THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM ANDERSON COUNTY
For the Court of Common Pleas

R. Lawton McIntosh, Judge for Tenth Judicial Circuit

Appeal Case No.: 2015-000647

Terry and Suzette Patton .....Appellant

v.

American Lifestyle Homes, LLC, Rufus G. Revis d/b/a American Lifestyle Homes, and Anderson Brothers Concrete, LLC, Marcus Clinkscales a/k/a Marcus Anderson d/b/a Anderson Brothers Concrete, LLC, and Scott Brown.....Respondents

BRIEF OF THE APPELLANT

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STATEMENT OF ISSUES ON APPEAL

Did the Court err in determining that Plaintiff's case should not be restored under SCRCP 40j by erroneously determining that the "date stricken" as defined in SCRCP 40j was the date the Order was signed by the Presiding Judge and clocked by the Clerk's Office rather that the date the judgment was actually entered by the Clerk and served on the parties?

STATEMENT OF THE CASE

This case was filed on or about December 14, 2010. (**R. pp. 1-14**) An Amended Complaint correcting parties' names was filed on February 1, 2011. (**R. pp. 32-70**) The allegations in the complaint involve structural defects to an attached garage and retaining wall/driveway that is now crumbling and in the process putting stress on Plaintiffs' home and other structures it is attached to. The suit involved the general contractor, who was in default, a concrete supplier, who was also in default, and a subcontractor named Scott Brown, who was represented by G. Thomas Chase, Esq. of McAngus, Goudelock & Courie, LLC.

In August of 2013, the parties moved pursuant to SCRCP 40j to strike the matter from the docket so additional engineering testing could be performed on the structure. (**R. pp. 1-4**). The Consent Order was executed by the presiding judge on August 26, 2013 (**R. pp. 1**) and stamped that same day, but it was not "True Copy" stamped by the clerk until September 11, 2013 (**R. pp. 1**), prepared to be copied to counsel for both parties until on or about September 12, 2013 (as shown by the Clerk's notes in the file) (**R. p. 3**). Then, the envelope in which the Order was actually served upon counsel for Plaintiff wasn't post-marked until September 18, 2013 (**R. p. 4**). Plaintiff's counsel finally received the Order on September 19, 2013, as shown on the date stamp on the back of the envelope, a procedure done at the intake of all mail at the Upstate Law Group, LLC, counsel for Plaintiffs. (**R. p. 2**)

After engineering testing was performed by the parties and no headway was made toward a resolution, Plaintiff then filed its motion to restore on September 11, 2014 – one year from the "True Copy" date on the Order and less than a year since the Order was actually issued by the Clerk to the parties. (**R. pp. 1-4; 71-74**) Without waiting the requisite ten (10) days per the Rule, the case was restored by the Court on September 16, 2014. (**R. p. 5-7**). On September 23, 2014, Counsel for Scott Brown then moved to reconsider restoration of the case based on the fact that he did not receive the 10 days notice before the case was restored and because he alleged that the statute had expired because the case was not restored within "one year from the date the case was *stricken.*" **(R. pp. 75-216)** Scott Brown argued that the tolling period would have ended one year from the date the Judge executed the Order and the Clerk clocked the Order (August 26, 2013), rather than the date that the clerk actually stamped the Order "True Copy" (September 11, 2013), or noted that she sent the Order to the parties (September 12, 2013), or *actually* sent the Order to the parties (September 18, 2013) as shown by the postmarked envelope. (**R. pp. 1-4, 71-74, 226-230**).

Defendant Brown conceded that the Plaintiff's Complaint and Amended Complaint were timely filed within the statute of limitations. (**R. p. 226**) However, Brown argued that the "year from the date stricken" ran from the date the Judge executed the Consent Order and it was clocked in, rather than when it was "True Copy" stamped by the Clerk or actually served upon the parties. (**R. p. 227**) As such, Brown argued, and the Court agreed, that the case should not be restored because it was no longer within the statute of limitations. (**R. p. 12-17**)

ARGUMENT

THE COURT ERRED IN DETERMINING THAT PLAINTIFF'S CASE SHOULD NOT BE RESTORED UNDER SCRCP 40J BY ERRONEOUSLY DETERMINING THAT THE "DATE STRICKEN" AS DEFINED IN SCRCP 40J WAS THE DATE THE ORDER WAS SIGNED BY THE PRESIDING JUDGE AND CLOCKED BY THE CLERK'S OFFICE RATHER THAT THE DATE THE JUDGMENT WAS ACTUALLY ENTERED BY THE CLERK AND SERVED ON THE PARTIES.

Plaintiff filed its motion to restore on September 11, 2014 – one year from the "True Copy" date on the Order and less than a year since the Order was actually issued by the Clerk and served upon the parties. (**R. pp. 1-4, 71-74**). Scott Brown alleged that the statute had expired and was no longer tolled because the case was not restored within "one year from the date the case was *stricken*." (**R. pp. 226-230)** Scott Brown argued that the tolling period would have ended one year from the date the Judge executed the Order and the Clerk clocked the Order (August 26, 2013), rather than the date that the clerk actually stamped the Order "True Copy" (September 11, 2013), or noted that she served the Order to the parties (September 12, 2013), or when she *actually sent* the Order to the parties (September 18, 2013) as shown by the postmarked envelope. ((**R. pp. 1-4, 71-74, 226-230**).

In *First Union National Bank of South Carolina v. Hitman, Inc.*, 306 S.C. 327 (Ct. App. 1991), the Court held that an Order is not final until it is written *and entered* by the Clerk of Court. Clearly, from this analysis, an order does not take effect until the same has been entered by the Clerk of Court, because any time prior to delivery, the judge may alter his/her opinion and/or amend his/her ruling. *Id.*

The court reaffirmed this position in *Bowman v. Richland Memorial Hosp.* 335 S.C. 88 (1999) reasoning that "the parties to an action are not provided with notice of a judge's ruling at the time the judge signs an order…rather, only after the order is filed with the clerk of court are

the parties given notice of the order and provided with an opportunity to comply with the order." *Id.* at 92.

Further jurisprudence indicates that an Order does not take effect until it has been delivered. *Bowman v. Richland Memorial Hosp.*, 335 S.C. 88 (1999). While the *Bowman* case involves an amendment of a complaint, this pronouncement applies to all orders and is not limited to any particular rule of civil procedure. Specifically, the *Bowman* court compared a Court Order to an unrecorded deed:

> *Until the paper has been delivered by the judge to the clerk of court, to be filed by him as an order in the case, it is subject to the control of the judge, and may by him be withdrawn at any time before such delivery. . . . 'A judgment is the final determination of the rights of the parties in an action. While the written instrument purporting to be the judgment in a cause remains in the possession of the judge who is to pronounce it, it is of no effect, and like a deed not delivered.*

Id. at 91-92.

The same is true for an Order sent by the Judge to a Clerk that is never actually served upon the parties. How could the parties ever learn of the actual entry of an Order that was never served upon them? Surely, that could not be sound public policy.

This logic is further bolstered by the case of *Upchurch v. Upchurch*, 367 S.C. 16 (2006). In that case, the Court applied this rule in deciding whether a notice of appeal was timely filed. finding "[t]o hold Wife responsible for notice of an event that had not yet occurred runs afoul of the notions of fairness and equity articulated in *Bowman*." 367 S.C. at 24 (2006). The Court has found that even where an oral ruling was made in a final and otherwise dispositive hearing, the death of a party voids the judgment when it has not yet been recorded. *Bayne v. Bass*, 302 S.C. 208 (Ct. App. 1990).

Most telling, however, though unpublished, is this recently affirmed theory in a case involving a 40(j). *West v. Luck Ave. Prop.* 2014-UP-415 (Ct. App. 11/26/2014). In that case, this

Court found "the trial court erred by finding the effective date of the order striking the case was the date the order was signed, and not the date it was filed." There are no facts in the *West* case to indicate that the Clerk failed to actually serve the order on the parties or that the Clerk entered a new "True Copy" date on the Order as in the case *sub judice*. In this case, the litigants clearly were not served the order until September 12, 2013 – at the earliest by the Clerk's own notes. **(R. p. 3)**

Accordingly, despite the "clocked" date on the Order, the Clerk's notes and the "True Copy" stamp actually indicate the Order was not "entered" until September 11th or 12th. As such, the tolling period under SCRCP 40j should have extended to one year from that date.

CONCLUSION

This Court should find that the Court's Order Granting Motion for Reconsideration and Vacating Restoration of the Case Under Rule 40j was in error as the Consent Order Striking Case From Docket could not have been effective until it was entered by the Clerk on September 11, 2013 and served on the parties no earlier than September 12, 2013. As such, Plaintiff had one year from September 12, 2013 to move to reinstate the case. Here, Plaintiffs moved this court on or about September 11, 2014 to reinstate. As such, Plaintiffs were in compliance with the dictates of SCRCP 40(j) and case should have been restored.

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CERTIFICATE OF COUNSEL

The undersigned hereby affirms that the final brief complies with SCACR Rule 211(b).

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