

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case No. 2013-CP-20-55

Court of Appeals Case No.: 2014-001567

73021

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JUL 28 2014

SC Court of Appeals

Caitlin Elisabeth Braun, Appellant

v.

The Ben Arnold Sunbelt Beverage Company of South Carolina, L.P.,
Two Heels, Inc. d/b/a State Street Pub and Sunbelt Golf Development,
Inc. d/b/a Indian River golf Course, Defendants,

Of whom The Ben Arnold Sunbelt Beverage Company of
South Carolina, L.P. is the Respondent, Respondent,

RESPONDENT BEN ARNOLD SUNBELT BEVERAGE COMPANY OF SOUTH
CAROLINA, L.P.'S MOTION TO DISMISS APPEAL

John E. Cuttino (S.C. Bar No. 1519)
Jessica A. Waller (S.C. Bar No. 100256)
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ATTORNEYS FOR RESPONDENT THE
BEN ARNOLD SUNBELT BEVERAGE
COMPANY OF SOUTH CAROLINA, L.P.

The undersigned, as attorneys for Respondent The Ben Arnold Sunbelt Beverage Company of South Carolina, L.P., (hereinafter "Ben Arnold"), hereby moves this Court for an order dismissing Appellant Caitlin Elisabeth Braun's Notice of Appeal pursuant to Rules 203(b) and 260(a) of the South Carolina Appellate Court Rules. The grounds for this motion are that Appellant's Notice of Appeal is untimely, thus the Court of Appeals is without jurisdiction to entertain this appeal, and the appeal should be dismissed.

AND IT IS SO MOVED.



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Of whom The Ben Arnold Sunbelt Beverage Company of
South Carolina, L.P. is the Respondent, Respondent,

RESPONDENT BEN ARNOLD SUNBELT BEVERAGE COMPANY OF SOUTH
CAROLINA, L.P.'S MEMORANDUM IN SUPPORT OF ITS
MOTION TO DISMISS APPEAL

John E. Cuttino (S.C. Bar No. 1519)
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ATTORNEYS FOR RESPONDENT THE
BEN ARNOLD SUNBELT BEVERAGE
COMPANY OF SOUTH CAROLINA, L.P.

Respondent Ben Arnold Sunbelt Beverage Company of South Carolina, L.P., (hereinafter “Ben Arnold”) submits this Memorandum in Support of its Motion to Dismiss Plaintiff/Appellant Caitlin Elisabeth Braun’s Notice of Appeal.

I. FACTUAL AND PROCEDURAL HISTORY

In this attempted appeal, Appellant seeks to challenge the Circuit Court’s Order granting summary judgment to the Respondent Ben Arnold. Specifically, Circuit Judge Knox McMahon’s Order granting summary judgment to Respondent Ben Arnold was filed on April 25, 2014. Thereafter, Appellant filed a Motion for Reconsideration pursuant to Rule 59(e). Respondent Ben Arnold then filed and served its memorandum in opposition to the Motion for Reconsideration on May 29, 2014. Circuit Judge McMahon’s Order denying Appellant’s Motion for Reconsideration was issued on Friday, May 30, 2014. That Order was then entered/filed by the Fairfield County Clerk of Court on Monday, June 2, 2014. That same day (June 2, 2014), the Order was placed in the U. S. Mail to counsel for all parties as evidenced by the Clerk of Court’s a Certificate of Service . (See Certificate of Service and Order, attached as Exhibit 1).

Counsel for all Defendants (including those not participating in this appeal) received the Clerk of Court’s mailed Order within one week of it being mailed on June 2, 2104. Counsel for Respondent Ben Arnold (John E. Cuttino) was traveling out of state from June 2-8, 2014, but the envelope from the Fairfield Clerk of Court containing the Order was present in his Columbia, South Carolina office when he returned on Monday, June 9, 2014. Clearly, that mailing actually arrived in his office no later than Friday, June 6th, 2014. Counsel for Defendant Sunbelt Golf Development, Inc. d/b/a Indian

River Golf Course received the Order in his Myrtle Beach, South Carolina office on June 4, 2014. Counsel for Defendant Two Heels, Inc. d/b/a State Street Pub received the Order in his Sumter, South Carolina office on June 5, 2014. (*See* Affidavit of John E. Cuttino, attached as Exhibit 2).

However, Appellant's Notice of Appeal asserts that "Appellant received written notice of entry of the Order denying Appellant's Motion for Reconsideration on July 16, 2014" which is forty-four (44) days after the June 2, 2014 Order was mailed to her counsel's correct business address in Columbia, South Carolina, and approximately six (6) weeks after it was received by all defense counsel. Appellant filed and served her Notice of Intent to Appeal on July 18, 2014.

II. ARGUMENT

Appellant's Notice of Appeal is untimely and should therefore be dismissed. Rule 203(b)(1), SCACR requires that a notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment. "Whenever it appears that an appellant or a petitioner has failed to comply with the requirements of these Rules, the clerk shall issue an order of dismissal, which shall have the same force and effect as an order of the appellate court." Rule 260(a), SCACR. Furthermore, Rule 263(b) SCACR expressly states an appellate court cannot extend the time period for filing an appeal. *See* Rule 263(b), SCACR ("[T]he time prescribed by these Rules for performing any act except the time for serving the notice of appeal under Rules 203 and 243 may be extended or shortened by the appellate court, or

by any judge or justice thereof.”). *See also* Rule 6(b), SCRCR (“The time for filing notice of intent to appeal is jurisdictional and may not be extended by consent or order.”).

“[S]ervice of the Notice of Appeal is a jurisdictional requirement, and [appellate courts] ha[ve] no authority to extend or expand the time in which the Notice of Appeal must be served.” *Sadisco of Greenville, Inc. v. Greenville Cnty. Bd. of Zoning Appeals*, 340 S.C. 57, 59, 530 S.E.2d 383, 384 (2000). Thus, a party’s failure to comply with Rule 203(b), SCACR “divests this court of subject matter jurisdiction and results in dismissal of the appeal.” *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 651, 661 S.E.2d 791, 795 (2008) (quoting *Canal Ins. Co. v. Caldwell*, 338 S.C. 1, 4, 524 S.E.2d 416, 418 (Ct.App.1999)). “The requirement of service of the notice of appeal is jurisdictional, *i.e.*, if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to ‘rescue’ the delinquent party by extending or ignoring the deadline for service of the notice.” *Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004); *See also Panhorst v. United States*, 241 F.3d 367, 369-70 (4th Cir. 2001) (noting that the United States Supreme Court has repeatedly emphasized that the requirement of a timely notice of appeal is “mandatory and jurisdictional.”) (quoting *Browder v. Director, Dep’t of Corrections*, 434 U.S. 257, 264, 98 S.Ct. 556 (1978)).

Furthermore, “[e]vidence that a letter is properly addressed and mailed raises a presumption it was received by the addressee[.]” *Foster v. Ford Motor Credit Co.*, 302 S.C. 450, 452, 395 S.E.2d 440, 441 (1990); *see also Williams v. Fulmer*, C/A 8:09-1044-PMD, 2009 WL 2421791 (D.S.C. July 31, 2009) (“The envelope in which the Order was mailed was not returned undelivered, thus it is presumed that Plaintiff received his copy

of the Order.”). If the date of receipt is unknown or disputed, case law and Rule 6, SCRCF provides a presumption that service by regular mail is received within five (5) days. *See* Rule 6(e), SCRCF (“Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail or upon a person designated by statute to accept service, five days shall be added to the prescribed period.”); *see also* *Nguyen v. Inova Alexandria Hosp.*, 187 F.3d 630 (4th Cir. 1999) (noting if the date is unknown, however, it is presumed that service by regular mail is received within three days pursuant to Rule 6(e) of the Federal Rules); *see also* *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 148, n. 1, 104 S.Ct. 1723, 1724 (1984) (suggesting that Rule 6(e) applies when parties dispute the date of receipt).

Finally, a party cannot deny receipt of mail due to the party’s failure to open and/or retrieve the mail. *See, e.g., Kramer v. Labor & Indus. Review Comm’n*, 605 N.W.2d 664 (Wisc. Ct. App. 2000) (“[Plaintiff’s] lack of diligence in checking his post office box will not erase the fact that the notice of hearing was mailed, delivered and received at [Plaintiff’s] last known address. He cannot base his claim for relief upon his neglect of a common responsibility.”); *Hagin v. Fireman’s Fund Ins. Co.*, 353 P.2d 1029, 1032 (Ariz. 1960) (noting that where plaintiffs let their mail accumulate, and all that plaintiffs had to do was to open their mail, they are charged with constructive notice of the knowledge which this letter attempted to convey). Rather, “a party has a duty to monitor the progress of his case.” *Goodson v. Am. Bankers Ins. Co. of Florida*, 295 S.C. 400, 403, 368 S.E.2d 687, 689 (Ct. App. 1988). Indeed, “it is the duty of litigants and

their counsel to keep themselves advised of the developments and status of their case or cases.” *Poston v. State Highway Dep't*, 192 S.C. 137, 5 S.E.2d 729, 731 (1939).

In this case, all defendants, through their counsel, received notice of Circuit Judge McMahon’s Order Denying Appellant’s Motion to Reconsider either on June 4, June 5, or June 9, 2014, while Appellant contends she did not receive notice of the entry of the Order until July 16, 2014, almost six (6) weeks after the last Defendant (Ben Arnold) received it, and a total of forty-four (44) days after it was mailed from the Fairfield County Clerk’s office. There is no evidence the Clerk of Court’s mailing to Appellant’s counsel was returned unopened, to the Clerk or U.S Postal Service. Thus, pursuant to Rule 6, SCRCF, Appellant should be presumed to have received the Order it seeks to appeal from as of Monday, June 9, 2014, at the latest. (Five days after the June 2 mailing of the Order would be Saturday, June 7, thus the next business day per Rule 6(a), SCRCF is Monday, June 9) . Clearly, Appellant’s attempt to file and serve her Notice of Appeal is untimely and the appeal should be dismissed.

Moreover, if the Appellant contends it is significant or dispositive that she personally did not receive notice of entry of the Order, (as opposed to receipt by her counsel of record), such argument is irrelevant and unavailing. *See* Rule 5(b), SCRCF (“Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court.”); *see also Motley v. Williams*, 374 S.C. 107, 112, 647 S.E.2d 244, 247 (Ct. App. 2007) (“Acts of an attorney are directly attributable to and binding upon the client.”). Because Appellant is represented and therefore acts through her counsel, any contention that she received notice of the Order

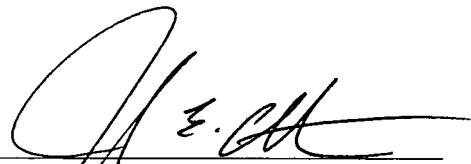
on a later date than her counsel of record did, is of no significance and cannot operate to extend the time for filing the Notice of Appeal. The appeal is untimely and should be dismissed.

III. CONCLUSION

Counsel for Respondent Ben Arnold has no evidence, and is loathe to suggest, that Appellant's counsel has made any misrepresentation to the Court. Nonetheless, the extreme difference in the dates on which the Circuit Court's Order was received by Appellant and Respondent/Defendants seems implausible and unexplainable. The issue is a matter of jurisdiction for the Court.

For the foregoing reasons, Ben Arnold respectfully submits that Appellant's Notice of Appeal should be dismissed as untimely.

Respectfully submitted,



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ATTORNEYS FOR RESPONDENT
BEN ARNOLD SUNBELT BEVERAGE
COMPANY OF SOUTH CAROLINA, L.P.

July 28, 2014

EXHIBIT 1

FORM 4

STATE OF SOUTH CAROLINA
 COUNTY OF FAIRFIELD
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2013CP2000055

Caitlin Elisabeth Braun

Two Heels Inc

State Street Pub

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER DENYING PLAINTIFF'S MOTION TO RECONSIDER

This order ends does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Judge Code

6/2/2014

Date

For Clerk of Court Office Use Only

This judgment was entered on **June 2, 2014**, and a copy mailed first class or placed in the appropriate attorney's box on **June 2, 2014**, to attorneys of record or to parties (when appearing pro se) as follows:

Henry Ronald Stanley
1418 Park St.
Columbia, SC 29201

John Edward Cuttino
PO Box 7368
Columbia, SC 29202
Allen Jackson Barnes
PO Box 2838
Sumter, SC 29151-2838
Robert Curt Calamari
PO Box 3939
Myrtle Beach, SC 29578

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Betty Jo Beckham

Court Reporter

Betty Jo Beckham - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF FAIRFIELD)
)
 Caitlin Elizabeth Braun,)
)
 Plaintiff,)
)
 vs.)
)
 The Ben Arnold Sunbelt Beverage)
 Company Of South Carolina, L.P.,)
 Two Heels, Inc., D/B/A State Street Pub,)
 And Sunbelt Golf Development, Inc.)
 D/B/A Indian River Golf Course)
)
 Defendants.)
)

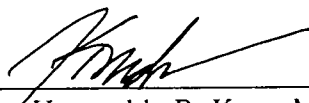
IN THE COURT OF COMMON PLEAS
 FOR THE SIXTH JUDICIAL CIRCUIT
 CASE NO.: 2013-CP-20-55

CLERK OF COURT
 BETTY JO BERNHARDT
 JUN 2 2 12 PM '14
 FAIRFIELD COUNTY

**ORDER DENYING PLAINTIFF'S
 MOTION TO RECONSIDER**

This matter is before the Court to address Plaintiff's Motion, pursuant to Rule 59(e) SCRCF, for Reconsideration as to the Order Granting Summary Judgment To Defendant, Ben Arnold Company of South Carolina, L.P. A hearing on Defendant's Summary Judgment Motion was held in Fairfield County on February 20, 2014, and an Order Granting Defendant's Motion was issued on April 24, 2014. The Court has reviewed the Plaintiff's Motion for Reconsideration and finds that oral arguments would not assist in this matter and finds that any additional hearing would be redundant and unnecessary.

Therefore it is **ORDERED** that the Plaintiff's Motion for Reconsideration is **DENIED** and the prior ruling is reaffirmed in toto.


 The Honorable R. Knox McMahon
 Presiding Judge, Sixth Judicial Circuit

Lexington, South Carolina
 May 30, 2014

EXHIBIT 2

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case No. 2013-CP-20-55

Court of Appeals Case No.: 2014-001567

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Caitlin Elisabeth Braun, Appellant

v.

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Inc. d/b/a Indian River golf Course, Defendants,

Of whom The Ben Arnold Sunbelt Beverage Company of
South Carolina, L.P. is the Respondent, Respondent,

AFFIDAVIT OF JOHN E. CUTTINO

John E. Cuttino (S.C. Bar No. 1519)
Jessica A. Waller (S.C. Bar No. 100256)
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ATTORNEYS FOR RESPONDENT THE
BEN ARNOLD SUNBELT BEVERAGE
COMPANY OF SOUTH CAROLINA, L.P.

AFFIDAVIT OF JOHN E. CUTTINO

Personally appeared before me, John E. Cuttino, Attorney who after being duly sworn upon his oath, deposes and states as follows:

1. My name is John E. Cuttino. I am over twenty-one(21) years of age and am competent to testify to the matters stated herein.
2. I have been a licensed attorney in the State of South Carolina for over thirty-one (31) years.
3. I represent Respondent Ben Arnold Sunbelt Beverage Company of South Carolina, L.P., (“Ben Arnold”) in this matter.
4. The Court of Common Pleas for Fairfield County (Judge Knox McMahon) granted Ben Arnold’s Motion for Summary Judgment on April 25, 2014.
5. Thereafter, Plaintiff/Appellant Caitlin Braun filed a Motion for Reconsideration of Judge McMahon’s Order pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure.
6. I, as counsel for Ben Arnold, filed a Memorandum in Opposition to Appellant’s Motion for Reconsideration on May 29, 2014.
7. I was traveling outside the State of South Carolina during the period of June 2-June 8, 2014. Upon my return to my office in Columbia, South Carolina on Monday, June 9, a copy of Circuit Judge McMahon’s Order denying Appellant’s Motion for Reconsideration was in my unopened mail, having been mailed to me by the Fairfield County Clerk of Court.
8. I have personally conferred with counsel for the other two defendants in this matter in order to determine when they each received the mailing from the Fairfield County

Clerk of Court containing Circuit Judge McMahon's Order that is now appealed from. Mr. Robert Calamari, counsel for defendant Sunbelt Golf Development, Inc. d/b/a Indian River Golf Course informed me that he received a copy of the Order on June 4, 2014 in his Myrtle Beach, South Carolina office. Mr. A. Jackson Barnes, counsel for defendant Two Heels, Inc. d/b/a State Street Pub informed me that he received a copy of the Order on June 5, 2014 in his Sumter, South Carolina office.

9. Due to the time constraints involved in filing Ben Arnold's Motion to Dismiss, I was unable to obtain sworn affidavits from Mr. Calamari and Mr. Barnes, but will do so if the Court so requires.


10. I declare under the penalties of perjury that the foregoing statements are true and correct to the best of my knowledge.

AFFIANT FURTHER SAYETH NOT.



John E. Cuffino

SWORN TO BEFORE ME
THIS 28 DAY OF July, 2014



Notary Public for South Carolina
My Commission Expires 10/23/22

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SC Court of Appeals

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Of whom The Ben Arnold Sunbelt Beverage Company of
South Carolina, L.P. is the Respondent, Respondent,

PROOF OF SERVICE

I certify that I have served Respondent Ben Arnold Sunbelt Beverage Company of South Carolina, L.P.'s Motion and Memorandum in Support of Motion to Dismiss Appeal on Caitlin Elisabeth Braun by depositing a copy of the same in the United States Mail, postage prepaid, addressed to the following:

H. Ronald Stanley
Post Office Box 7722
Columbia, South Carolina 29202

Jerry Leo Finney
2117 Park Street
Columbia, South Carolina 29201



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ATTORNEYS FOR RESPONDENT THE
BEN ARNOLD SUNBELT BEVERAGE
COMPANY OF SOUTH CAROLINA, L.P.

July 28, 2014



Gallivan, White & Boyd, P.A.
ATTORNEYS AT LAW

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July 28, 2014

VIA U.S. Mail

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: *Caitlin Elizabeth Braun, Appellant vs. The Ben Arnold Company, L.P.*
Respondent
Case No.: 2013-CP-20-55
Court of Appeals Case No.: 2014-001567
GWB File No.: 1948-147

Dear Ms. Kitchings:

Please find enclosed the original and seven (7) copies of Respondent Ben Arnold Sunbelt Beverage Company of South Carolina, L.P.'s Motion and Memorandum in Support of Motion to Dismiss Appeal with the Proof of Service. I have also enclosed the filing fee of \$25.00. Please file these documents and return clocked copies to this office via our courier.

By copy of this letter, and as evidenced on the attached Proof of Service, I am serving Counsel of Record with the same.

With kind regards, I remain

Very truly yours,

John E. Cuttino
Direct Dial: 803-724-1714
E-Mail: jcuttino@gwbllawfirm.com

JEC/sm
Enclosures
cc: H. Ronald Stanley, Esq.
Jerry Leo Finney, Esq.

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SC Court of Appeals