadings and

papers in a civil action, it is reasonable to believe that the existing procedural rules for service would have also been amended at the time AIS rules were added in 2011. Appellants contend that it is highly unlikely that such a transformative addition to our procedural rules for providing service and notice would be couched as an undefined phrase of a sub-rule that is primarily related to the functions of a state bar organization.

Rule 410(e) does not provide for service of notice of entry by email. Although Appellants can only postulate that, at best, the AIS rules contained in Rule 410 may be paving the way for future procedural rules which *do* provide for electronic service and notice. Today, however, the position Respondent asks this Court to take is significant and dangerous to the rights of litigants and is not a position currently supported by any mechanism for governing service by email. For example, our procedural rules do not account for the determination of *when* a party receives notice via email and do not account for technical realities such as an email being delivered to a junk box or flagged as SPAM mail. Our rules do not account for the distinction between text that appears in the body of an email as opposed to an attachment. Our rules do not account for the time of day an email is sent and how time should be computed upon receipt of an email. For example, our rules do not currently account for an email sent to another party or a party's attorney on a Friday evening at 11:59PM.

Moreover, without an announcement of changes in our procedural rules, practicing lawyers have not accounted for the proposed expansion of effective service to include service by email. The AIS does not require or address providing contact information for an attorney's paralegals or staff members. What is the mechanism for designating others in the office to receive emails in the event that the particular lawyer is

in trial or otherwise not available to view the email? Does failure to include an attorney's support staff on the email frustrate the effort to serve by email? Would an automated out-of-office response render the proposed email service void? There are many practical issues that would accompany the change of declaring an email to an attorney to be effective service under the South Carolina Rules of Civil Procedure.

Respondent cites Canal Insurance Company v. Caldwell, 338 S.C. 1, 524 S.E.2d 416 (Ct. App. 1999), in support of their position that notice of entry may be satisfied by sending an email. First, the court in Caldwell did not directly address whether providing notice of entry via fax was proper service and that was not the issue of the case. Further, the facts are distinguishable. In Caldwell, "there was no question that [the party] received written notice of entry of the judgment, including the judgment roll number, from opposing counsel." 338 S.C. at 5, 524 S.E.2d at 418. However, the receiving party wrote the other party to inquire about the status of the order and the other party wrote and sent a fax in reply—indicating a back and forth communication between the parties that is not present here. Further, the receiving attorney in Caldwell waited an entire month after receiving notice of entry of the order to obtain a copy of the order and then an additional month to file a motion to reconsider the trial court's order. Here, there is no question Appellants' counsel received written notice of entry on May 15, 2014 and served their Notice of Appeal within thirty days—on June 16, 2014.

Simply, at the time Appellants received written notice of entry of the trial court's order, the rules that governed, and continue to govern, our courts do not countenance service by email—either expressly or impliedly. Because the email sent by Respondent's counsel's office did not constitute service of notice of entry of the order, this Court

should find that service was effectuated on May 15, 2014 by the Charleston County Clerk's Office.

II. BECAUSE APPELLANTS RECEIVED NOTICE OF ENTRY ON MAY 15, 2014, APPELLANTS' NOTICE OF APPEAL WAS TIMELY.

Because Appellants timely filed notice of appeal and Respondent's motion should be denied. Pursuant to Rule 203 of the South Carolina Appellate Court Rules, "[a] notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order of judgment." SCACR 203(b)(1) (emphasis added).

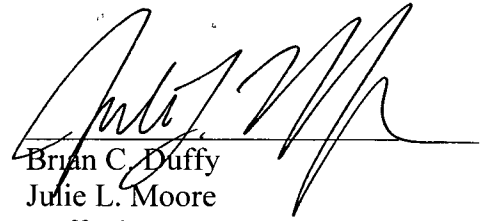
Because written notice of entry of the order was received by Appellants on May 15, 2014, the time period during which Appellants had to serve notice of appeal began to run on May 16, 2014.¹ Thirty days following May 16, 2014 was June 15, 2014. Because June 15, 2014 was a Sunday, the last day of the time period for Appellants to file notice of appeal was the next day—Monday, June 16, 2014.² Thus, the Notice of Appeal served on Respondent Thomas McGrath on June 16, 2014 was timely and Respondent's motion must be denied.

CONCLUSION

For the reasons articulated above, Appellants respectfully request that this Court deny Respondent's motion to dismiss this appeal for lack of appellate jurisdiction.

¹ Pursuant to Rule 263(a) of the South Carolina Appellate Court Rules, "the day of the act . . . after which the designated period of time begins to run is not to be included" in computing any period of time prescribed by the Appellate Court Rules.

² Rule 263(a) of the South Carolina Appellate Court Rules also provides that "[t]he last day of the period so computed is to be included, unless it is a Saturday, Sunday or a state or federal holiday, in which even the period runs until the end of the next day which is neither a Saturday, Sunday nor such holiday."



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July 1, 2014
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EXHIBIT A

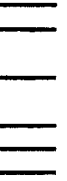
JULIE J. ARMSTRONG

CLERK OF COURT, C P & G S
100 BROAD STREET, SUITE 106
CHARLESTON, SC 29401-2258

RETURN SERVICE REQUESTED



www3.charlestoncounty.org



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ELIZABETH ANN ZECK
PO BOX 8416
COLUMBIA SC 29202-8416

NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRPC

Order-granting defnt Thomas Mcgrath mot to dismiss

CASE NO: 2013CP1000893

Shannon C McGrath , plaintiff, et al VS Thomas J McGrath , defendant, et al

This judgment was entered on the 08th day of May, 2014, and a copy mailed first class on Tuesday, May 13, 2014, to all counsel of record and/or all parties entitled to receive notice.

You may view and download this document at www3.charlestoncounty.org.

EXHIBIT B

DUFFY & YOUNG LLC

96 BROAD STREET, CHARLESTON SC 29401

Telephone 843-720-2044 Facsimile 843-720-2047

ATTORNEYS AT LAW

July 1, 2014

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SC Court of Appeals

VIA U.S. MAIL

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1205 Pendleton Street
Columbia, South Carolina 29201

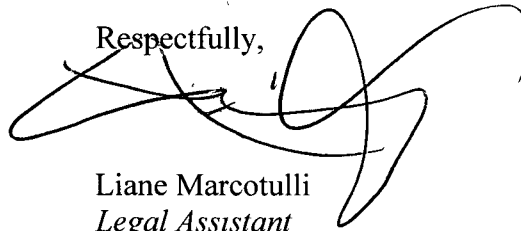
RE. Shannon C. McGrath v. Thomas J. McGrath, et al.
Civil Action No.: 2013-CP-10-893
Appellate No.: 2014-001319

Dear Ms. Kitchings:

Enclosed for filing in the above-matter, please find the original and seven (7) copies of Appellants' Return to Respondent Thomas J. McGrath's Motion to Dismiss Appeal and the original and seven (7) copies of a Proof of Service regarding same. Kindly return one (1) stamped copy of each document to us in the envelope provided.

Thank you in advance for your assistance. Please do not hesitate to contact me with any questions or concerns.

Respectfully,



Liane Marcotulli
Legal Assistant

Enclosures

cc: Elizabeth A. Zeck, Esq. (via U.S. mail)
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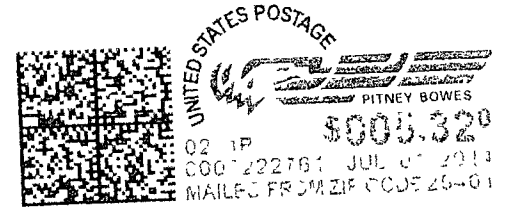
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The Honorable **Jenny Abbott Kitchings**
South Carolina Court of Appeals
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Columbia, South Carolina 29201

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Thomas J. McGrath, TD Ameritrade, Inc., E*Trade Securities, LLC and E*Trade
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Of whom Thomas J. McGrath is the Respondent.

PROOF OF SERVICE

I, Julie L. Moore, of Duffy & Young, LLC, certify that I have served the **RETURN TO RESPONDENT THOMAS J. MCGRATH'S MOTION TO DISMISS APPEAL** on Respondents and co-counsel for Appellants by U.S. mail on July 1, 2014 by depositing a copy of it to their attorneys of record as shown below:

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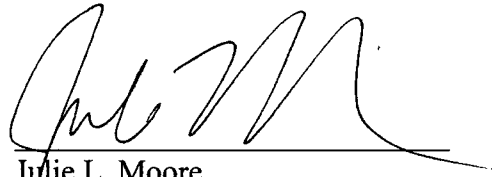
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