THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

James O. Spence, Master-In-Equity Judge

Appellate Case No. 2015-002048

Marjorie E. Temple.....Respondent,

v.

Charles E. Strickland, III, Latisha D. Strickland, and Justin R. Dillon.....Appellants.

Appellants' Memorandum in Opposition to Respondent's Motion to Dismiss Appeal

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I. Introduction

This matter is before the Court on Respondent's Motion to Dismiss this appeal based upon the grounds that the appeal was not timely served or filed. Appellants filed this appeal within 30 days of **receipt of written notice of entry of the master's order which denied Plaintiff's Rule 59 (e) motion**, in accordance with Rule 203 (b) of the South Carolina Appellate Court Rules. The master found that that the Plaintiffs-Appellants timely filed a Motion to Alter or Amend the Court's Order denying attorney fees. Respondent did not appeal this finding and it is, therefore, the law of the case. Because this appeal was timely filed pursuant to the Appellate Court Rules and the South Carolina Rules of Civil Procedure, the Respondent's Motion should be denied. Furthermore, the Respondent's position that an email of the Order Denying Attorney Fees by the master's court assistant (without a notice of entry or a Form 4) was sufficient written notice to trigger the time within which to file the Motion to Alter or Amend the Judgement denying attorney fees is legally incorrect, because under the South Carolina Rules of Civil Procedure a written notice of entry of the judgment must be by the clerk of court or a party and must be transmitted by U.S. mail, not by email. Therefore, for this additional

reason, Appellants' appeal was timely filed and Respondent's Motion to Dismiss this appeal should be denied.

II. Procedural Background

This is an appeal from an Order of the Master in Equity for Lexington County denying the Appellants' Motion for Rule 11 Sanctions and Request for Attorney Fees after the court terminated the Respondent's interest in an installment land sale contract (Bond for Title). The master found that the Respondent, Marjorie Temple, had no equitable interest in the property based upon her concession and agreement that no equity existed.

The Appellants, Charles Strickland, et al, filed this action on May 11, 2011 in the Circuit Court of Lexington County seeking foreclosure of a Bond for Title (hereafter the Agreement) or, in the alternative, termination of the Agreement and any equitable interest Temple may have had in the property. Strickland also requested attorney fees and costs in the pleadings.

Temple served an answer, counterclaim and third party complaint on July 26, 2011, alleging defenses and causes of action for unconscionability, rescission, negligent misrepresentation, fraud and unfair trade practices. [1] Temple alleged in the counterclaims and defenses that Strickland had failed to disclose the existence of a dam and pond on the property, as well as the

[1] The matters raised in the Third Party Complaint are not at issue in this appeal.

fact that a portion of the property was in a wetlands, despite the fact that all of these matters were disclosed in writing in the Agreement, which Temple acknowledged she read. In addition, she walked and viewed the property prior to purchasing it.

The circuit court issued an order granting summary judgment on May 20, 2013 as to all of Temple's counterclaims and defenses, and referred the underlying breach of contract action to the master in equity for purpose of determining whether Temple had any equitable interest in the property and for final judgment. The court signed an order of reference on May 23, 2013.

Strickland filed a Motion for Rule 11 Sanctions and Attorney Fees on April 17, 2014 on the basis that Temple's counterclaims were filed in bad faith; that there were no good grounds to bring the claims; and that the circuit court found there was no basis in fact or law to support the allegations.

The master issued a final order without a hearing on August 5, 2014 terminating the Agreement and any alleged equitable interest in the property, which consisted of a mobile home and lot, on the grounds that Temple conceded there was no equity the property and that the contract had been breached. The master further ordered that Temple vacate the

property by August 29, 2014 and reserved for determination the issue of attorney fees and costs in his final order.

Strickland requested attorney fees and costs in the amount of $19, 236. 82 under the Agreement and Rule 11, SCRCP from Temple and her counsel. He also sought a monetary fine.

The master heard Strickland's Motion for Rule 11 Sanctions and Attorney Fees on December 11, 2014 and issued an Order denying the requested relief on June 4, 2015 from which Strickland appeals. The order was entered on June 15, 2015 and thereafter Strickland filed a timely Motion To Alter or Amend the Judgment pursuant to Rule 59 (e), SCRCP. The master issued an order denying the Rule 59 (e) motion on September 1, 2015, written notice of which was received on September 16, 2015.

Strickland filed Notice of Appeal on September 28, 2015.

III. Argument

Plaintiffs'- Appellants' Motion to Alter or Amend the Order of the Master Denying Attorney Fees was Timely Filed with the Master within 10 Days of Receipt of Written Notice of Entry of the Order. The Email from The Master's Court Assistant Attaching a Copy of the Written Order (without notice of entry or a Form 4) Is Not Legally Sufficient Notice of Entry, Which Under the South Carolina Rules of Civil Procedure Must Be *Served* By the Clerk of Court Via U. S. Mail, Which Plaintiff Acknowledges as Received, But Not Properly Served, on June 16th, 2015.

The South Carolina Rules of Civil Procedure (SCRCP) govern the practice in Circuit Court, including the time within which motions must be filed. Rule 81, SCRCP provides "These rules or any of them, shall apply to every trial court of civil jurisdiction within this state, within the limits of the jurisdiction and powers of the court provided by law and the procedure therein shall conform to these rules insofar as practicable." Rule 59 (e), SCRCP prescribes the time frame within which a motion to alter or amend an order or judgment of the court must be filed. A Rule 59 (e) motion has also been long viewed as a "motion for reconsideration." *Elam v. South Carolina Dept. of Transportation,* 361 S. C. 9, 602 S.E.2d 772 (2004). Rule 59 (e) provides that "a motion to alter or amend the judgment shall be served not later than ten days after receipt of written **notice of entry** of the order." (Emphasis added) Rule 5 (a), SCRCP provides in pertinent part that:

> Unless otherwise ordered by the court because of numerous defendants or other reasons, **all (1) written orders;** (2) pleadings subsequent to the original summons and complaint, which includes answers, counterclaims, cross claims, replies and amended complaints; (3) written motions, other than ones which may be heard ex parte; (4) written notices; (5) discovery requests and responses; (6) appearances; (7) demands; (8) offers of judgment; (9) designations of record or case; (10) grounds or exceptions on appeal; **and (11) other similar papers shall be served upon each of the parties of record.**
>
> SCRCP 5

Written notice of entry of a judgment is such a similar paper and is a form which has been approved by the South Carolina Supreme Court.

Rule 5(b)(1), SCRCP provides that service upon the attorney or upon a party, **shall** be made **by delivering a copy to him or by mailing it to him** at his last known address or if no address is known, by leaving it with the clerk of court." "Delivery of a copy within this rule means: **handing it to the attorney** or to the party; or leaving it at his office with his clerk or other person in charge thereof...." (Emphasis added) There is no provision for service by email in the South Carolina Rules of Civil Procedure. Nor do the South Carolina Appellate Court Rules contemplate service by email for matters pertaining to filing and service of orders and motions in circuit court. The Appellate Court Rules do not apply to the timely service and filing of matters in circuit court. The scope of the Appellate Court Rules is contained in Rule 101, SCACR. It provides in pertinent part, "[t]hese Rules are divided into six parts. Part I governs the applicability of these Rules and contains general provisions. Part II governs practice and procedure in appeals, petitions and motions *in the Supreme Court and the Court of Appeals.*" (Emphasis added)

It is the receipt of written notice of entry of an order, not mere receipt of a written order, which triggers the time running for the filing of a motion to

alter or amend a judgment or order. *Ackerman v. 3-V Chemical, Inc.* 349 S.C. 212, 502 S.E.2d 613 (2002). "There is simply no language in the rule [Rule 59 (e)] permitting the motion to served 10 days after the written order." This is precisely what happened here. While the Appellants received an email copy of a written order, they did not receive a "written notice of the entry of the judgment," which is accomplished by a separate document- a Form 4 Notice of Entry to which the order must be attached. (Order, March 26, 2013, C.J. Toal- Form 4C Instructions- Judgment In A Civil Case, **Exhibits 1 & 2**)

In *Upchurch v. Upchurch*, 367 S.C. 16, 624 S.E.2d 16 (2006) a written letter from the Judge's assistant providing an unfiled order was not notice of entry of the judgment for purposes starting the time from which appeal must be taken. But sending even a filed order via email does not invoke the running of the ten day period within which a motion to alter or amend the judgment or order. The Rules of Civil Procedure require that the order be served, and prescribes the manner of service as either by U. S. mail or hand- delivery. Rule 5 (a) (b), SCRCP. See also SCRCP Rule 77(d).

The Appellants are aware that this Court has recently entered an Order dismissing an appeal where the Appellants received an email from the master's court assistant, similar to this case, which attached the written

order, but also included a "clocked Form 4," which signified that written notice of the entry of judgement had been given. Here, no Form 4 or written notice of entry of the judgment was given until June 16, 2015. Email from Mona Huggins, **Exhibit 3.** These facts certainly distinguish this case from the Court's Order in *Wells Fargo Bank, N.A. v. Fallon Properties South Carolina, LLC,* 413 S.C. 642, 777 S.E.2d 575 (2015), and the Court here should find as a minimum that written notice of entry of the judgment denying the Rule 59 (e) motion was not given until June 16, 2015, indicating the order denying attorney fees was entered on June 15, 2015, as reflected on the Form 4 in this case, **Exhibit 4.** And indeed, the Appellants respectfully submit the Court's holding in *Fallon Properties* was incorrect because the South Carolina Rules of Civil Procedure do not provide for service by email.

Appellant's call attention to this Court that the Form 4- which has been approved by the Supreme Court and used by Lexington County appears to have been altered to provide that "This judgment was entered on _____, and a copy mailed, *emailed,* or placed in the appropriate attorney's box on _____to attorneys of record or to parties (when appearing pro se) as follows:" (Emphasis added) The Form 4, which has been approved by the Supreme Court of South Carolina, Ex. 2, supra, does not contain language

providing that service may be by email. Appellant's counsel has not been able to find where this was authorized by the Supreme Court. And it should not be sanctioned.

Parenthetically, the undersigned counsel's paralegal checks the firm's box at the courthouse on a routine basis, 2 to 3 times per week to make sure the firm is retrieving filed documents. This is essentially hand-delivery to the attorney who has consented to receiving documents from the court in this fashion. Under these circumstances this would be proper service by consent. See Affidavit of Glenda Taylor, **Exhibit 5**.

Lawyers need to be able to read the plain and unambiguous rules of civil procedure and rely on them, without having to read appellate case law where the rules are clear. Appellants further understand the Court's reasoning in *Fallon Properties*, but respectfully disagree that the Attorney Information System (AIS) contemplates current application of service by email. Indeed Appellate Court Rule 410 (e) as written plainly requires, "The mailing **and** e-mail address shown in the AIS **shall be used** for the purpose of notifying and serving the member." SCACR 410 (e). Thus, Rule 410 (E) requires both email and mailing by clear, mandatory and unambiguous terms at present. While the Supreme Court may wish to change this in the future, this is the law at present. Therefore, this Court

should overrule *Fallon Properties* and find that the email of the order by the master's court assistant did not constitute written notice of the entry of the judgment.

Moreover, the Supreme Court's Order entered October 17, 2001 which amended Rule 410 of the Appellate Court Rules in *Re Attorney Information System Amendments and Requirements,* 396 S.C. 42, 721 S.E.2d 411 (2011) noted that "the Department ... **has begun preparing for the electronic filing of court documents in the future.**" (Emphasis added) The AIS system does not presently provide for the circuit court or the clerk to serve orders by electronic mail. Lexington County has not yet begun e-filing, and therefore, the AIS cannot be a legal basis for holding that the master's court assistant's emailing of his order is proper service.

The proper method for service of written notice of entry of an order is prescribed by SCRCP, Rule 77 (d) which provides that, "Immediately upon entry of an order or judgment, the **clerk shall serve a notice of the entry by first class mail** upon every party affected thereby who is not in default for failure to appear, and shall make a note in the case file or docket sheet of the mailing." This was not done and indeed one could argue that the time for filing a motion for reconsideration has not yet run- though this

position is not taken here. Nevertheless, the master held Plaintiffs' Rule 59 (e) motion was timely filed, and it was.

Finally, the Appellants understand that the Court in *Fallon Properties* cites to and relied upon the Court's decision in *Canal Ins. Co. v. Caldwell*, 338 S.C. 1, 524 S.E.2d 416 (Ct. App. 1999) for the proposition that " a fax is written notice for initiating the time for serving a notice of appeal under Rule 203(b)(1)." 413 S.C. at 646. Appellants respectfully submit, however, that this is not a fair reading of *Canal*. The notice provided by opposing counsel in *Canal* advised that the court's order there had been entered on March 19 as Judgment Roll Number 211763 and was sent both by **fax and mail.** The attorney who was notified of entry waited a month to request a copy of the judgment and after receipt waited an additional ten days before filing a Rule 59 (e) motion to reconsider. The Court held, "Because Parker's attorney waited a month to request a copy of the order, his Motion for Reconsideration and Amendment of the Judgment ... was not timely." *Canal*, 338 S.C. at 6. *Canal* can be fairly read to say that since Parker's attorney had received notice by fax **and U.S. Mail**, which is permitted by the rules, that he had received sufficient service by mail, which presumably would have been received within a few days of mailing. The Court did not

specifically hold that a fax was sufficient service of notice of entry of judgment.

IV. Conclusion

For the foregoing reasons, this Court should hold Plaintiffs'-Appellants' Motion to Alter or Amend the Order of the Master Denying Attorney Fees was timely filed with the master within 10 Days of receipt of written notice of entry of the order. The email from the master's court assistant attaching a copy of the written Order (without notice of entry or a Form 4) is not legally sufficient notice of entry of the judgment, which under the South Carolina Rules of Civil Procedure, must be *served* by the clerk of court via U. S. Mail or by hand delivery.

Respectfully Submitted,

BY: _____

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November 12, 2015
Lexington, SC

THE STATE OF SOUTH CAROLINA

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v.

Charles E. Strickland, III, Latisha D. Strickland, and Justin R. Dillon.....Appellant.

PROOF OF SERVICE

I certify that I have served the Appellants' Memorandum in Opposition to Respondent's Motion to Dismiss Appeal on Marjorie E. Temple by depositing a copy of it in the U.S. Mail, postage prepaid, on November 5, 2015, addressed to her attorneys of record, S. Andrew Syrett and Rolland E. Greenburg, III at the addresses listed below:

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November 13, 2015

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Rick Hall
Jennifer M. Cooper

November 11, 2015
VIA U.S. MAIL

The Honorable Jenny Abbott Kitchings
Clerk, SC Court of Appeals
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Columbia, South Carolina 29211

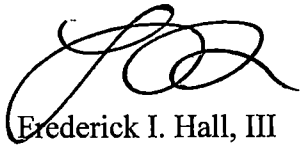
RE: Charles E. Strickland, III, Latisha D. Strickland and Justin Dillon, Appellants vs. Marjorie E. Temple, Respondent
Appellate Case No. 2015-002048

Dear Ms. Kitchings:

Please find enclosed herewith the original and six (6) copies of Appellants' Memorandum in Opposition to Respondent's Motion to Dismiss Appeal, in connection with the above-referenced case.

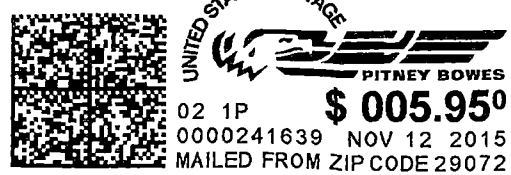
Should you have questions regarding this matter, please feel free to contact me at my Lexington office.

Yours truly,



Frederick I. Hall, III

FIH,III/kaj
Enclosures
cc: S. Andrew Syrett, Esquire
Rolland E. Greenburg, III, Esquire
Mr. Jimmy Dillon



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