

In the State of South Carolina
In the Court of Appeals

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SC Court of Appeals

174058

Appeal from Spartanburg County
Brian M. Gibbons, Circuit Court Judge

Case No. 2013-CP-42-1569

BLH by parents/general guardians Kenneth
and Angela Hensley, and on behalf of all others
similarly situated, Respondents

vs.

South Carolina Department of Social Services, Appellant

Motion to Dismiss the Appeal

The DSS's appeal must be dismissed because the orders it appealed are not immediately appealable and because it has a Rule 59(e) motion pending in the trial court.

The DSS appealed orders denying its motion for summary judgment and granting the Plaintiff's motion for class certification. Neither is immediately appealable. *Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 168, 580 S.E.2d 440, 444 (2003)("[T]he denial of summary judgment is not appealable, even after final judgment."); *Salmonsens v. CGD, Inc.*, 377 S.C. 442, 448-452, 661 S.E.2d 81, 85-87 (2008) (reaffirming that class certification orders are generally not immediately appealable).

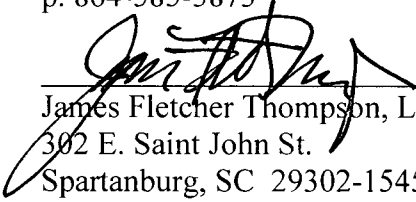
Beyond that, the DSS has a Rule 59(e) motion pending before the trial court. See Ex. A (Cover letter for motion and motion to alter or amend, dated September 26, 2014).

The Supreme Court has cautioned parties not to have a Rule 59 motion and an appeal

pending at the same time. *Elam v. South Carolina Dep't. of Transp.*, 361 S.C. 9, 20 n. 2, 602 S.E.2d 772, 778 n. 2 (2004). This pending motion, by itself, requires the appeal's dismissal. *Wicker v. Anderson County*, 289 S.C. 479, 347 S.E.2d 96 (1986)(dismissing an appeal because the appellant's post-judgment motion was still pending in the circuit court).

Respectfully submitted,

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Attorneys for Respondents

Dated: Oct 31, 2014

EXHIBIT A

DAVIDSON & LINDEMANN, P.A.

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September 26, 2014

Of Counsel
Kenneth P. Woodington

Writer's Email: alindemann@dml-law.com

Via Email Only

The Honorable Brian M. Gibbons
Circuit Court Judge
Post Office Drawer 580
Chester, South Carolina 29706

RE: BLH (dob 2/20/97) by parents/general guardians Kenneth and Angela Hensley, and on behalf of all others similarly situated v. South Carolina Department of Social Services
Civil Action Number: 2013-CP-42-1569
Our File Number: 103.8851

Dear Judge Gibbons:

I am writing with respect to the requirement in your Amended Order filed September 16, 2014, that I, as defense counsel, prepare and email you a draft copy of the Notice of Class Action within ten days of your Amended Order.

Earlier today, I served a copy of a Rule 59(e) Motion in this action which, in part, asks this Court to issue a written order adjudicating the Defendant's prior Rule 59(e) Motion filed August 5, 2014. I had been awaiting such an Order in order to proceed with an appeal, but to my knowledge, none has yet been entered by the Court. Instead, based on my information, we only have your September 9, 2014 email denying that prior motion, but clearly I cannot appeal from an email. While I understand that you signed and filed the Amended Order, that Amended Order makes no mention of nor includes any adjudication of the prior Rule 59(e) Motion filed August 5, 2014. I was anticipating that an Order would be issued that memorializes your email, but I have not received such an Order.

It is my belief that the currently pending Rule 59(e) Motions serve to stay the requirements of your Amended Order including the requirement that defense counsel prepare the Notice of Class Action within ten days. If that is not correct, I find myself in the unfortunate position that I cannot comply with that directive at this time given my intent to appeal the Amended Order after I receive an Order from the Court on the pending Rule 59(e) Motions. I have struggled with how best to handle this situation and after giving this matter great thought, I

The Honorable Brian M. Gibbons
September 26, 2014
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believe that if I were to comply with the Court's directive regarding the preparation of the Notice of Class Action, I would likely moot that issue for appeal because, as you know, I have taken the position the Defendant has no obligation under Rule 23(d)(2) to provide the notice to the class members. By way of explanation, Rule 23(d)(2) provides that the Court "may order that notice be given in such a manner as it may direct of the action by the party seeking to maintain the action on behalf of the class." Likewise, the Notes to Rule 23 state that "[t]his Rule requires those seeking to maintain an action on behalf of a class to notify the members of the class of the pendency of the action." It is therefore our position that Rule 23 requires the class representative and not the Defendant to take that action. Thus, if I voluntarily satisfy that obligation, I would anticipate that the Plaintiff will argue that the issue is moot.

Thus, I find myself in this procedural and jurisdictional quandary. I am not deliberately disregarding the Court's directive to me. I would therefore ask that the Court schedule a hearing or at least a status conference to assist with working through this issue. I would also ask that the Court extend the time for compliance with your directive until this issue can be further addressed with the Court, particularly if the Court does not agree that the deadline is held in abeyance while the Rule 59(e) motions remain pending.

Thank you for your consideration of this request.

Sincerely,

DAVIDSON & LINDEMANN, P.A.



Andrew F. Lindemann

AFL/

cc: Charles J. Hodge, Esquire (*Via Email Only*)
T. Ryan Langley, Esquire (*Via Email Only*)
James Fletcher Thompson, Esquire (*Via Email Only*)

1. On September 9, 2014, the parties received an email from Judge Gibbons stating that he was denying the Defendant's Motion to Alter or Amend Order and/or Motion for Reconsideration filed August 5, 2014. No form order or formal order, however, has been issued. The parties have now received the Amended Order on Plaintiff's Motion for Class Certification, Plaintiff's Motion to Compel and Defendant's Motion for Summary Judgment, which was filed September 16, 2014, but that Amended Order does not mention the Defendant's Rule 59(e) Motion to Reconsider or set forth the Court's rulings on that motion. The Court's September 9, 2014 email has not been filed nor is it a proper court order per the South Carolina Rules of Civil Procedure or the South Carolina Uniform Electronic Transactions Act, which governs the use of electronic documents. The Defendant is therefore filing this Rule 59(e) Motion to specifically request that a formal order adjudicating the Rule 59(e) Motion to Reconsider be issued. The Defendant further requests that the order address with specificity each of the issues raised by the Defendant so as to allow for proper appellate review.

2. In the Amended Order on Plaintiff's Motion for Class Certification, Plaintiff's Motion to Compel and Defendant's Motion for Summary Judgment, which was filed September 16, 2014, the principal amendment or change from the original Order is the reference to and reliance on two affidavits of Judy Caldwell and Jessica Hanak Coulter. Those two affidavits were never filed with the Court contemporaneously with the Motion for Class Certification as required by Rule 6(d), SCRCF. Those affidavits were likewise not filed at or before the April 8, 2014 motion hearing. Those affidavits were submitted by the Plaintiffs to Judge Gibbons for the first time by email on September 5, 2014, together with the Plaintiff's response to the Defendant's Motion to Alter or Amend Order and/or Motion for Reconsideration filed August 5, 2014. Those affidavits were submitted because the Defendant had challenged the Court's reliance in the original Order on

the "arguments of counsel at the hearing" as proof of the five requirements under Rule 23, SCRCPP, for class certification. The record was closed at the April 8, 2014 hearing. Therefore, the Court relied in error in the Amended Order on the affidavits that were not filed as required by Rule 6(d) or properly part of the record.

A Rule 59(e) motion may not be used to present evidence that was available but not submitted prior to the entry of an order or judgment. In other words, Rule 59(e) should not be used to supplement the record with otherwise available evidence after an order or judgment is entered. In *Elam v. South Carolina Department of Transportation*, 361 S.C. 9, 602 S.E.2d 772 (2004), the South Carolina Supreme Court noted that the Rule 59(e) in the Federal Rules of Civil Procedure is "practically identical" to its state counterpart. 602 S.E.2d at 779. As a result, the Supreme Court has relied on federal case law in construing Rule 59(e), SCRCPP. The federal courts have recognized that one of the limited purposes of Rule 59(e) is "to account for new evidence not available at trial" meaning not available prior to judgment. See, *Bogart v. Chapell*, 396 F.3d 548, 555 (4th Cir. 2005). The federal courts thus impose a burden on the moving party to demonstrate that the new evidence was unavailable at the time that the trial court entered judgment. *Id.* The federal district court in *Nagle Industries, Inc. v. Ford Motor Co.*, 175 F.R.D. 251 (E.D. Mich. 1997), explained that a Rule 59(e) motion "should not be utilized to submit evidence which could have been previously submitted in the exercise of reasonable diligence." 175 F.R.D. at 254. The Eighth Circuit has held that "[a]rguments and evidence which could have been presented earlier in the proceedings cannot be presented in a Rule 59(e) motion." *Peters v. General Service Bureau, Inc.*, 277 F.3d 1051, 1057 (8th Cir. 2002). See also, *BP Amoco Co. v. Sun Oil Co.*, 200 F.Supp.2d 429, 432 (D. Del. 2002) ("a motion for reargument may not be used to supplement or enlarge the record on which the court made its initial decision").

Consequently, Rule 59(e) may not be used to supplement or enlarge the record on which the Court made its decision. A Rule 59(e) motion may be used only to ask a court to reconsider a prior decision, but that reconsideration needs to be based on the same evidentiary record presented. Here, the Plaintiff has made no showing that affidavits of Judy Caldwell and Jessica Hanak Coulter were unavailable prior to the April 8, 2014 hearing or the date that the Court issued its ruling on the Motion for Class Certification. The dates of those two affidavits show that the evidence was available, but the Plaintiff did not submit it. Rule 59(e) cannot be used to get a "second bite of the apple" and correct an error made by the Plaintiff in failing to provide evidentiary support for his motion. The Court therefore has erred in accepting and citing to the affidavits in the Amended Order. The Court has further erred in accepting the late affidavits without at the very least giving notice of doing so to the Defendant and without allowing for the Defendant to file counter-affidavits or objections or having any opportunity to be heard on the newly considered evidence or requiring the Plaintiffs to show good cause.

As a result, the Court is requested to disregard the affidavits which were not timely or properly submitted and to rule that the Plaintiff has not proven his request for class certification. The Court is asked to rely on the record as closed at the April 8, 2014 hearing. The Plaintiff merely filed an unsupported motion for class certification. The motion itself consists of two sentences. It was not accompanied by any affidavits, deposition testimony or other evidence to make a showing of the five requirements on which the Plaintiff has the burden of proof. In short, the record that was properly closed at the April 8, 2014 hearing has no evidence to support the Court's rulings in allowing the certification of a class action.

The Defendant's motion is based upon the pleadings filed in this case, the Defendant's Memorandum in Opposition to Plaintiff's Motion for Class Certification filed April 11, 2014, the

Defendant's Memorandum in Support of Motion for Summary Judgment filed April 11, 2014, prior orders issued by the Court, and the rules of court.

The Defendant requests oral argument on this motion.

DAVIDSON & LINDEMANN, P.A.

BY: 

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(803) 806-8222

*Counsel for Defendant
South Carolina Department of Social Services*

Columbia, South Carolina

September 26, 2014

ORAL ARGUMENT REQUESTED

James Fletcher Thompson, LLC

Attorney at Law

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29X State Street
Charleston, SC 29401

October 31, 2014

The Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: *BLH by parents/general guardians Kenneth and Angela Hensley, and on behalf of all others similarly situated v. South Carolina Department of Social Services*
Case No. 2013-CP-42-1569


Dear Ms. Kitchings:

Please find enclosed for filing the original and six (6) copies of the Respondents' Motion to Dismiss Appeal, together with an original Certificate of Service and filing fee.

Thank you for your attention to this matter. If you have any questions, please do not hesitate to call me.

With respect and kind personal regards, I am,

Sincerely yours,


JAMES FLETCHER THOMPSON

JFT/mhw

Enclosures

Cc w/enclosures: Andrew F. Lindemann, Esq.
Joel S. Hughes, Esq.
Charles J. Hodge, Esq.
T. Ryan Langley, Esq.

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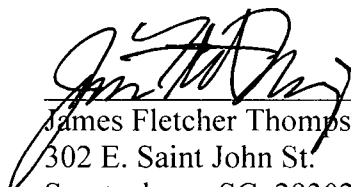
vs.

South Carolina Department of Social Services, Appellant

Certificate of Service

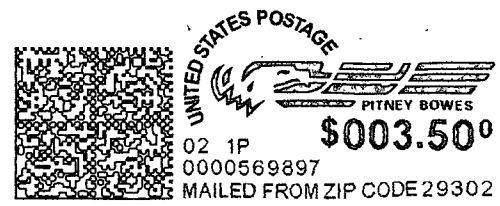
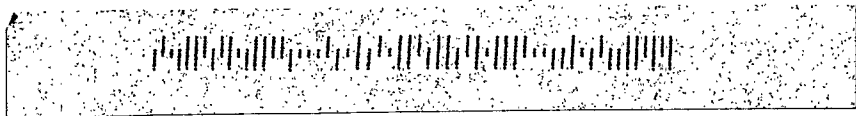
I certify that on October 31, 2014, I have served *Respondent's Motion to Dismiss the Appeal* by first-class mail, postage attached, addressed to:

Andrew F. Lindemann
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Attorneys for Respondents

Dated: Oct 31, 2014



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|||||
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