IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Georgetown County
Court of Common Pleas

The Honorable Benjamin H. Culbertson

Case No. 2012-CP-22-00971

In the Matter of the Estate of Willie Rogers Deas

Carolyn Deas.....Respondent,

v.

Marvadine Giles a/k/a Marvdine Giles, Willie Deas, Jr., Michelle Deas, Rodney Branton, Moya Branton, Whitney Beaufort.....Respondents/Appellants,

Of whom Marvadine Giles a/k/a Marvdine Giles is.....Appellant.

PETITION FOR REHEARING

Andrew T. Shepherd, S.C. Bar No. 76859
andrew@hartfirm.com
Katherine H. Hyland, S.C. Bar No. 76436
kate@hartfirm.com
Gregory L. Hyland, S.C. Bar No. 76443
greg@hartfirm.com
HART HYLAND SHEPHERD, LLC
Post Office Box 130
Summerville, SC 29484
(843) 410-0711
ATTORNEYS FOR RESPONDENT

PETITION FOR REHEARING

Respondent, Carolyn Deas, pursuant to Rule 221(a), SCACR, petitions the Court for rehearing of its Opinion filed February 4, 2015. In its Opinion, the Court reversed the Order of the Honorable Benjamin H. Culbertson, which Order had dismissed Appellant's appeal from the Probate Court for lack of appellate jurisdiction. Respondent respectfully submits that the Opinion misapprehends and overlooks certain salient facts and points of law that necessitate a rehearing before the Court.

Appellant's Appeal was untimely filed with the Circuit Court as it was filed after the ten-day deadline provided in S.C. Code Ann. § 62-1-308. In the alternative, and as an additional sustaining ground, the Notice of Appeal was untimely filed and is rendered moot since it was not filed after the Probate Court's Order denying Appellant's Rule 59 Motion, and the unappealed Order denying the Rule 59 Motion is the law of the case.

I. The Opinion Misapprehends Facts That Actually Indicate That The Appellant's Notice of Appeal Was Not In the Clerk Of Court's Post Office Box By The Deadline, And Thus Could Not Be Filed.

The Opinion misapprehends the facts which led to the failure of Appellant to perfect the filing of her Notice of Appeal in the Circuit Court. The procedure for initiating an appeal from the Probate Court to the Circuit Court is governed by S.C. Code Ann. § 62-1-308. The law in effect at the time of the appeal stated: "the notice of intention to appeal to the circuit court must be filed in the office of the circuit court and in the office of the probate court and a copy served on all parties within ten days after receipt of the appealed from order . . . of the probate court." § 62-1-308(a). By its plain language, § 62-1-308 requires both the service of the notice of intention to appeal and dual filing in the office of the Probate Court and the Circuit Court within ten days of receipt of written notice of the entry of the final order.

Appellant did not dispute that her deadline to file the Notice of Intent to Appeal was September 10, 2012. Further, Appellant presented evidence that the Notice of Intent to Appeal was not in the office of the Georgetown County Clerk of Court until September 11, 2013 when actually retrieved from the Clerk's post office box. In its Opinion, the Court finds that the parcel was delivered to *the Clerk's post office box* on September 10, 2012, which was sufficient to constitute filing, thus excusing the lack of actual timely receipt in the Clerk's office due to intervening errors by the postal service and the mail delivery arrangements of the Clerk's office. However, this finding and decision misapprehends the facts and occurrences which led to the inability of the Appellant's Notice of Appeal to actually be retrieved by the Clerk on the date it was placed within *a* post office box, and excuses the onus upon all appellants to ensure actual filing of their notices.

It is undisputed that the Appellant's Notice of Appeal was placed in *a* Post Office box on September 10, 2012. (R. p. 43). However, no *authorized* person was available to sign for the mail which the Appellant *chose* to send via certified mail, thus requiring signature by an authorized party. It was the testimony of the Clerk that the courier for the Clerk's Office retrieves the mail from the Clerk's post office box twice per day, but that sometimes the Post Office will place judicial mail into the Georgetown County general post office box where the County's courier does not sign for judicial mail, and instead will give the mail to the Post Office for placement in the correct post office box belonging to the Clerk's Office—where the Clerk's courier has authority to sign for mail. (R. pp. 54-56, pp. 44-45). It is undisputed that despite the fact the Clerk's courier retrieves mail from the *Clerk's* post office box, and is a person with authority to sign for certified mail notices, the Notice of Appeal in this case was not retrieved because

(according to Appellant's own exhibit) no authorized person was available to accept the parcel. (R. p. 43). The Opinion of the Court misapprehends and overlooks this crucial evidence, thus relieving Appellant of her duty to ensure timely filing.

With access to the tracking information, Appellant had the opportunity to remedy the mistakes in mailing, and ensure the Notice of Intent to Appeal was filed on time. The blame for failure to file in a timely fashion cannot be shifted to a third party, namely the Clerk of Court or the U.S. Postal Service. Based on the evidence presented, both the Clerk of Court and the U.S. Postal Service performed their duty and acted in a timely fashion, and even if there were errors by the U.S. Postal Service, the Appellant bears the risk of ensuring timely filing when she places her Notice of Appeal in the hands of the Postal Service.

As stated in Respondent's brief, while it appears little authority exists that is on point from South Carolina courts, the Federal Courts have directly addressed the issue. Mail delay has been found a reason for excusable delay when the mailing party is in jail. *Thompson v. E.I. DuPont de Nemours & Co., Inc.*, 76 F.3d 530 (4th Cir. 1996). In such a situation the prisoner has no ability to remedy errors in the mailing system. In contrast, "an unincarcerated litigant who decides to rely on the vagaries of the mail must suffer the consequences if the notice of appeal fails to arrive within the applicable time period." *Id* at 534. *See also*, *Houston v. Lack*, 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed. 245 (1988) ("if [unincarcerated] litigants do choose to use the mail, they can at least place the notice directly into the hands of the [postal service] and they can follow its progress by calling the court to determine whether the notice has been received and stamped, knowing that if the mail goes awry they can personally deliver notice at the last moment . . .").

As Appellant explained in her own Brief, she had access to postal service tracking information throughout the duration of the mailing. Once it was seen that the mail was not going to be delivered on time or something had gone awry in the delivery, Appellant had the opportunity and ability to deliver the notice to the Clerk of Court's Office to ensure it's timely delivery.

Appellant had the duty to ensure she satisfied all statutory requirements to perfect the appeal and further had the opportunity to avail herself of the various tools available to her to ensure the same was done. The Record on Appeal supports the conclusion that while the Notice of Appeal was placed into *a* post office box in Georgetown on September 10, 2012—and contrary to the misapprehended facts set forth in the Court's Opinion—there is actually no proof that it was placed into the correct box belonging to the Clerk; and, due to not only the Appellant's *choice* to send the parcel in a manner requiring signature by an authorized party and the errors of the U.S. Postal Service, the Notice of Appeal was not capable of retrieval for filing by the Clerk—a risk assumed by the Appellant which cannot be shifted to a third party. If anything, the Appellant's choice to send the parcel via certified mail requiring authorized signature operates as proof that the Appellant's Notice of Appeal did *not* reach the *Clerk's* post office box by the deadline. The Opinion's misapprehension of these key factors erroneously forgives the duties of an Appellant to ensure actual delivery to the Clerk *and* filing. As acknowledged in the Court's Opinion, when a statute requires the filing of a paper or document, it is filed when delivered to and received by the proper officer." *Gary v. State*, 347 S.C. 627, 557 S.E.2d 662 (2001) (emphasis added) (citing *Fox v. Union-Buffalo Mills*, 226 S.C. 561, 86 S.E.2d 253 (1955)); *See also*, *United States v. Lombardo*, 241 U.S. 73, 36 S.Ct. 508, 60 L.Ed. 897 (1916) ("A paper is filed when it is delivered to the

proper official and by him received and filed."); *Estate of Cretzmeyer*, 365 S.C. 12, 615 S.E.2d 116 (2005); *King v. Atlantic Coast Line R. Co.*, 86 S.C. 510, 68 S.E. 769 (1910); *Townsend v. Sparks*, 50 S.C. 380, 27 S.E. 801 (1897); *Archer v. Long*, 46 S.C. 292, 24 S.E. 83 (1896). Placement in a post office box for which no proof exists definitively stating it was the correct box does not meet the definition of delivered and received. (as the same is more fully defined and cited in Respondent's Brief and the Opinion). Accordingly, Respondent respectfully requests rehearing.

II. While The Court Has Discretion To Decline To Address An Additional Sustaining Ground, Because The Additional Sustaining Ground Raises A Threshold Jurisdictional Issue The Court Should Not Overlook The Matter.

The Opinion of the Court overlooks the threshold jurisdictional issues raised by Respondent's additional sustaining ground, which ground was also raised to the Circuit Court. Since the Appellant's Notice of Appeal was filed simultaneously with the Appellant's Rule 59 Motion (i.e. before issuance of a final order), the Notice of Appeal was of no effect according to precedent, and thus no appeal has ever been perfected and the Circuit Court and the Court of Appeals lack appellate jurisdiction—requiring the dismissal of Appellant's appeal. The Appellant's failure to file a notice of appeal following the Probate Court's Order denying her Rule 59 motion now renders the probate matter incapable of appeal, and the unappealed Rule 59 order—the final order—is the law of the case.

As set forth in Respondent's Brief, a timely and permissible Rule 59 motion stays the time period for filing the notice of intention to appeal until the entry of an Order on the Rule 59 motion. *See* Rule 59(f), SCRCP. Although the time for filing the Notice of Appeal was technically tolled by Rule, Appellant *simultaneously* served and filed both a

Notice of Appeal and a motion pursuant to Rule 59, SCRCP. Appellant never filed a subsequent or amended Notice of Appeal following entry of an Order denying her Rule 59 motion. The Supreme Court has acknowledged the effect of simultaneously filing both a Rule 59 motion and a notice of appeal:

> We are aware that a party may attempt to file both a Rule 59 motion and a notice of appeal. If this does occur, one or the other will be inappropriate depending on whether the motion is both timely under Rule 59 and permissible under our ruling today. *Cf. Hudson v. Hudson*, 290 S.C. 215, 349 S.E. 2d 341 (1986) (holding that when a timely post-trial motion is pending before the lower court, any notice of appeal will be dismissed without prejudice as premature). It is, of course, the party's responsibility to determine whether a Rule 59 motion or notice of appeal is appropriate under the facts of the case, and we caution parties not to attempt to avoid this responsibility by the simple expedient of filing both. *Elam v. SCDOT*, 362 S.C. 9, 602 S.E.2d 772 (2004). (emphasis added).

There is no question that Appellant's Rule 59 Motion in the Probate Court was both timely and permissible. However, the simultaneous filing of the Rule 59 Motion with the Notice of Appeal rendered the Notice of Appeal a nullity unless Appellant refiled the Notice following entry of an Order denying her Rule 59 Motion. *Id.* While the authority cited refers to appeals from the Circuit Court to the State's appellate courts, it is the argument of Respondent that the Circuit Court, when sitting in an appellate capacity, should not deviate from such precedent in its application, particularly where the trial and post-trial proceedings of the Probate Court are subject to the same rules of civil procedure that led to the adoption of such precedent.

Because the Appellant's Rule 59 Motion was pending, the Notice of Appeal at issue in this case is rendered moot and did not seek to appeal a *final* order as required by S.C. Code Ann. § 62-1-308 and Rule 201, SCACR. Thus, the Opinion of the Court overlooks this threshold jurisdictional issue. There is neither a provision of law nor a rule of procedure in the State courts that allows for the ripening of a premature notice of

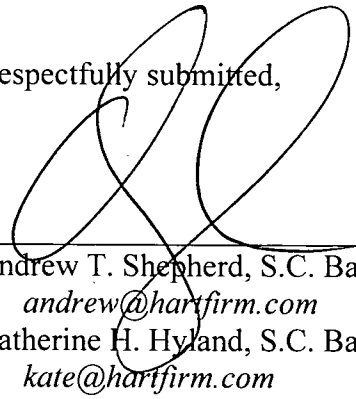
appeal following a trial court's ruling on an appellant's Rule 59 motion. In this case there was no appeal properly before the Circuit Court, and the unappealed Order denying Appellant's Rule 59 Motion is the law of the case which cannot, at this stage be appealed. "It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling. Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal. The unchallenged ruling, right or wrong, is the law of the case and requires affirmance." *First Union Nat. Bank of SC v. Soden*, 333 S.C. 554, 511 S.E.2d 372 (Ct. App. 1998) (citing *Lindsay v. Lindsay,* 328 S.C. 329, 491 S.E.2d 583 (Ct. App. 1997), *cert. denied* (June 18, 1998) (internal citations omitted)).

Accordingly, the Order of the Circuit Court dismissing the appeal of the Appellant should be affirmed, and the Order of the Probate Court denying Appellant's Rule 59 Motion is the unappealable law of the case—that there exists no basis to alter or amend the findings of fact or conclusions of law of the Probate Court's August 28, 2012 Order. To decline to address this additional sustaining ground (which was also raised to the Circuit Court and is entirely dispositive at each level of appeal) fails to address the underlying question as to whether any appellate jurisdiction exists over this matter, and "since this issue would be raised to the Court at some future time and since both parties have fully briefed the issue. . .it is in the interest of judicial economy to decide the matter now." *Southern Bell Telephone and Telegraph Co. v. Hamm*, 306 S.C. 70, 76 409 SE 2d 775 (1991).

CONCLUSION

Based on the foregoing, the Respondent respectfully petitions for rehearing of the issues presented.

Respectfully submitted,



Andrew T. Shepherd, S.C. Bar No. 76859
andrew@hartfirm.com
Katherine H. Hyland, S.C. Bar No. 76436
kate@hartfirm.com
Gregory L. Hyland, S.C. Bar No. 76443
greg@hartfirm.com
HART HYLAND SHEPHERD, LLC
207 East 1st North Street (29483)
Post Office Box 130
Summerville, SC 29484
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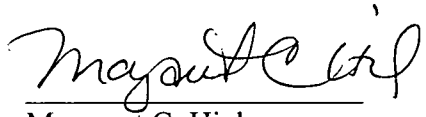
CERTIFICATE OF SERVICE

I certify that I have served the Respondent's Petition for Rehearing on the Appellants, by depositing a copy of it in the United States Mail, postage prepaid, on February 19, 2015, addressed to their attorneys of record, Malcolm M. Crosland, Esquire, Charles S. Goldberg, Esquire, and J. Kevin Holmes, Esquire, Post Office Box 9, Charleston, SC 29402.



Margaret C. Hiel
HART HYLAND SHEPHERD, LLC
Post Office Box 130
Summerville, SC 29484
(843) 410-0711

February 19, 2015

Summerville, South Carolina

HHS
HART HYLAND SHEPHERD

Thomas H. Hart, III, P.C.
Gregory L. Hyland
Andrew T. Shepherd
Katherine H. Hyland

February 19, 2015

VIA HAND DELIVERY, COURIER
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
John C. Calhoun Building
1015 Sumter Street
Columbia, South Carolina 29201

Re: In the Matter of the Estate of Willie Rogers Deas
Appellate Case No. 2013-000550

Dear Madame Clerk:

Enclosed please find the original plus eight (8) copies of the Respondent's Petition for Rehearing, together with the Certificate of Service for the same and check for $25.00. Please file the original and return two clocked copies to me in the envelope provided. By copy to opposing counsel I have served the same.

Should you require anything further, please do not hesitate to contact my office. Thank you for your assistance with this matter.

With warm regards, I remain

Sincerely,

Andrew T. Shepherd

ATS/

Cc: Carolyn Deas (w/encls.)
Malcolm M. Crosland, Esquire (w/encls.)