

7/10/15

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

AUG 12 2015

SC Court of Appeals

Maite Murphy, Circuit Court Judge

Case No.: 2010-CP-38-0670

Wanda Mack,

Appellant,

v.

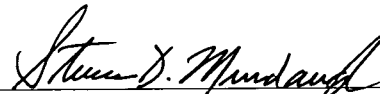
Carmen Gates,

Respondent.

NOTICE OF APPEAL

Wanda Mack appeals the order of the Honorable Maite Murphy dated June 8, 2015. Appellant received notice that the order had been signed via email on July 6, 2015. Appellant has not received written notice of entry of the order as of the date of this Notice of Appeal.

July 29, 2015



Steven D. Murdaugh
R. Alexander Murdaugh
Peters, Murdaugh, Parker, Eltzroth
& Detrick, P.A.
P.O. Box 1164
Walterboro, SC 29488
(843) 549-9544
Attorneys for Appellant

Other Counsel of Record:
James B. Lybrand, Jr.
McDonald, McKenzie, Rubin, Miller,
& Lybrand, P.A.
P.O. Box 58
Columbia, SC 29202
(803) 252-0500
Attorneys for Respondent

LAW OFFICES
PETERS, MURDAUGH, PARKER, ELTZROTH & DETRICK

PROFESSIONAL ASSOCIATION

123 WALTER STREET
POST OFFICE BOX 1164

WALTERBORO, SOUTH CAROLINA 29488

TELEPHONE: (843) 549-9544

TOLL FREE: (800) 943-2113

FAX: (843) 549-9546

WWW.PMPED.COM

RANDOLPH MURDAUGH, SR.
(1887-1940)

RANDOLPH MURDAUGH, JR.
(1915-1998)

J. ROBERT PETERS, JR.
(1927-2008)

OTHER OFFICES:
101 MULBERRY STREET EAST
POST OFFICE BOX 457
HAMPTON, SC 29924
TELEPHONE (803) 943-2111
FAX (803) 943-3945

690 NORTH GREEN STREET
POST OFFICE BOX 2500
RIDGELAND, SC 29936-2500
TELEPHONE: (843) 726-6131
FAX: (843) 726-6057

JOHN E. PARKER
J. PAUL DETRICK
DANIEL E. HENDERSON
MARK D. BALL
RANDOLPH MURDAUGH, IV
R. ALEXANDER MURDAUGH
BERT G. UTSEY, III
RANDOLPH MURDAUGH, III
GRAHAME E. HOLMES
LEE D. COPE
LEAGUE B. CREECH
STEVEN D. MURDAUGH
WILLIAM F. BARNES, III
AUSTIN HOWELL CROSBY

CLYDE A. ELTZROTH, JR.
(INACTIVE)

August 10, 2015

RECEIVED

AUG 12 2015

SC Court of Appeals

Steven D. Murdaugh
E-mail: smurdaugh@pmped.com

VIA FACSIMILE & U.S. MAIL: (803) 734-1839

The Honorable Jenny Abbott Kitchings
Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Wanda Mack v. Carmen Gates
Civil Action No.: 2010-CP-38-00670

Dear Mrs. Kitchings:

You will find enclosed the original and two copies of a Notice of Appeal in a Civil Case, Order Denying Plaintiff's Motion to Restore, Certificate of Service, Acceptance of Service with regards to the above-referenced matter along with this firm's check in the amount of \$100.00 to cover the filing fee.

Under separate cover of letter, I have forwarded a copy of same to counsel of record. Once these documents have been filed, please return a clocked copy in the addressed, stamped envelope provided for your convenience.

Sincerely,



Tamika D. Simmons
Legal Assistant to Steven D. Murdaugh

/tds

cc: James B. Lybrand, Jr. (w/o enclosures)
Enclosures as stated

STATE OF SOUTH CAROLINA)
)
 COUNTY OF ORANGEBURG)
)
 Wanda Mack)
 Plaintiff)
)
 v.)
)
 Carmen Gates)
 Defendant)

IN THE COURT OF COMMON PLEAS

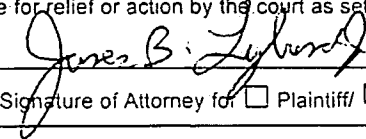
CASE NO. 2010-CP-38-00670

ORDER INFORMATION
 FORM AND COVER SHEET

RECEIVED

AUG 12 2015

SC Court of Appeals

Plaintiff's Attorney: Steven D. Murdaugh Peters, Murdaugh, Parker, Eltzroth & Detrick P.O. Box 1164 Walterboro, SC 29488 phone: _____ fax: _____ e-mail: _____ other: _____	Defendant's Attorney: JAMES B. LYBRAND P. O. Box 58 Columbia, SC 29202 phone: 252-0500 fax: 929-3530 e-mail: _____ other: _____
<input type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I AND III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II AND III) <input type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete Sections II and III)	
SECTION I: Hearing Information	
Nature of Motion: _____ Estimated Time Needed: _____ Court Reporter Needed: <input type="checkbox"/> YES / <input checked="" type="checkbox"/> NO	
SECTION II: Motion Type	
<input type="checkbox"/> Written motion attached <input checked="" type="checkbox"/> Order / Order Denying Plaintiff's Motion to Restore I hereby move for relief or action by the court as set forth in the attached proposed order.	
 Signature of Attorney for <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant	12/1/2014 Date submitted
SECTION III: Motion Fee	
<input checked="" type="checkbox"/> PAID - AMOUNT: \$25.00 <input type="checkbox"/> Other: _____	
JUDGE'S SECTION	JUDGE _____ CODE: _____ Date: _____
CLERK'S VERIFICATION	
Collected by: <u>Shante Zene</u> Date Filed: <u>12-3-14</u> <input checked="" type="checkbox"/> MOTION FEE COLLECTED: <u>\$ 25.00</u> <input type="checkbox"/> CONTESTED - AMOUNT DUE: _____	

SCCA/233 (11-03)

MAILED

12/10/14 Shanki

ATTEST: TRUE COPY

Winnif B. Clark
 CLERK OF COURT
 ORANGEBURG COUNTY, SC

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Wanda Mack,

Plaintiff(s),

v.

Carmen Gates

Defendant(s).

IN THE COURT OF COMMON PLEAS

CASE NO.: 2010-CP-38-00670

ORDER

ATTEST: TRUE COPY

Winniford B. Clark

CLERK OF COURT

ORANGEBURG COUNTY, SC

FILED FOR RECORD
VINNIFORD B. CLARK
CLERK OF COURT
ORANGEBURG COUNTY, SC
2014 DEC - 3 PM 1:11

This matter came before me on October 6, 2014 for argument of Plaintiff's Motion to Restore this action to the active general docket pursuant to Rule 40 (j) SCRCP. The motion was filed on February 19, 2013. Present at the hearing was Steven O. Murdaugh, counsel for Plaintiff, and James B. Lybrand, Jr., counsel for Defendant.

This action arises from an automobile accident occurring on March 10, 2009. Plaintiff filed her Complaint on May 12, 2010. Defendant filed her Answer on June 3, 2010. Discovery in the case was conducted and the case was mediated unsuccessfully. On September 29, 2011, Plaintiff sent Defendant a signed Consent Order striking the case under Rule 40(j) SCRCP. Defendant signed the consent and mailed the original Order on October 6, 2011 to Judge Edgar W. Dickson for filing. Defense counsel copied Plaintiff's counsel with his October 6 letter to Judge Dickson. On October 23, 2011, Judge Dickson signed the Order striking the case under Rule 40(j). The Order was filed on October 28, 2011. Defense counsel received a clocked copy of the filed Order from the Orangeburg Clerk's office a few days later.

On or about February 19, 2013, Plaintiff filed her motion to restore this case pursuant to Rule 40(j). Plaintiff sent defense counsel a letter and proposed Consent Order to Restore. On

February 26, 2013 defense counsel advised Plaintiff that he could not consent to restoring the case since the motion to restore had not been filed within one (1) year as provided in Rule 40(j). Counsel for Plaintiff submitted an Affidavit stating that he had never received a copy of the filed Order. The parties submitted documents (attached hereto) for the court's consideration.

Rule 40 (j) SCRPC governs the restoration of cases and provides as follows:

"A party may strike its complaint, counterclaim, cross-claim or third party claim from any docket one time as a matter of right, provided that all parties adverse to that claim, counterclaim, cross-claim or third party claim agree in writing that it may be stricken, and all further agree that if the claim is restored upon motion made within 1 year of the date stricken, the statute of limitations shall be tolled as to all consenting parties during the time the case is stricken, and any unexpired portion of the statute of limitations on the date the case was stricken shall remain and begin to run on the date that the claim is restored. A party moving to restore a case stricken from the docket shall provide all parties notice of the motion to restore at least 10 days before it is heard. Upon being restored, the case shall be placed on the General Docket and proceed from that date as provided in this rule." (emphasis added)

Here, it is undisputed that Plaintiff did not file her Motion to Restore within one (1) year from the date her case was stricken which was October 28, 2011. Her motion was not filed until or about February 19, 2013. Rule 40 (j) SCRPC does not require a plaintiff in all cases to file a motion to restore within one year of the case being stricken; however, the rule clearly provides that a Plaintiff must move to restore the case within the one (1) year period if Plaintiff seeks to take advantage of the statute of limitations tolling feature provided in the rule. Maxwell v. Genez, 356 S.C. 617, 591 S.E.2d 26 (2003); Graham v. Dorchester County School Dist., 339 S.C. 121, 125, 528 S.E.2d 80, 82 (SCAPP 2000). The striking of a case under Rule 40 (j) does not stop the running of the applicable statute of limitations. The statute of limitations ran on

The Affidavit of Plaintiff's counsel (paragraph 15) notes that neither Plaintiff nor her counsel were given a copy of the Order striking the case. Presumably, Plaintiff argues that her

failure to receive a copy excuses her failure to timely move to restore the case. This argument lacks merit. Plaintiff consented to the Order striking the case and Plaintiff was copied with the October 6, 2011 letter to Judge Dickson submitting the Order for filing. Accordingly, Plaintiff was on notice in early October 2011 that the case was being stricken and thereafter had ample time and opportunity to inquire from the court as to the status of the case. Prior to January or February 2013, Plaintiff apparently did not inquire about or request a copy of the Order from the Clerk of Court or Defense counsel. Plaintiff was certainly aware, before receiving a filed copy, that she would need to restore the case. Nonetheless, it was not until approximately February 2013, sixteen (16) months after the Order had been filed, that Plaintiff sought a copy of the Order.

Our Supreme Court has held that the time limits outlined in Rule 40(j) may not be extended under any "good cause" theory outlined in Rule 6(b) SCRCF. See, Maxwell, 591 S.E.2d at 28 (2003). The Court in Maxwell held as follows:

"Rule 40(j) does not require that a party move to restore the case to the docket within one year after it was stricken. Instead, the unambiguous language provides that, if the claim is restored within one year after it is stricken, the statute of limitations is tolled for that period.

. . .

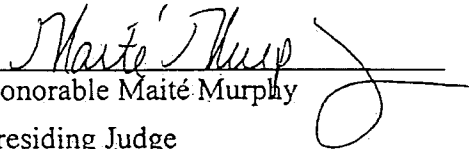
A party can move to restore a case to the docket more than one year after the claim was stricken without running afoul of Rule 40(j); the party simply cannot take advantage of the one year tolling period provided by the rule.

. . .

Rule 6(b) is not applicable to Rule 40(j). The language of Rule 6(b) specifies it applies when there is a deadline . . . Rule 40(j) does not have a deadline during which a motion to restore must be filed. Accordingly, Rule 6(b) is inapplicable." Maxwell, 591 S.E. 2d at 28.

The one year period of time to file a motion to restore applies only when a party seeks to take advantage of the tolling of a statute of limitations. Here, Plaintiff failed to move to restore within the one (1) year period after Judge Dickson's Order striking the case. As such, Plaintiff cannot take advantage of the tolling period thereby making restoration of the case improper. Accordingly, Plaintiff's Motion to Restore must be denied.

AND IT IS SO ORDERED.


Honorable Maité Murphy
Presiding Judge
First Judicial Court

Orangeburg, South Carolina

November 25, 2014

ATTACHMENTS

2019 DEC - 3 PM 1:11

FILED FOR RECORD
WINDY HILL
CLERK OF COURT
OFFICE

McDONALD, McKENZIE, RUBIN, MILLER AND LYBRAND, L.L.P.
ATTORNEYS AT LAW

ROBERT A. MCKENZIE
HYMAN S. RUBIN, JR.
BEN N. MILLER III
JAMES B. LYBRAND, JR.†
RONALD E. ALEXANDER
KEVIN T. BROWN
JOHN F. MCKENZIE*
AMANDA N. PITTMAN

POST OFFICE BOX 58,
COLUMBIA, SOUTH CAROLINA 29202

2ND FLOOR, 1704 MAIN STREET
COLUMBIA, SOUTH CAROLINA 29201
www.mmrl.com

HEYWARD E. McDONALD
1925-2000

TELEPHONE (803) 252-0500
FAX (803) 252-6705

†CERTIFIED MEDIATOR AND ARBITRATOR
*ALSO ADMITTED IN TEXAS

December 1, 2014

Lisa W. Mizell
Orangeburg County Clerk of Court
Post Office Drawer 9000
Orangeburg, SC 29116

Re: Wanda Mack -vs- Carmen Gates
Case Number: 2010-CP-38-00670

Dear Ms. Mizell:

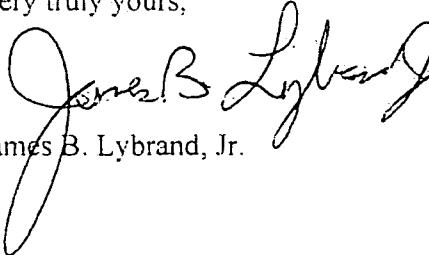
I am enclosing an original and copies of an Order from Judge Murphy denying Plaintiff's Motion to Restore this action. I am also enclosing a cover sheet and a check in the amount of \$25.00 for filing costs. I would ask that you file the original Order and return clocked copies to me in the envelope provided.

By copy of this letter to Steve Murdaugh, I am sending him an unlocked but signed copy of the Order. Please have your office send Mr. Murdaugh a clocked copy once it is filed.

If you require anything further, please let me know.

With kind regards, I am

Very truly yours,


James B. Lybrand, Jr.

JBLjr/bg
Enclosures
cc: Steven D. Murdaugh, Esquire

FILED FOR RECORD
WINTER 2014
CLERK OF COURT
ORANGEBURG, SC

2014 DEC -3 PM 1:09

cw

McDONALD, McKENZIE, RUBIN, MILLER AND LYBRAND, L.L.P.
ATTORNEYS AT LAW

ROBERT A. MCKENZIE
HYMAN S. RUBIN, JR.
BEN N. MILLER III
JAMES B. LYBRAND, JR.
RONALD E. ALEXANDER
KEVIN T. BROWN
JOHN F. MCKENZIE
AMANDA N. PITTMAN

POST OFFICE BOX 58
COLUMBIA, SOUTH CAROLINA 29202

2ND FLOOR, 1704 MAIN STREET
COLUMBIA, SOUTH CAROLINA 29201

www.mmrrml.com

HEYWARD E. McDONALD
1925-2000

TELEPHONE (803) 252-0500
FAX (803) 929-3530

CERTIFIED MEDIATOR AND ARBITRATOR
ALSO ADMITTED IN TEXAS

February 26, 2013

VIA FAX (843) 549-9546

Steven D. Murdaugh, Esquire
Peters, Murdaugh, Parker, Eltzroth, & Detrick, PA
P. O. Box 1164
Walterboro, SC 29488

Re: Wanda Mack v. Carmen Gates
Civil Action No: 2010-CP-38-00670

FILED FROM FIELD
WANDA MACK V. CARMEN GATES
CLERK OF COURT
ORANGE COUNTY
2014 DEC -3 PM 1:12

Dear Steve:

I will need to discuss with you the restoration issue on this case. After getting your motion and your request for our consent (which I called you about a few weeks ago) I pulled the file and saw where the case had been stricken under Rule 40(j) on October 28, 2011. Under the rule the case must be restored within one year and in looking through the file, I can't find any motion or request from your office about restoring the case until early 2013. Please check your file and let me know if I have overlooked something. I certainly have authority to consent to restoring cases when the request is timely made but if the request is beyond the time limits called for in the rules, that is something that I have to discuss with my client.

Please check your file and get back with me as soon as possible.

With kind regards,

McDonald, McKenzie, Rubin,
Miller and Lybrand, LLP

James B. Lybrand, Jr.

JBLjr/pa

LAW OFFICES
PETERS, MURDAUGH, PARKER, ELTZROTH & DETRICK
PROFESSIONAL ASSOCIATION

JOHN E. PARKER
J. PAUL DETRICK
DANIEL E. HENDERSON
MARK D. BALL
RANDOLPH MURDAUGH, IV
RONNIE L. CROSSBY
R. ALEXANDER MURDAUGH
BERT G. UTSEY, III
RANDOLPH MURDAUGH, III
GRAHAME E. HOLMES
LEE D. COPE
MATTHEW V. CRESCH
LEAGUE B. CRESCH
STEVEN D. MURDAUGH
WILLIAM F. BARNES, III

CLYDE A. ELTZROTH, JR.
(INACTIVE)

123 WALTER STREET
POST OFFICE BOX 1164
WALTERBORO, SOUTH CAROLINA 29488
TELEPHONE: (843) 549-3544
TOLL FREE: (888) 943-2113
FAX: (843) 549-9546
WWW.PMPED.COM

February 19, 2013

RANDOLPH MURDAUGH, SR.
(1987-1940)
RANDOLPH MURDAUGH, JR.
(1915-1935)
J. ROBERT PETERS, JR.
(1927-2008)

OTHER OFFICES:
101 MULBERRY STREET EAST
POST OFFICE BOX 457
HAMPTON, SC 29924
TELEPHONE (803) 943-2111
FAX (803) 943-3943.

110 WEST WILSON STREET
POST OFFICE BOX 2500
RIDGELAND, SC 29936-2500
TELEPHONE: (843) 726-6131
FAX: (843) 726-6057

Extension: 8324

Email: TSimmons@pmped.com

VIA FACSIMILE (803) 929-3530 & U.S. MAIL

Mr. James B. Lybrand, Jr.
McDonald, McKenzie, Rubin,
Miller and Lybrand, L.L.P.
Post Office Box 58
Columbia, SC 29202

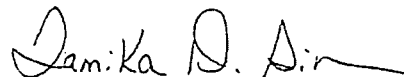
Re: *Wanda Mack v. Carmen Gates*
Civil Action No.: 2010-CP-38-00670

Dear Mr. Lybrand:

Enclosed herewith for your review and consideration is a proposed Consent Order to Restore Pursuant to Rule 40(j) with regard to the above referenced matter. If you are in agreement, please sign and return in the addressed, stamped envelope provided for your convenience. Upon receipt of the filed Order, I will provide you with a copy of same.

With kind regards, I am

Sincerely,



Tamika D. Simmons
Legal Assistant to Steven D. Murdaugh

/tds
Enclosures As Stated

FILED FOR RECORD
VENDOR'S OFFICE
CLERK OF COURT
ORANGE COUNTY
2011 DEC -3 PM 1:12

McDONALD, McKENZIE, RUBIN, MILLER AND LYBRAND, L.L.P.
ATTORNEYS AT LAW

ROBERT A. McKENZIE
HYMAN S. RUBIN, JR.
BEN N. MILLER III
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POST OFFICE BOX 58
COLUMBIA, SOUTH CAROLINA 29202

2ND FLOOR, 1704 MAIN STREET
COLUMBIA, SOUTH CAROLINA 29201
www.mmrmll.com

HEYWARD E. McDONALD
1925-2000

TELEPHONE (803) 252-0500
FAX (803) 929-3530

CERTIFIED MEDIATOR AND ARBITRATOR
*ALSO ADMITTED IN TEXAS

October 6, 2011

The Honorable Edgar W. Dickson
190 Gibson Street, Suite 207
Orangeburg, SC 29115

Re: Wanda Mack -vs- Carmen Gates
Case Number: 2010-CP-38-00670

Dear Judge Dickson:

Following up my conversation with you at the roster meeting on October 3, enclosed you will find the original and copies of an Order striking this case under Rule 40(j). I would be most appreciative if you could sign the Order and have it filed with the Orangeburg Clerk of Court. I am attaching a return envelope which the Clerk's office may use to return filed and clocked copies to me. If anything further is needed, please let me know.

With Kind Regards,

McDonald, McKenzie, Rubin,
Miller and Lybrand, L.L.P.

James B. Lybrand, Jr.

JBLjr\pa
Enc.

cc: Steven D. Murdaugh, Esquire

FILED FOR FILING
WITH THE CLERK
OF COURT
ORANGEBURG, SC
2011 DEC - 3 PM 1:12