THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
In the Court of Common Pleas

The Honorable J. Derham Cole, Circuit Court Judge

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SC Court of Appeals

Case No. 2014-CP-42-1081

Lenora Whitfield Tucci, Appellant,

v.

April Tucci and Robert D. Ganyard, Personal Representatives of The Estate of Francis Paul Tucci, Jr., Respondents

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INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

I. DID THE CIRCUIT COURT ERR IN DISMISSING APPELLANT'S APPEAL WHEN APPELLANT FAILED TO COMPLY WITH THE STRICT TIME REQUIREMENTS OF SOUTH CAROLINA CODE §62-1-308(b)

STATEMENT OF THE CASE

This matter is before the Court on appeal from the Order of the Court of Common Pleas dated September 30, 2014, which dismissed Appellant's appeal from the Order of the Probate Court for Spartanburg County dated February 28, 2014

Francis Paul Tucci, Jr. ("Decedent") died a resident of Spartanburg County on July 29, 2012. April Tucci and Robert D. Ganyard (collectively, "Respondent") were appointed Co-Personal Representatives of Decedent's Estate by the Spartanburg County Probate Court ("Probate Court") on September 21, 2012.

The Probate Court issued its Order on February 28, 2014.[1] Appellant filed a Notice of Intent to Appeal to the Circuit Court on March 19, 2014. Respondent filed a cross-appeal by Notice of Intent to Appeal on March 20, 2014. Thereafter, on May 23, 2014, Respondent filed a Notice of Motion and Motion to dismiss Appellant's appeal based on failure to comply with the strict time requirements set forth in *South Carolina Code* §62-1-308(b), which states that the appellant "must file with the Clerk of Court of the Circuit Court a Statement of Issues on Appeal" within "forty-five days after receipt of written notice of the order, sentence, or decree of the probate court." (Emphasis added). Appellant in turn filed and served a Notice of Motion and Motion to dismiss Respondent's cross-appeal on June 13, 2014.

The Circuit Court issued its Order dismissing both appeals on September 30, 2014.[2] Appellant filed a Motion for Reconsideration on October 13, 2014, which the Circuit Court

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[1] The Probate Court Order is not at issue in this appeal

[2] Respondent did not appeal from this ruling

denied by Order dated November 30, 2014.

Respondent disputes all remaining portions of Appellant's Statement of Facts. Such facts are not relevant to this matter as the sole issue before this Court is whether the Circuit Court erred in granting Respondent's Motion to Dismiss Appellant's appeal for failure to comply with the strict time requirements set forth in *South Carolina Code* §62-1-308(b).

STANDARD OF REVIEW

Interpretation of a statute is a matter at law. Eldridge v. City of Greenwood, 331 S.C. 398, 416 -17, 503, S.E.2d 191 (S C. App. 1998) In an action at law, the "scope of review is limited to correction of errors at law." Johnson v. Lloyd, 399 S.C. 470, 732 S.E.2d 198, 200 (S.C. App. 2012).

ARGUMENT

I. THE CIRCUIT COURT DID NOT ERR IN DISMISSING APPELLANT'S APPEAL WHEN APPELLANT FAILED TO COMPLY WITH THE STRICT TIME REQUIREMENTS OF SOUTH CAROLINA CODE §62-1-308(b).

South Carolina Code § 62-1-308(b) clearly provides that "within forty-five days after receipt of written notice of the order, sentence, or decree of the probate court, the appellant *must* file with the clerk of the circuit court a Statement of Issues on Appeal . ." (emphasis added).

Form 4 of the Probate Court indicates that written notice of the Order was mailed to attorneys for all parties on March 7, 2014 Appellant's Notice of Motion and Motion reflects that she received notice of the Order on March 11, 2014. Forty-five (45) days after receipt of the Order was April 25, 2014, which was the deadline for Appellant to file and serve the Statement of Issues on Appeal. The Proof of Service of Appellant states that a copy of her Statement of Issues on Appeal was mailed to Respondent on May 15, 2014, which was sixty-five (65) days after the date that Appellant acknowledges receipt of the Order of the Probate Court.

The Circuit Court, in dismissing Appellant's appeal, relied on *State v Brown*, which states in pertinent part, "this Court has held the failure to comply with procedural requirements for an appeal divests a court of appellate jurisdiction . . . ." State v. Brown, 358 S C. 382, 387, 596 S.E.2d 39 (2004). Appellant contends that strict filing deadlines only apply to the commencement of an appeal and not to filing deadlines once an appeal has begun. The case law relied upon by Appellant for this contention does not support

Appellant's position Appellant cites McCall v. Finley, 294 S.C. 1, 362 S.E.2d 26 (Ct. App. 1987) and Plyler v Burns, 373 S.C. 637, 647 S.E.2d 188 (2007) as authority for the proposition that appellate courts should ignore technical requirements where the respondent has not been prejudiced by lack of compliance. However, both *McCall* and *Plyler* address noncompliance with technical requirements of the South Carolina Rules of Civil Procedure, not the unambiguous language of a South Carolina statute.

The South Carolina Supreme Court has held that when the language of a statute is clear and unambiguous, the Court must follow the language of the statute. In the case of In re Estate of Cretzmeyer, 365 S.C. 12, 615 S.E.2d 116 (2005), the Supreme Court, in affirming the dismissal of an appeal from the Probate Court, stated: "We decline Appellant's invitation to construe the statute in a manner inconsistent with its unambiguous terms. Our settled rules of statutory construction mandate the result we reach, for the statute is clear that the notice of appeal 'must be filed' in the circuit court within the ten-day period." In re Estate of Cretzmeyer, 365 S.C 12, 14, 615 S.E.2d 116 (2005). The Supreme Court has also held that: "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Media General Communications, Inc. V. South Carolina Dept. of Revenue, 388 S.C. 138, 694 S.E.2d 525, 530, (2010) (citing Hodges V. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). Here, *South Carolina Code* § 62-1-308(b) is unambiguous and states unequivocally that the appellant *must* file a Statement of Issues on Appeal within the prescribed time period. (Emphasis added). Appellant essentially asks that this Court substitute the word "may" in place of "must" in *South Carolina Code* § 62-1-

308(b), thereby judicially rewriting the statute. Appellant's contention that because Respondent was not prejudiced, the strict statutory time requirements may be ignored, is disingenuous and without merit.

The remainder of Appellant's Brief is not at issue before this Court. Essentially, Appellant attempts to have this Court rule on the merits of her appeal from the Order of the Probate Court, notwithstanding the fact that the merits of the appeal were not argued before or ruled upon by the Circuit Court. The only issue which was argued before and ruled upon by the Circuit Court was the Respondent's Motion to Dismiss Appellant's appeal for failure to comply with *South Carolina Code* § 62-1-308(b). Since the merits of Appellant's appeal from the Order of the Probate Court were not before the Circuit Court and were not ruled upon below, this matter is not properly before the Court. It is a well-settled principle of appellate law that "[i]n order to preserve an issue for appellate review, the issue must have been raised to and ruled upon by the trial court." Holy Loch Distributors, Inc., v. Hitchcock, 340 S.C. 20, 24, 531 S.E 2d 282 (2000). Thus, the other issues raised by Appellant relating to her appeal from the Order of the Probate Court are extraneous and are not properly before this Court.

CONCLUSION

The Appellant's argument that the Circuit Court erred in dismissing her appeal from the Order of the Probate Court is without merit. The Appellant failed to comply with the strict time requirements of *South Carolina Code* § 62-1-308(b), which mandates in plain language that a Statement of Issues on Appeal must be filed within forty-five (45) days after receipt of the written order being appealed. The Order of the Circuit Court dismissing Appellant's appeal should therefore be affirmed.

Respectfully submitted,

May 7, 2015

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April Tucci and Robert D. Ganyard,
Personal Representatives of The Estate
of Francis Paul Tucci, Jr , Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on this date she has served a copy of the Initial Brief of Respondent and Designation of Matter to be Included in the Record on Appeal, by ordinary first-class mail, filed in this case to the following attorney for the Appellant:

Kenneth P. Shabel
175 Magnolia Street, Suite 201
Spartanburg, SC 29306

This 7 day of May, 2015.

SWORN to before me this 7
day of May, 2015.

Betty J. Kressley
Notary Public for South Carolina
My commission expires 3-10-24

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

Re: Lenora Whitfield Tucci v. April Tucci and Robert D. Ganyard
Appellate Case No. 2014-002726

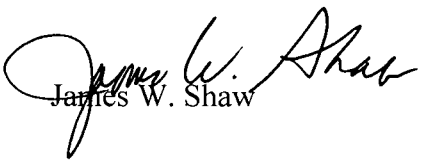
Dear Ms. Kitchings:

Enclosed please find the original and one (1) copy of the Initial Brief of Respondents and Designation of Matter to be Included in the Record on Appeal in the above-referenced matter. Also enclosed is the original and one (1) copy of a Proof of Service upon the Attorney for Appellant.

With kindest regards,

Sincerely yours,

DENNIS, SHAW, DRENNAN & PACK, LLC



James W. Shaw

Enclosures
cc:
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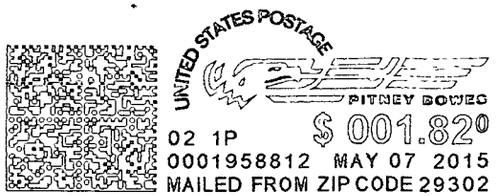
Ms. April Tucci
Mr. Robert Ganyard



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