

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM AIKEN COUNTY

J. Ernest Kinard, Jr., Circuit Court Judge

RECEIVED
NOV 03 2014
SC Court of Appeals

Case No.: 2013-CP-02-02781

Stephen P. Donohue,

Appellant

v.

City of North Augusta, the Mayor
and City Council of North Augusta,

Respondent.

**APPELLANT'S RETURN TO RESPONDENT'S
MOTION TO DISMISS APPEAL AS UNTIMELY**

For the following reasons, Appellant, Stephen P. Donohue, requests the Court deny Respondent's request for dismissal of this appeal as untimely.

I. Facts

The Respondent's recitation of facts are not correct in the following particulars. Respondent asserts without proof that Appellant's attorney received the trial court's order on August 20th, 2014 the same date Mr. Zier, one of Respondent's attorneys, received a copy of the order when the clerk of court placed it Mr. Zier's courthouse mailbox. The Respondent claims that the time for filing a motion under SCRCR Rule 59(e) expired on August 30th, ten days later. If in fact the Appellant received the order on August 20th, 2014, the ten-day period would not have expired until September 2nd, 2014, because August 30th was a Saturday and September 1st was Labor Day, a federal and state holiday. Under Rule 6(a) SCRCR the last day of any period of time cannot fall on a Saturday, Sunday or holiday, therefore, even if Appellant had been properly served the order of the

trial court on August 20th, as they allege, the last day for filing a timely motion would have been September 2nd, 2014.

The facts recited by Respondent make assumptions that since they received their copy of the trial court's order through their courthouse mailbox, and through the US mails, then Appellant must have received their copy of the order on the same day. The facts are otherwise as supported by the attached affidavit of Ms. Carla Williams, paralegal and secretary to Appellant's attorney. She checked the courthouse box on several occasions after the Order was mailed to the Clerk of Court, and judge's order was not in the attorney's courthouse mailbox. On at least one occasion Ms. Williams made contemporary comments to the attorney that the order was not in the courthouse box. Ms. Williams eventually obtained a copy of the order after it was placed in the courthouse mailbox on August 27th and spoke with the court clerk's staff about the untimely delivery of order especially since the order was stamped as having been placed in the mailbox on August 20th. The court clerk's staff had no explanation other than maybe it had been placed in the wrong attorney's mailbox.

II. Civil Rules of Procedure on Service and Time

Respondent's tortured recitation of the procedural history of the case is irrelevant to the issue of the timeliness of Appellant's motion for post trial relief under Rule 59(e) SCRCF and his filing of Notice of Appeal. Respondent is correct that a motion to amend a judgment under Rule 59(e) SCRCF must be served "not later than 10 days after the receipt of written notice of the entry of judgment" otherwise it does not stay the time for notice of Appeal.

The rules of civil procedure require all written orders to be served on each of the parties of record. Rule 5(a) SCRCF. Service on the attorney of record "shall 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. Service by mail is complete upon mailing . . .". Rule 5(b), SCRCF.

Furthermore, the rules require the clerk of court to "[i]mmediately 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. For parties proceeding in the SCE-File electronic filing system, the clerk shall serve a notice of the entry by electronically transmitting a Notice of Electronic Filing to all parties. Such mailing or electronic transmission shall not be necessary to parties who have already received notice. Such mailing or electronic transmission 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) SCRCF. The Appellant and his attorney did not receive a notice of entry from the clerk or the Respondent via US mail. Respondents could have sent the notice of entry or the judgment on Appellant as provided in the rules.

Another jurisdiction considered the principle of "service by courthouse mailbox" and found that theory wanting and in conflict with prescribed Rules of Civil Procedure which rule are similar if not exactly the same as South Carolina's rules. In Coles v. Lawyers Title Ins. Corp., 839 N.E.2d 982, 163 Ohio App.3d 659, 2005-Ohio-5360 (Ohio App. 6 Dist. 2005) the Ohio appellate court held:

Appellee, however, states that service was accomplished within three days of June 28, 2005, when a copy of the judgment entry was placed in appellants' attorney's "courthouse mailbox."

The basis of appellee's contention that service was accomplished within three days of June 28, 2005, is an affidavit of Beth A. Naufel which states in pertinent part that: 1) She is the civil bailiff for the Erie County Court of Common Pleas, 2) "Local counsel" have individual mailboxes, set up by the clerk of courts, at the courthouse, 3) The clerk of courts timely puts all "notices, pleadings and entries" in the local counsels' mailboxes after they are filed, and 4) "To the best of [her] knowledge" the "court" placed a copy of the judgment entry granting

defendant summary judgment in plaintiff's counsel's courthouse mailbox within three days of June 28, 2005 [the date it was file stamped]."

Appellee states that this procedure of placing the final judgment entry in appellants' counsel's courthouse mailbox is proper service pursuant to Civ.R. 5(B), which states:

"Service: * * * Service upon the attorney or party shall be made by delivering a copy to the person to be served, transmitting it to the office of the person to be served by facsimile transmission, mailing it to the last known address of the person to be served or, if no address is known, leaving it with the clerk of the court. * * * 'Delivering a copy' within this rule means: handing it to the attorney or party; leaving it at the office of the person to be served with a clerk or other person in charge; if there is no one in charge, leaving it in a conspicuous place in the office; or, if the office is closed or the person to be served has no office, leaving it at the dwelling house or usual place of abode of the person to be served with some person of suitable age and discretion then residing in the dwelling house or usual place of abode. Service by mail is complete upon mailing. Service by facsimile transmission is complete upon transmission."

Appellee states that placing the judgment in the courthouse mailbox is:

"the functional equivalent of actual physical delivery to the attorney. * * * Placing papers in a mailbox reserved for the attorney, a mailbox as to which that attorney has knowledge, and as to which long-standing custom and usage in the county imposes the obligation to retrieve important papers from, accomplishes all the same goals as does actual physical delivery, while simultaneously freeing the Clerk of Court from the onerous obligation of physically handing the papers to counsel. * * * Leaving a copy of an entry in Counsel's attorney mailbox is also the functional equivalent of mailing it to that attorney's office * * *. [T]he mailbox in question is reserved for the exclusive use of delivering papers to counsel, much as a post office box at a United States post office accomplishes the same thing with regard to mail from other senders."

The Fifth District Court of Appeals has addressed this issue in Cole v. Motorists Mut. Ins. Co. (Oct. 16, 1995), 5th Dist. No. 1995CA00066, 1995 WL 617610, where the court held that "Leaving the entry in the [courthouse] mailbox of Appellant's attorney is not a prescribed method of service required by Civ.R. 58(B) and 5(B)." We agree; nothing in Civ.R. 5(B) even suggests that the clerk carries out the duty of serving notice of a final judgment on a party's counsel by placing a copy of that judgment in a courthouse mailbox. We also agree with appellants' statement that a locked, numbered United States Post Office Box is "a far cry from an unlocked hanging file folder situated on the front desk of the Erie County Clerk's Office, which is readily visible by and accessible to any number of people who walk into the unlocked clerk's office on a daily basis." Further, we do not find that requiring the clerk of court to properly serve counsel with notice of final judgments is an "onerous obligation."

Therefore, we find that Civ.R. 58(B) was not complied with in this case and that leaving a copy of a final judgment entry in an attorney's "courthouse mailbox" is not service pursuant to Civ.R. 5(B). In this case Civ.R. 5(B) service was accomplished by regular mail on July 18, 2005, and the notice of appeal was filed on August 17, 2005; therefore, the appeal is timely and the motion to dismiss is denied.

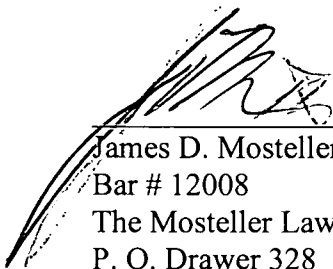
We are compelled to comment further on the procedure used by the clerk of court in this case, since we find that even if putting a copy of a final decision in an attorney's "courthouse mailbox" were proper Civ.R. 5(B) service, Civ.R. 58(B) requires more. Several formalities must be observed when a judge enters a final judgment and unless these formalities are followed, the parties are denied due process.

The courthouse mailboxes in the Aiken County courthouse suffer from the same deficiencies as those noted by the Ohio Appellate Court, *supra*. The Appellant's attorney was never properly served a copy of the notice of judgment or the actual court order in the case until August 27, 2014. A complaint of late delivery was lodged with the clerk's staff on that date. The Rule 59(e) motion to alter the judgment was served via US mail on the Respondents on

September 5, 2014 which was within 10 days of receipt of the court's order. The Rule 59(e) motion being timely, it stayed the time for filing of the notice of appeal. The notice of appeal was timely filed within 30 days after receipt of the judge's denial of relief on the Rule 59(e) motion.

Appellant respectfully requests this Court to deny Respondent's motion for dismissal of Appellant's appeal because the notice was timely filed.

Respectfully submitted on this the 30th day of October, 2014.



James D. Mosteller, III
Bar # 12008
The Mosteller Law Firm, LLC
P. O. Drawer 328
Aiken, South Carolina 29802
(803) 226-0396
Attorney for Appellant

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

Stephen P. Donohue,)
)
 Plaintiff,)
 vs.)
)
 City of North Augusta,)
 the Mayor and City Council)
 of North Augusta)
)
 Defendants.)

Case No. 2013-CP-02-2781
AFFIDAVIT OF CARLA WILLIAMS

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SC Court of Appeals


Personally appeared before me, Carla Williams, who being duly sworn, deposes and says that:

1. I am the paralegal for The Mosteller Law Firm, the attorney for the Plaintiff in this case and makes this affidavit of my own personal knowledge.
2. On August 21, 2014, I believe I checked the box at the Courthouse and there was no Order for the above captioned case. On August 22, 2014 I notified JD via text that I was going by the Courthouse to check the box. I checked the box again and there was not an Order in the box. On August 26, 2014, I went by the Courthouse again to check the box. I specifically remember discussing the fact that the Order was not in the box with Mr. Mosteller as he stood in the hallway waiting for a domestic hearing to begin. I also specifically remember picking up documents from the box. One of the documents in the box was a certificate of mailing in Tam v. Tam and a certificate of mailing in Johnson v. Medlin. Once again, there was not an Order for the Donohue v. City of North Augusta, et. al. case. On August 27, 2014, per JD's instructions, I went once again to the Courthouse to check the box and this time the Order for the Donohue v. City of North Augusta, et. al. was in the box. However, it was stamped August 20, 2014.
3. Immediately while I was at the Courthouse, I went to discuss with Anita Knoepfle that the Order for the above captioned case was not timely placed in our box but she was not at her desk. Upon returning to the office, I contacted Anita via telephone and discussed with her that the Order had not been placed in our box on three different occasions and upon arrival

the morning on August 27, 2014, the Order was in the box but it was stamped August 20, 2014. I mentioned to her that I had been there on at least three prior occasions, and the Order was not in our box. She told me that she can not answer why it was not in the box. She spoke to Lisa Comer and she told Anita she had put it in the box and that she also did not know why it was not in there before August 27, 2014. Anita offered that maybe another attorney's office accidentally picked it up from our box and returned it when they noticed the error. She proceeded to tell me that it was crazy up there that day because there were a lot of people from the media in there requesting a copy of the Order.

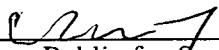
4. Additionally, I never received the Notice of Entry or the Order by mail.

FURTHER AFFIANT SAYETH NOT.



Carla Williams

Sworn and subscribed to before me
on this 30th day of October, 2014



Notary Public for South Carolina
My Commission expires: 5/13/19

THE STATE OF SOUTH CAROLINA
In The Court of

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Court of Common Pleas

J. Ernest Kinard, Circuit Court Judge

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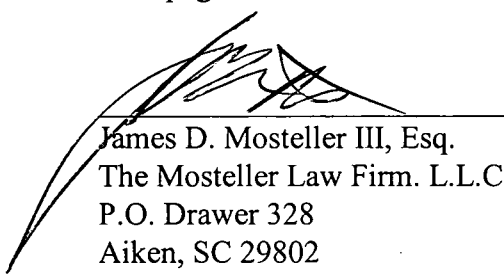
City of North Augusta,
the Mayor and
City Council of North Augusta

Respondents.

PROOF OF SERVICE

I, James D. Mosteller III, hereby certify that on the 30th day of October, 2014, with proper postage prepaid via the United States Postal service have served the Appellants Return to Motion to Dismiss on Belton Ziegler, Esq., C.D. Rhodes, Esq, Gary Pope Esq., all of Pope Ziegler LLC, and Kelly Zier Esq., at the addresses which appear on the second page of this document.

October 30, 2014.



James D. Mosteller III, Esq.
The Mosteller Law Firm. L.L.C.
P.O. Drawer 328
Aiken, SC 29802
803-226-0396
Attorney for Appellant.

Kelly Zier, Esq.
City Attorney North Augusta
Zier Law Firm LLC
P.O. Box 6516
North Augusta, SC 29861

Belton T. Zeigler, Esq.
C.D. Rhodes, Esq.
Gary Pope, Esq.
Pope Zeigler, LLC
1411 Gervais St., Suite 300
Columbia, SC 20201

**THE MOSTELLER LAW FIRM, LLC
ATTORNEYS AT LAW**

James D. Mosteller III
of Counsel:
C. LaVaun Fox, Esquire

Post Office Box 1832
Barnwell, SC 29812

Ph: 803-259-4964
Fax: 803-259-4966

Post Office Drawer 328
Aiken, SC 29801

Ph: 803-226-0396
803-649-6281
803-648-4256
Fax: 803-226-0493

C. LaVaun Fox, Esquire
Post Office Box 464
Aiken, SC 29801

October 30, 2014

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SC Court of Appeals

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

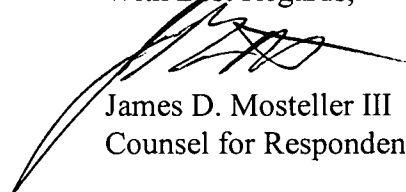
Re: Donohue v. City of North Augusta et al.
Case No. 2013-CP-02-02781

Dear Ms. Kitchings:

Attached please find the original and seven copies of Appellant's Return to Respondents Motion to Dismiss. Please clock and return the copy to me in the Self Addressed Stamped Envelope provided for your convenience. By copy of this letter and its contents, I am serving opposing counsel with the same.

If you have any questions or need any further information, please do not hesitate to contact me.

With Best Regards,



James D. Mosteller III
Counsel for Respondent

cc: w/enc.
Steve Donohue
Belton Zeigler, Esq.
C.D. Rhodes, Esq.
Gary Pope Jr., Esq.
Kelly Zier, Esq.

Barnwell
9725 Marlboro Avenue
Barnwell, South Carolina 29812

Aiken
322 Laurens Street, NW
Aiken, South Carolina 29801