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IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

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SC 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 A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on April 2, 2015.

QUESTIONS PRESENTED

1. Did the Court of Appeals err by holding that submitting proof that a Notice of Appeal was placed in a Clerk of Court's post office box on the date of a filing deadline constitutes timely filing, despite the fact the Notice was not actually received and filed in the Clerk of Court's Office until the next day?

2. Did the Court of Appeals err in declining to address Respondent's additional sustaining ground when the same constitutes a threshold jurisdictional issue and a novel question of law?

STATEMENT OF THE CASE

On August 28, 2012, the Honorable Ralph Waldo Maring, Probate Court Judge for Georgetown County, issued an Order ruling that the Respondent, Carolyn Deas, was the surviving spouse of Willie Rogers Deas and had priority for appointment as Personal Representative of the Estate of Willie Rogers Deas. (R. pp. 1-11). Appellant received written notice of the entry of the Probate Court's Order on August 29, 2012, thereby making September 8, 2012 the deadline for serving and filing the notice of intention to appeal in the Probate Court and Circuit Court. Since September 8, 2012 fell on a Saturday, Appellant's notices of intention to appeal had to be served on the parties and filed in both courts no later than Monday, September 10, 2012. (R. p. 20).

Appellant filed a Notice of Intention to Appeal in the Probate Court on September 7, 2012. Concurrently, on September 7, 2012 Appellant served a Rule 59, SCRCP Motion, seeking alteration, amendment, and/or reconsideration of the Probate Court's Order

Appellant served and filed these documents under copy of a cover letter to the Probate Court dated September 6, 2012. Appellant further served and filed the Notice of Intention to Appeal to the Circuit Court under copy of a cover letter to the Georgetown County Circuit Court, dated September 5, 2012. Appellant's Notice of Intention to Appeal was stamped received by the Georgetown County Clerk of Court's office on September 14, 2012.

On November 15, 2012, Respondent filed a Motion to Dismiss the Appeal on the basis the Notice of Intent to Appeal was untimely served on the Circuit Court, which lacked jurisdiction over the Appeal as a result. (R. p. 32). Appellant presented evidence that the Notice of Intention to Appeal was placed in the Clerk of Court's mailbox on September 10, 2012, but was not picked up by the Clerk of Court's courier until September 11, 2012 because no authorized person was available to retrieve the document on September 10, 2012. (R. p. 43). The Honorable Alma White, Clerk of Court for Georgetown County confirmed that it was received in the Clerk of Court's office on September 11, 2012 despite the clock-in date of September 14, 2012. (R. p. 45).

On February 26, 2013, The Honorable Benjamin H. Culbertson entered an Order granting Respondent's Motion to Dismiss based on the strict interpretation of S.C. Code, Ann. § 62-1-308, which requires that a notice of appeal be filed within ten days of the Appellant's receipt of written notice of the entry of the Order. (R. pp. 19-22). Judge Culbertson held that § 62-1-308 must be read for its clear and unambiguous terms, and, thus, the Circuit Court lacked appellate jurisdiction over the appeal. (R. pp. 21-22).

The Court of Appeals reversed the judgment of the Circuit Court. *In the Matter of the Estate of Willie Rogers Deas*, Op. No. 2015-UP-059 (S.C. Ct. App. filed Feb. 4, 2015). Petitioner seeks a writ of certiorari to review that decision.

ARGUMENT

1. THE COURT OF APPEALS SHOULD HAVE AFFIRMED THE CIRCUIT COURT AND THE DECISION IS IN CONFLICT WITH PRIOR DECISIONS OF THE SUPREME 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 applicable version of statute at the time the present appeal began 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. The South Carolina Supreme Court has directly addressed this very issue in the *Estate of Cretzmeyer*, 365 S.C. 12, 615 S.E.2d 116 (2005) (holding Section 62-1-308(a) must be read for it's clear and unambiguous terms and mailing does not constitute filing).

The Court of Appeals held that under the facts of the present case *Cretzmeyer* is not applicable because the Appellant submitted proof that her Notice of Appeal was placed in a post office box (presumably that of the Clerk of Court) on the date of the filing deadline. The clear and unambiguous terms of the controlling statute and long standing precedent as to what constitutes "filing" requires affirmation of the Circuit Court. South Carolina law is unambiguous as to the definition of filing. "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 on the date of a filing deadline does not meet the definition of delivered and received, particularly under the facts of this case. As even noted by the Appellant, the parcel was not delivered to the proper official on the due date because no authorized recipient was available to retrieve the parcel from the post office box in which it was placed. (R. p. 43). Due to the manner in which Appellant chose to mail the parcel via certified mail which required an authorized recipient, the Notice of Appeal was simply not received by the proper officer in time to constitute the necessary filing. *Gary v State*, 347 S.C. 627, 557 S.E.2d 662 (2001). Delivery errors of the United States Postal Service which may result in delay of a parcel's arrival to its destination are a risk assumed when mailing, and under the facts of the present case—and despite the harsh result—those risks when coupled with an Appellant's choice to mail a parcel in a certain manner which may ultimately restrict its immediate retrieval or forwarding should not fall to the Clerks of Court of this State. Federal Courts have held that "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 . . .").

While the facts of the present case may differ in some respects from those of *Cretzmeyer*, most notably that the Appellant in the present case could prove her parcel made it to a post office box for retrieval, the requirement of filing (as that term is defined by precedent) remains the same and should not be changed to accommodate an otherwise inconvenient and harsh result for the Appellant. To do so impermissibly extends the deadline to file the Notice of Appeal and operates to defeat precedent governing bright-line rules for filing. "The time prescribed by statute within which notice of appeal must be given cannot be enlarged or extended by the courts." *Palmer v Simons*, 107 S.C. 93, 95, 92 S.E. 23, 23 (1917); *Gibbes v Beckett*, 84 S.C. 534, 66 S.E. 1000 (1910) ("The law requiring appeals to be taken within a fixed time may sometimes produce hardship, but it is important to the administration of justice that there will be no uncertainty."). With the Appellant's access to the tracking information for the parcel, Appellant had the opportunity to remedy the mistakes in mailing, and ensure the Notice of Intent to Appeal was filed on time in the Clerk's Office. The blame for failure to achieve filing in the Clerk's Office in a timely fashion should not be shifted to a third party, namely the Clerk of Court or the U.S. Postal Service. Based on the evidence presented, it was the manner and method of Appellant's mailing that ultimately prevented the parcel's retrieval from the post office box on the date it was due, and the same could have been remedied through the very tracking history cited by the Court of Appeals as proof of Appellant's substantial compliance.

While the unpublished opinion of the Court of Appeals has no precedential effect, it nonetheless excuses the burden of an Appellant to ensure their filings are timely received by

the Clerk and filed, in contravention of long standing authority.

2. THE RESPONDENT'S ADDITIONAL SUSTAINING GROUND CONSTITUTES A THRESHOLD JURISDICTIONAL ISSUE PRESENTED TO THE LOWER COURT THAT SHOULD BE RULED UPON AS BOTH A MATTER OF JUDICIAL ECONOMY AND A NOVEL ISSUE OF LAW.

While the Court of Appeals has the discretion to address an additional sustaining ground as was cited within its opinion, the Respondent's additional sustaining ground in this case constitutes a novel issue for this Court, and furthermore constitutes a threshold jurisdictional issue governing whether the instant appeal may even be maintained. "An appellate court may affirm the lower court's judgment for any reason appearing in the record on appeal." I'ON, L.L.C. v. Town of Mt. Pleasant, 338 SC 406, 422, 526 S.E.2d 716 (2000). "An affirmance promotes judicial economy and finality in private and public affairs, which are important public policies." *Id* (citing *E g , Kreutner v David,* 320 S.C. 283, 465 S.E.2d 88 (1995) (appellate court may affirm for any reason appearing in the record); *State v Johnson,* 278 S.C. 668, 301 S.E.2d 138 (1983)).

Respondent's additional sustaining ground derives from the Appellant's simultaneous filing of both a Motion to Alter or Amend pursuant to Rule 59, SCRCP, and a Notice of Appeal without filing a subsequent Notice of Appeal of the Probate Court's Order denying the Rule 59 Motion. Assuming, *arguendo*, that the Appellant's Notice of Appeal from the Probate Court was not tardy due to the mailing issues discussed *supra*, the Appellant has still failed to actually appeal the Final Order of the Probate Court.

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. Unlike Federal Courts, there is no authority in the State Courts allowing the ripening of such a Notice after entry of an Order denying the Rule 59 motion. *Cf* Fed. R. App. P. 4.

The South Carolina 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).

In the present 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 and must be affirmed. "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 as the Final order of the Probate Court has never been appealed and there is no appellate jurisdiction. The unappealed Order of the Probate

Court denying Appellant's Rule 59 Motion is the 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.

While the Court of Appeals certainly has discretion to decline to address additional sustaining grounds, the ground before the Court provides a basis to affirm the Order of the Circuit Court. As argued by Respondent on Petition for Rehearing, 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 fundamental 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 S.E.2d 775 (1991). The additional sustaining ground provides an avenue for affirmance of the Circuit Court, thus promoting judicial economy and finality in private affairs. I'ON, L.L.C. v. Town of Mt. Pleasant, 338 SC 406, 422, 526 S.E.2d 716 (2000).

CONCLUSION

For the reasons stated, petitioner asks the Court to grant the petition for a writ of certiorari.

[SIGNATURE OF COUNSEL ON FOLLOWING PAGE]

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

May 4, 2015.

IN THE STATE OF SOUTH CAROLINA
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of whom Marvadine Giles a/k/a Marvdine Giles is.....Appellant.

PROOF OF SERVICE

I certify that I have served the Respondent's Petition for a Writ of Certiorari and Appendix on the Appellant, by depositing a copy of it in the United States Mail, postage prepaid, on May 4, 2015, addressed to her 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
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May 4th, 2015

Summerville, South Carolina

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

May 4, 2015

Clerk of Court
The State of South Carolina Court of Appeals
1220 Senate St.
Columbia, SC 29201

RE: **In the Matter of the Estate of Willie Rogers Deas**
Case No.: 2012-CP-22-00971
Carolyn Deas v. Marvadine Giles a/k/a Marydine Giles, Willie Deas, Jr., Michelle Deas, Rodney Branton, Moya Branton, Whitney Beaufort

Dear Madam Clerk:

Please find enclosed the **Respondent's Petition for a Writ of Certiorari with Appendix**, and **Proof of Service** in the above referenced matter A duplicate original of each has been simultaneously filed with the Supreme Court

If you have any questions, or if I can be of further assistance, please do not hesitate to contact me

With kindest regards, I remain

Most sincerely,

Andrew T Shepherd

Enclosure(s) as stated

ATS/mch

cc. Malcolm M. Crosland, Jr , Esquire
Charles S Goldberg, Esquire
James K. Holmes, Esquire

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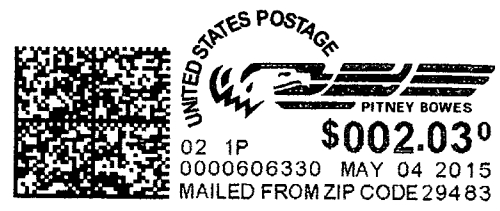

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