

IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM LEE COUNTY  
R. Ferrell Cothran, Jr., Circuit Court Judge

Lower Case No. 2009-CP-31-131

RECEIVED  
MAY 06 2016  
SC Court of Appeals

United States of America, acting through the  
Farmers Home Administration, United States  
Department of Agriculture..... Plaintiff/Respondent

v.

Maxie Lee Thomas, Jr. a/k/a Maxie Lee  
Thomas, deceased, and all other heirs at law  
and/or distributes of Maxie Lee Thomas, Jr.  
a/k/a Maxie Lee Thomas, deceased, his  
heirs, personal representatives, executors,  
administrators, successors and assigns, and  
any spouses if any he has, and all persons  
entitled to claim under or through him or  
any of them; all persons unknown claiming  
any right, title, estate, interest in or lien upon  
the real estate described in the Complaint  
herein, any and all persons who may be in  
the military service of the United States of  
America, being a class designated as John  
Doe; and any unknown minors or persons  
under a disability being a class designated as  
Richard Roe, Laura Ann Toney, and  
Brittany Nicole Thomas.....Defendants

Of Whom Laura Ann Toney is..... Appellant

APPELLATE CASE NO. 2015-002380

INITIAL BRIEF OF RESPONDENT

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### **STATEMENT OF ISSUES ON APPEAL**

Based upon the Statement of Issues on Appeal in Appellant's Initial Brief, Respondent cannot adequately discern the specific issues that Appellant wishes to appeal. Appellant's Statement of Issues on Appeal are broad general statements prohibited by Rule 208(b)(1)(B), SCACR. Accordingly, Respondent will address following Issues on Appeal.:

- I. Did Appellant preserve for appeal the issues set forth in her Statement of Issues on Appeal?
- II. Did the trial court commit reversible error in issuing the Order for Summary Judgment?
- III. Did the trial court abuse its discretion in denying the Amended Motion to Vacate?
- IV. Were Appellant's procedural due process rights violated with regard to the hearing on the Amended Motion to Vacate?
- V. Did the trial court violate Canon 3 of the South Carolina Code of Judicial Conduct?

### **STATEMENT OF THE CASE**

On or about August 10, 1984, Maxie Lee Thomas a/k/a Maxie Lee Thomas, Jr. ("Thomas"), made, executed and delivered to Respondent a Promissory Note ("Note") dated August 10, 1984 promising to pay Respondent the sum of Forty Thousand and 00/100 (\$40,000.00) Dollars upon the terms and conditions set forth therein. (Ex. A, Aff. In Supp. of Mot. For Summ. J.) The Note was executed to evidence a loan ("Loan") given to Thomas of an even amount. The Note defines a default as the failure to pay, when due, any debt evidenced thereby, and, upon an event of default, Respondent, at its option, could declare all or any part of the indebtedness due and payable. (Ex. A., Aff. In Supp. of Mot. For Summ. J.)

Contemporaneous with the execution of the Note, Thomas made, executed and delivered to Respondent a mortgage ("Mortgage") covering real property owned by Thomas located in Lee County and commonly referred to as 71 Broad Acres Road, Bishopville, SC 29010 ("Mortgage"). (Ex. A., Aff. In Supp. of Mot. for Summ. J.) The Mortgage was executed to secure the Loan. (¶

2, Aff. In Supp. of Mot. for Summ. J.) The Mortgage, among other things, provided that upon an event of default or Thomas's death, Respondent, with or without notice, may declare the entire unpaid amount due under the Note immediately due and payable. (Ex. A., Aff. In Supp. of Mot. for Summ. J.) Respondent may also foreclose the Mortgage in accordance with applicable law, collect attorney's fees and court costs associated therewith, and enforce all other rights and remedies provided by law. (Ex. A., Aff. In Supp. of Mot. for Summ. J.) The Mortgage was subsequently filed in the Office of the Register of Deeds for Lee County in Mortgage Book 102 at Page 279, and its execution appears to have been witnessed by Margie G. McCutchen and Edward F. Hucks and notarized by Margie G. McCutchen, a notary public for the State of South Carolina. (Ex. A., Aff. In Supp. of Mot. for Summ. J.) Thomas' execution of the Note, Mortgage and other documents related to the Loan at issue were supervised by William P. Baskin, III, Esq., an attorney duly licensed in the State of South Carolina. (Ex. B., Aff. In Supp. of Mot. for Summ. J.)

On or about October 25, 2005, D. Christine Jordan ("Jordan"), an agent for Respondent learned of Thomas's death. (§ 12(c), Order On Pl's Mot. for Summ. J. and to Dismiss Jury Demand.) On November 7, 2005, Defendant Brittany Lee Thomas ("Ms. Thomas") presented Respondent an Order of Appointment as evidence of her appointment as Personal Representative of Thomas's estate, and she agreed that the Property's locks could be changed. (§ 12(d), Order on Pl's Mot. for Summ. J. and to Dismiss Jury Demand.) On December 2, 2005, Respondent changed the locks on the Property and took photographs of all the belongings on the Property (§ 12(f), Order on Pl's Mot. for Summ. J. and to Dismiss Jury Demand.) On December 12, 2005, Jordan met Ms. Thomas at the Property, and Ms. Thomas removed a few items from same, including a couch, dining room table and chairs and a baby picture. (§ 12(g), Order on Pl's Mot. for Summ. J. and to Dismiss Jury Demand.) On February 13, 2006, Respondent received notice that Appellant had

been appointed as successor Personal Representative of Thomas's estate, and Respondent met Appellant at the Property so that she could perform an inventory and appraisal of same. (§ 12(h), Order on Pl's Mot. for Summ. J. and to Dismiss Jury Demand.) Thomas's estate was stricken on November 13, 2007 by Order of the Honorable Catherine F. Harris, Probate Judge for Lee County as a result of Appellant's failure to administer same. (§ 13, Aff. In Supp. of Order for Summ. J.)

The Lis Pendens and Summons and Complaint in this matter were filed on June 24, 2009. (Comp.) In response, Appellant filed an Answer and Counterclaim that included a jury trial demand. (Answer and Countercl.) The Answer and Counterclaim were amended several times over the course of litigation with the most recent amendment occurring on January 4, 2010 (Amended Answer and Counterclaim). Appellant claimed to amend the Answer and Counterclaim; however, each amendment was a restatement of the Answer and Counterclaim. In her Answer and Counterclaim, Appellant alleged Respondent violated the Fair Debt Collection Practices Act ("First Counterclaim"), violated Appellant's right to due process by failing to send her a default/right to cure letter ("Second Counterclaim"), committed the unauthorized practice of law ("Third Counterclaim"), committed burglary and violated S.C. Code Ann. §27-5-110 ("Fourth Counterclaim"), committed fraud ("Fifth Counterclaim"), improperly notarized the Mortgage ("Sixth Counterclaim") and committed constructive fraud ("Seventh Counterclaim"). (Amended Answer and Countercl.) Respondent denied the allegations on September 27, 2009 by filing a Reply to Amended Answer and Counterclaim. (Reply to Am. Answer and Countercl.)

Soon thereafter, Respondent filed a Notice of Motion and Motion to Bifurcate and for Reference of Foreclosure to Lee County Master in Equity on December 11, 2009. (Notice of Mot. and Mot. to Bifurcate). The Motion to Bifurcate was granted by Order to Bifurcate on January 26,

2010 wherein Respondent's claim for foreclosure and Appellant's defenses related thereto were referred to the Honorable S. Bryan Doby, Master in Equity for Lee County. (Order to Bifurcate.) Appellant's remaining counterclaims for damages remained with Circuit Court. (Order to Bifurcate.) In response, Appellant filed a Notice of Appeal on February 10, 2010 that was dismissed by Order of the South Carolina Court of Appeals on March 2, 2010. (Notice of Appeal, Order.) On March 11, 2010, Appellant filed a Motion for Rehearing that was denied on May 24, 2010. (Mot. for Reh'g.; Order dated May 24, 2010.) Thereafter, Appellant filed a Petition for Writ of Certiorari with the South Carolina Supreme Court on June 23, 2010 that was denied on October 20, 2011 (Pet. For Writ of Cert. dated June 23, 2010; Order dated October 21, 2011.) The South Carolina Court of Appeals filed its Remittitur on December 18, 2011. (Remittur)

On September 19, 2013, Respondent filed a Notice of Motion and Motion to Dismiss Jury Trial Demand of Defendant Laura Ann Toney. (Mot. to Dismiss Jury Trial Demand.) It also filed a Notice of Motion and Motion for Summary Judgment as to Defendant Laura Ann Toney's Counterclaims on October 31, 2013, along with the Affidavit In Support of Motion For Summary Judgment ("Motion for Summary Judgment"). (Mot. for Summ. J.; Aff. in Supp. of Mot. for Summ. J.) After due and proper notice, the Honorable R. Ferrell Cochran, Jr. heard oral arguments relating to the Motion for Summary Judgment and the Motion to Dismiss Jury Trial Demand on March 21, 2014. (Notice of Hr'g. dated March 4, 2016.) On January 5, 2015, Nelson Russell Parker, Jr., Law Clerk to the Honorable R. Ferrell Cothran, Jr. ("Parker"), informed the Appellant and Respondent that the Motion for Summary Judgment and the Motion to Dismiss Jury Trial Demand had been granted and gave Appellant and Respondent the reasoning for same ("January, 2015 email").

On January 16, 2015, Respondent, via email, transmitted the proposed Order for Summary Judgment and Dismissing Jury Trial Demand (“Order for Summary Judgment”) to Mr. Parker; however, Respondent inadvertently did not include Appellant on the email transmission (“January 16, 2015 email”). The proposed Order for Summary Judgment was signed and filed on March 26, 2015 and same was delivered to Appellant. (Order for Summ. J.) The Order for Summary Judgment granted Respondent summary judgment as to Appellant’s First Counterclaim and Fourth Counterclaim, and concluded the remainder of Appellant’s counterclaims were defenses to Respondent’s foreclosure claim. (Order for Summ. J.) The Order for Summary Judgment also found Appellant was not entitled to a jury trial as to the defenses to the foreclosure claim. (Order for Summ. J.)

On or about April 8, 2015 Appellant filed the Notice of Ex-Parte Application and the Ex-Parte Application to Vacate Order (“Ex-Parte Application”) on the basis that Respondent violated Rule 5(b)(3), SCRCP and Rules 3.4(c) and 3.5(b) of the South Carolina Rules of Professional Conduct. (Notice of Ex-Parte Application and Application to Vacate Order.) Appellant also alleged the trial court violated Canon 3 of the South Carolina Code of Judicial Conduct. (Notice of Application and Application to Vacate Order.)

Upon receiving the Application, Respondent, informed Mr. Parker via email that it was willing to vacate the Order for Summary Judgment to provide Appellant with time to provide comment to same (“April 10, 2015 email”). Respondent also proposed the scheduled foreclosure hearing be continued to provide Appellant time to comment on the Order for Summary Judgment. Respondent, via certified mail, return receipt requested, delivered the communication to Appellant as it did not believe it had a valid email address for Appellant. After receiving the April 10, 2015 email, Appellant filed an Amended Notice of Ex-Parte Application and Application to Vacate

Order on April 23, 2015 (“Amended Motion to Vacate”). (Am. Notice of Ex-Parte Application and Application to Vacate Order.)

The trial court held a hearing on the Amended Motion to Vacate on October 1, 2015 after it notified Appellant and Respondent of same. (Tr. of Hr’g on Am Notice of Ex-Parte Application and Application to Vacate Order dated October 1, 2015.) In addition to receiving notice from the trial court, Respondent served on Appellant a gratuitous Notice of Hearing on September 28, 2015. (Notice of Hr’g dated September 21, 2015.) Neither Appellant nor her representative appeared at the hearing on the Amended Motion to Vacate. (Tr. of H’g on Am. Notice of Ex-Parte Application and Application to Vacate Order dated October 1, 2015.) As she did not appear, she presented no evidence or argument in support of the Amended Motion to Vacate.

As a result, the trial court issued its Order Denying Amended Notice of Ex-Parte Application and Ex-Parte Application to Vacate Order on November 5, 2016 (“Order Denying Amended Motion to Vacate”). Pursuant to the Order Denying Amended Motion to Vacate, the Court found that the issuance of the Order for Summary Judgment did not constitute reversible error as Appellant was on notice of the trial court’s ruling and Appellant failed to present evidence that the trial court exhibited partiality toward Respondent or that Appellant suffered any prejudice. (Order Deny. Am. Notice of Ex-Parte Application and Ex-Parte Application to Vacate Order.) Accordingly, the Order Denying Amended Motion to Vacate concluded the Order for Summary Judgment would not be altered or amended pursuant to Rule 59(e), SCRCF. (Order Den. Am. Notice of Ex-Parte Application and Ex-Parte Application to Vacate Order.) The Order Denying Amended Motion to Vacate also found Appellant failed to present any evidence that the Order for Summary Judgment should be vacated pursuant to Rule 60, SCRCF. (Order Deny. Am. Notice of Ex-Parte Application and Ex-Parte Application to Vacate Order.) On or about November 9, 2015,

Appellant filed her Objections to Proposed Order to Deny Amended Notice of Ex-Parte Application and Ex-Parte Application to Vacate Order (“Proposed Objection”). (Objections to Proposed Order to Den. Am. Notice of Ex-Parte Application and Ex-Parte Application to Vacate Order). The Proposed Objections indicates that she did not receive a notice of her own Amended Motion to Vacate until October 3, 2015, that the trial court violated S.C. Code Ann. §14-5-950, and that her due process rights were violated. (Objections to Proposed Order to Den. Am. Notice of Ex-Parte Application and Ex-Parte Application to Vacate Order.) A hearing has not occurred on the Proposed Objection.

### **ARGUMENTS**

For the reasons set forth below, Appellant has not preserved the majority of the issues which she is attempting to appeal. To the extent she has, the trial court’s issuance of the Order for Summary Judgment does not constitute reversible error. As a result, the trial court did not abuse its discretion in issuing the Order Denying Amended Motion to Vacate. Relatedly, the trial court did not violate Appellant’s due process rights, S.C. Code Ann. §14-5-950, or Canon 3 of the South Carolina Code of Judicial Conduct.

#### **I. APPELLANT FAILED TO PRESERVE FOR APPEAL THE MAJORITY, IF NOT ALL, OF THE ISSUES SET FORTH IN HER STATEMENTS ON APPEAL.**

In her Initial Brief, Appellant attempts to set forth the issues which she is appealing. In particular, Appellant has alleged that: the trial judge violated her due process rights (“Issue I”), the trial judge violated S.C. Code Ann. §14-5-950 (“Issue II”), the trial court violated Rules 5(b)(3), Rule 65(b)<sup>1</sup>, and Rule 3.3(d) of the SCRCP<sup>2</sup> (“Issue III”), and the trial judge violated Canon

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<sup>1</sup> Rule 65(b), SCRCP, concerns the process by which a party may obtain a temporary restraining order and the requirements thereof. As a temporary restraining order has never been at issue in this matter, it should not be considered on appeal.

<sup>2</sup> Respondent is not aware of the existence of Rule 3.3(d), SCRCP. Based on the Amended Motion to Vacate, Respondent is left to assume Appellant is claiming the trial court violated Rules 3.4(c) and Rules 3.5(b), Rule 407

3(b)(7)(a) of the South Carolina Code of Judicial Conduct (“Issue IV”). (Appellant Initial Br. 1.) For the reasons set forth below, the majority of these issues, if not all, have not been preserved for appeal.

Under South Carolina law, it is axiomatic that an issue cannot be raised for the first time on appeal, but it must be ruled by the trial court. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E. 2d 731, 733 (1998) (citing Creech v. South Carolina Wildlife and Marine Resources Dep’t, 328 S.C. 24, 491 S.E. 2d 571 (1997)). Put another way, the issue must have been raised upon to and ruled upon by the trial judge to be preserved for appeal. See Id. Relatedly, where a party raises an issue but the issue is never ruled upon by the trial court, and the party fails to file a motion to alter or amend, the issue is not preserved. South Carolina Farm Bureau Mut. Ins. Co. v. S.E.C.U.R.E. Underwriters Risk Retention, 347 S.C. 333, 554 S.E. 2d 870 (Ct. App. 2001). Also, the issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be understood by the judge. Malloy v. Thompson, 409 S.C. 557, 762 S.E. 2d 690 (2014). In other words, the statement of issues must be concise and direct. Rule 208(b)(1)(B), SCACR. Broad general statements may be disregarded by the appellate court. Id. The record should also contain evidence that an issue has been properly raised by the appellant to the trial court. See York v. Conway Ford, Inc., 325 S.C. 170, 480 S.E. 2d 726 (1997); Tupper v. Dorchester County, 326 S.C. 318, 487 S.E. 2d 187 (1997).

With regard to this matter, Appellant has not properly preserved for appeal Issue I. As an initial matter, Issue I, is a broad general statement. It does not set forth with specificity how Appellant believes her due process rights have been violated. As a result, Issue I is not concise and direct, and should be disregarded as a result.

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SCACR. Respondent has raised an alleged violation of Rule 3.3(d), Rule 407, SCACR for the first time on appeal. Accordingly, Respondent will address Appellant’s arguments as needed.

However, to the extent the Court considers Issue I to be concise and direct, it is not properly preserved, as Appellant's Designation of Matter to Be Included on Appeal ("Appellant's Designation") does not show that Appellant raised the issue of due process to the trial court and that the trial court ruled upon same. In particular, Appellant's Initial Brief states she believes her due process rights were violated as the result of receiving a notice of hearing concerning the hearing on her Amended Motion to Vacate. (Appellant's Initial Br. 7.) This issue only appears in the Proposed Objection which has not been heard by the trial court. (Objections to Proposed Order Den. Am. Notice of Ex-Parte Application and Ex-Parte Application to Vacate Order.) As a result, the trial court has not ruled on same. Accordingly, Issue I is not properly preserved for appeal.

Concerning Issue II, it not preserved for appeal for many of the same reasons as Issue I. In particular, it is a broad general statement. Also, the only reference to an alleged violation of S.C. Code §14-5-950 (1976) is contained in Appellant's Proposed Objections. (Objections to Proposed Order Den. Am. Notice of Ex-Parte Application and Ex-Parte Application to Vacate Order.) It is not mentioned in any other document included in the Appellant's Designation. Also, as discussed with Issue I, the trial court has not heard the matter set forth in the Proposed Objections, and they have not been ruled upon as a result. (Objections to Proposed Order Den. Am. Notice of Ex-Parte Application and Ex-Parte Application to Vacate Order.) Accordingly, Issue II has not been properly preserved for appeal.

Issue III has also not been preserved for appeal, the alleged violation of Rule 5(b)(3) possibly excepted. In particular, Appellant alleged a violation of Rule 5(b)(3), SCRPC in her Amended Motion to Vacate; however, she did not include the Order Denying Amended Motion to Vacate in Appellant's Designation. Accordingly, Appellant has not shown that the trial court ruled on the alleged violation of Rule 5(b)(3), SCRPC. That being said, Respondent has included same in the Respondent's Designation of Matter to be Included on Appeal ("Respondent's

Designation”). With regard to the remainder of the matters set forth in Issue III, Appellant has not raised any issue with regard to Rule 65(b), SCRPC in her Initial Brief nor does she address a violation of Rule 3.3(d), Rule 407, SCACR. Appellant’s Designation also does not show that she has raised same. (Appellant’s Designation.) It is additionally worth noting that the trial court did not rule upon these issues to the extent they were previously raised. (Order on Pl’s Mot. for Summ. J. and Dismiss Trial Demand; Order Den. Am Notice of Ex-Parte Application and Application to Vacate Order; Tr. of Hr’g on Am Notice of Ex-Parte Application and Ex-Parte Application to Vacate Order.) Accordingly, Issue III, with the possibility of the exception of the alleged violation of Rule 5(b)(3), SCRPC, is not preserved for appeal.

Issue IV is also not preserved for appeal as it has not been ruled upon by the trial court. Appellant made reference to an alleged violation of Canon 3 of the South Carolina Code of Judicial Conduct in her Amended Motion to Vacate. (Am. Notice of Ex-Parte Application and Ex-Parte Application to Vacate Order.) However, this issue was not ruled upon by the trial court in the Order Denying Amended Motion to Vacate. Accordingly, it is not preserved for appellate review.

For the reasons set forth above, Issue I, Issue, II, Issue III, and Issue IV should be dismissed.

**II. APPELLANT HAS NOT PRESENTED ANY EVIDENCE OR ARGUMENT TO REQUIRE THE TRIAL COURT TO VACATE THE ORDER FOR SUMMARY JUDGMENT OR TO SUPPORT: THAT THE ORDER DENYING MOTION TO VACATE IS AN ABUSE OF DISCRETION, THAT HER DUE PROCESS RIGHTS WERE VIOLATED, THAT S.C. CODE ANN. §14-5-950 WAS VIOLATED, OR THAT THE TRIAL COURT VIOLATED CANON 3(B)(7)(a) OF THE SOUTH CAROLINA CODE OF JUDICIAL CONDUCT.**

While Respondent takes the position Appellant has not preserved Issue I, Issue II, Issue III, and Issue IV for appeal, Respondent will address Appellant’s arguments in the event the Court finds that same are properly preserved.

**A. The Issuance of the Order for Summary Judgment Does Not Constitute Reversible Error and Appellant Has Failed to Present Evidence the Order Denying Amended Motion to Vacate Is an Abuse of Discretion.**

For the reasons set forth below, Appellant has failed to show that the issuance of the Order for Summary Judgment<sup>3</sup> constitutes reversible error. She has also failed to show that the Order Denying Amended Motion to Vacate is an abuse of discretion under Rule 59(e), SCRCP and Rule 60(b), SCRCP.

**1. The trial court's issuance of the Order for Summary Judgment is not reversible error and the Order Denying Amended Application is not an abuse of discretion under Rule 59(e), SCRCP.**

In her Amended Motion to Vacate, Appellant appears to argue that the Order for Summary Judgment should be altered, amended or vacated pursuant to Rule 59(e) as the result of an alleged *ex parte* communication and resulting violation of Rule 5(b)(3), SCRCP. (Am Notice of Ex-Parte Application and Ex-Parte Application to Vacate Order.) She also appears to argue that the trial court erred in issuing the Order Denying Amended Motion to Vacate. (Appellant's Initial Br. 5.) However, she has not presented any evidence or argument to show that the issuance of the Order for Summary Judgment constitutes reversible error. (Order Den. Am. Notice of Ex-Parte Application and Ex-Parte Application to Vacate Order.) As a result, she has not shown the Order Denying Amended Motion to Vacate was an abuse of discretion under Rule 59(e). See Sullivan v. Hawker Beechcraft Corp., 397 S.C. 143, 723 S.E. 2d 835 (S.C. Ct. App. 2012).

Pursuant to Rule 5(a), SCRCP, “[u]nless otherwise ordered by the court because of numerous defendants or other reasons, all (1) written orders... shall be served upon each parties of record.” Rule 5(a), SCRCP. Likewise, Rule 5(b)(3), SCRCP, provides that “[a]ny party

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<sup>3</sup> Appellant did not raise any issue with the merits and substance of the Order for Summary Judgment in her Notice of Ex-Parte Application, Amended Notice of Ex-Parte Application, Proposed Objections, and Appellant's Initial Brief. She also did not raise any issue with regard to the substance of the Order Denying Amended Application. Accordingly, the matters contained therein have not been preserved for appeal.

providing a proposed order, proposed finding of fact, or conclusions of law, or proposed judgment or other paper to the court for its consideration in any other pending matter shall serve the same on all counsel of record at the time and by the same means.” Rule 5(b)(3), SCRCP. However, “[t]he rule does not require the court to delay entering any proposed order.” Rule 5(b)(3) n., SCRCP.

Regarding an *ex parte* communication, same is defined as a prohibited communication between counsel and the court when opposing counsel is not present. Fore v. Giffco of Wampee, Inc., 409 S.C. 360, 369, 762 S.E. 2d 37, 41 (S.C. Ct. App. 2014) (internal citations omitted). While “[*e*]/*x parte* communications are strongly disfavored. A&I, Inc. v. Gore, 366 S.C. 233, 241, 621 S.E. 2d 383, 387 (Ct. App. 2005). “However, ‘prejudice must be shown to obtain a reversal on this ground.’ Id. (internal citations omitted.) Stated another way, an *ex parte* communication resulting from a trial judge signing a proposed order drafted by opposing counsel, but not sent to the opposing party is not a reversible error as long as the record does not reflect any partiality or prejudice. See Grant v. South Carolina Coastal Council, 319 S.C. 348, 356, 461 S.E. 2d 388, 392 n. 5 (1995) (citing Burgess v. Stern, 311 S.C. 326, 428 S.E. 880 (1993)); Fore v. Giffco of Wampee, Inc., 409 S.C. at 369.

As applied to this matter, Appellant did not attend the hearing on the Amended Motion to Vacate. (Tr. of Hr’g on Am. Notice of Ex-Parte Application and Application to Vacate Order.) As a result, she did not present any evidence to show any partiality on the part of the trial or that she was prejudiced with regard to the issuance of the Order for Summary Judgment. Id. She also did not present any evidence or make allegations in her Amended Motion to Vacate regarding any partiality or prejudice with regard to the issuance of the Order for Summary Judgment. (Am. Notice of Ex-Parte Application and Application to Vacate Order.) Accordingly, Appellant has failed to show that the issuance of the Order for Summary Judgment constitutes reversible error.

Since Appellant has not presented any evidence of partiality on behalf of the Court or that she suffered prejudice as a result of the issuance of the Order for Summary Judgment, she has failed to provide evidence that the Order for Summary Judgment should be altered or amended under Rule 59(e), SCRPC. As a result, the trial court did not abuse its discretion in issuing the Order Denying Amended Motion to Vacate under Rule 59(e), SCRPC.

**2. The trial court's issuance of the Order for Summary Judgment is not reversible error and the Order Denying the Amended Motion to Vacate is not an abuse of discretion pursuant to Rule 60(b), SCRPC.**

Appellant has also failed to present evidence that the Order for Summary Judgment should be vacated pursuant to Rule 60(b), SCRPC. Accordingly, the trial court did not abuse its discretion with regard to the issuance of the Order Denying the Amended Motion to Vacate.

“[O]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence... (3) fraud, misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application. Rule 60(b), SCRPC. However, lack of fairness is not a ground for relief from judgment. Gainey v. Gainey, 382 S.C. 414, 431, 675, S.E. 2d 792, 801 (Ct. App. 2009).

Although most often used when relief is sought from a judgment by default, Rule 60(b)(1) applies to any final judgment. RRR, Inc. v. Toggas, 378 S.E. 174, 182, 662 S.E. 2d 438, 442 (Ct. App. 2008) (citing Goodson v. Am. Bankers Inc. Co. of Fla., 295 S.C. 400, 402, 368 S.E. 2d 687, 689 (Ct. App. 1998)). In determining whether to grant relief from judgment based on mistake, inadvertence, surprise, or excusable neglect, the court must consider the following factors: (1) the

promptness with which the relief is sought, (2) reasons for the failure to act promptly, (3) the existence of a meritorious defense, and (4) the prejudiced of the other party. Rouvet v. Rouvet, 388 S.C. 301, 309, 696 S.E. 2d 204, 208 (Ct. App. 2010). As to Rule 60(b)(3), “extrinsic fraud is the only type of fraud for which relief may be granted.” Gainey v. Gainey, 382 S.C. 414, 425 675 S.E. 2d 792, 798 (Ct. App. 2009) (citing Raby Const. L.L. P. v. Orr, 358 S.C. 10, 20, 594 S.E. 2d 478, 483 (2004)). Extrinsic fraud is “fraud that induces a person not to present a case or deprives a person of the opportunity to be heard.” Id. (citing Hilton Head Ctr. Of S.C. v. Public Serv. Comm., 294 S.C. 9, 11, 362 S.E. 2d 176, 177 (1987)). It is granted on the theory that the fraud prevented a party from fully exhibiting and trying a case, and that there has never been a real contest before the court on the subject matter of the action. Id.

As with Rule 59(e), SCRCF, the decision to grant or deny a motion for relief from judgment pursuant to Rule 60(b), SCRCF, lies within the sound discretion of the judge, and the party seeking to set aside a judgment pursuant to Rule 60(b) has the burden of presenting evidence entitling him to the requested relief. See e.g. Sullivan v. Hawker Beechcraft Corp., 397 S.C. 143, 723 S.E. 2d 835 (Ct. App. 2012); McClurg v. Deaton, 380 S.C. 563, 671 S.E. 2d 87 (Ct. App. 2008); ITC Commercial Funding, LLC v. Crerar, 393 S.C. 487, 713 S.E. 2d 335 (Ct. App. 2011).

In this matter, Appellant has not presented any evidence of mistake, inadvertence, surprise or excusable neglect with regard to the Order for Summary Judgment. (Am. Notice of Ex-Parte Application and Ex-Parte Application to Vacate Order; Tr. of Hr’g on Am. Notice of Ex-Parte Application and Application to Vacate Order.) She also has not presented any newly discovered evidence that could not have been discovered within the time to move for a new trial under Rule 59(c), SCRCF. Id. Additionally, she has not presented any evidence of extrinsic fraud with regard to the Order for Summary Judgment. Id. She furthermore has not shown any evidence that the

judgment is void or that it has been released, satisfied, discharged or that it would be no longer equitable that it should have prospective application. Id.

In contrast, the evidence shows Appellant was present at the hearing on the Motion for Summary Judgment, and the trial court communicated its ruling to her and Respondent via email. (Order on PI's Mot. for Summ. J. and to Dismiss Jury Demand.) The evidence also shows Appellant was not present at the hearing on her Amended Motion to Vacate. (Tr. of Hr'g on Am. Notice of Ex-Parte Application and Application to Vacate Order.) Furthermore, the evidence shows Appellant was given an opportunity to be heard with regard to the Order for Summary Judgment, the issuance thereof, and her Amended Motion to Vacate. (Tr. of Hr'g on Am. Notice of Application and Application to Vacate Order.) She simply did not take advantage of the opportunities provided her.

As Appellant has failed to present any evidence that the Order for Summary Judgment should be vacated under Rule 60(b), SCRCP, the Order Denying the Amended Motion to Vacate does not constitute an abuse of discretion.

**3. Appellant has also failed to show Respondent violated Rule 3.4(c), Rule 407 SCACR and Rule 3.5(d), Rule 407, SCACR.**

Related to the Rule 59(e), SCRCP and Rule 60(b), SCRCP analysis, Appellant has failed to present any evidence that Respondent violated Rules 3.4(c), Rule 407, SCACR and Rule 3.5(b), Rule 407, SCACR. Under those rules, “[a] lawyer shall not... (c) knowingly disobey an obligation under the rules of a tribunal...” or communicate ex parte with a judge, juror, member of the jury venire or other official during the proceeding. Rule 3.4(c), Rule 407, SCACR; Rule 3.5, Rule 407, SCACR. This is seen in the fact that the April 10, 2015 email was sent to the trial judge's law clerk and states that any violation of Rule 5(b)(3), SCRCP was accidental and not intended to cause

any prejudice to Appellant. It is also seen in the fact that counsel for Respondent agreed to vacate the Order for Summary Judgment to allow time for Appellant to provide comment to same. Appellant has not presented any evidence otherwise. Additionally, Appellant has failed to show that counsel for Respondent sought to influence the trial judge, juror, member of the jury venire or other official. If anything, the Order for Summary Judgment accurately reflects the court's ruling.

Accordingly, Appellant has failed to show evidence of an alleged violation of Rule 3.4(c), Rule 407, SCACR and Rule 3.5(b), Rule 407, SCACR.

**B. The Trial Court Did Not Violate Appellant's Due Process Rights With Regard To The Hearing On the Order Denying Amended Motion to Vacate.**

For the first time on appeal, Appellant has alleged the trial court violated her due process rights. Appellant appears to argue that she did not receive notice of the hearing on her Amended Motion to Vacate; however, the evidence shows otherwise.

Pursuant to S.C. Const. Art. I, §3, "[t]he privileges and immunities of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection under the laws." S.C. Const. Art. I §3. Due process includes both procedural and substantive components and substantive due process is far narrower in scope than procedural due process. Plyler v. Moore, 100 F. 3d 365, 374 (4<sup>th</sup> Cir. 1996). In order to succeed on a procedural due process claim, a plaintiff must show that there exists a liberty or property interest which has been interfered with by the state government and that the procedures attendant with that deprivation were constitutionally insufficient. Safety Kleen, Inc. (Pinewood) v. Wyche, 274 F. 3d

846 (4<sup>th</sup> Cir 2000). At minimum, certain elements must be present in order to comply with procedural due process, including (1) adequate notice, (2) adequate opportunity for a hearing, (3) the right to introduce evidence, and (4) the right to confront and cross-examine witnesses. In re Vora, 354 S.C. 590, 582 S.E. 2d 413 (2003). In other words, the fundamental requirement for due process is the opportunity to be heard at a meaningful time and in a meaningful manner. South Carolina Dep. Of Social Services v. Wilson, 352 S.C. 445, 574 S.E. 2d 730 (2002). That being said, due process is flexible and calls for such procedural protections as the situation demands. It is not technical, and no particular form of procedure is necessary. Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 656 S.E. 2d 346 (2008).

However, the South Carolina Rules of Civil Procedure, "...governs the procedure in all South Carolina Courts in all suits of a civil nature whether cognizable as cases in law or in equity, with the exceptions stated in Rule 81." Rule 1, SCRCP. "They shall be construed to secure the just, speedy and inexpensive determination of every action", Rule 1, SCRCP. Accordingly, pursuant to Rule 5(a), SCRCP, all written motions and written notices shall be served upon each of the parties of record. Rule 5(a), SCRCP. Also, pursuant to Rule 6, SCRCP, "[a] written motion other than one which may be heard ex parte, and notice of the hearing thereof, shall be served not later than ten (10) days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Rule 6(d), SCRCP.

**1. Respondent was under no duty to send Appellant notice of the hearing on her Amended Motion to Vacate.**

To the extent Appellant alleges Respondent violated her due process rights with regard to the Notice of Hearing of her Amended Motion to Vacate, her argument should more appropriately be considered as an alleged violation of Rules 5, SCRCP and Rule 6, SCRCP. (Appellant's Initial

Br. 7.) However, Respondent was under no such duty or obligation to provide her with a notice of hearing of her own Amended Motion to Vacate, and Appellant's argument fails as a result.

As set forth above, Appellant filed this Amended Motion to Vacate on April 23, 2016. (Am. Notice of Ex-Parte Application and Ex-Parte Application to Vacate Order.) Respondent did not file the Amended Motion to Vacate. Accordingly, under Rule 5(a), SCRCP, Appellant was required to deliver to Respondent a written notice of hearing with regard to her Amended Motion to Vacate. Rule 5(a), SCRCP. Additionally, she was required to serve the notice of hearing ten (10) days prior to the hearing. Rule 6(d), SCRCP. Appellant did not deliver the required notice. It is also worth noting that Appellant labeled the Amended Motion to Vacate "exparte", presumably to avoid sending the notice of hearing according to the procedure set forth in Rule 6. As a result, Respondent could not have violated Rule 5, SCRCP, with regard to the notice of hearing on the Amended Motion to Vacate as it was under no duty or obligation to send same. Rather, it appears the violation lies at Appellant's feet.

**2. The trial court did not violate Appellant's procedural due process.**

Additionally, the trial court did not violate Appellant's due process rights with regard to the Amended Motion to Vacate.

At the hearing on the Amended Motion to Vacate, the trial judge indicated that his law clerk attempted to contact Appellant on numerous occasions and told her to be at the hearing. (Tr. of Hr'g on Am. Notice of Ex-Parte Application and Application to Vacate Order.) The trial judge also indicated Appellant stated that she may or may not be there once she was contacted. (Tr. of Hr'g on Am. Notice of Ex-Parte Application and Application to Vacate Order.) The trial judge further indicated that the hearing was Appellant's opportunity to make whatever motion she thought was appropriate concerning the issuance of the Order for Summary Judgment. (Tr. of

Hr'g on Am. Notice of Ex-Parte Application and Application to Vacate Order.) Furthermore, the trial court noted that Appellant was not in attendance. (Tr. of Hr'g on Am. Notice of Ex-Parte Application and Application to Vacate Order.) In other words, trial judge indicated that Appellant was: (1) given adequate notice of the hearing on her Amended Motion to Vacate, (2) given adequate opportunity for a hearing, (3) given an opportunity to present evidence concerning the issuance of the Order for Summary Judgment, and (4) given a right to confront and cross-examine witnesses regarding same. In re Vora, 354 S.C. 590, 582 S.E. 2d 413 (2003). Put another way, Appellant was afforded procedural due process and her rights were not violated as a result. She simply refused and/or failed to take advantage of the opportunities and rights given her. (Tr. of Hr'g on Am. Notice of Ex-Parte Application and Application to Vacate Order.) Respondent has failed to present any evidence otherwise, and, accordingly, the trial court did not violate Appellant's rights to procedural due process. (Tr. of Hr'g on Am. Notice of Ex-Parte Application and Application to Vacate Order.)

**3. The trial court did not violate S.C. Code Ann. §14-5-950 (1976).**

Relatedly, Appellant raised, for the first time on appeal, an issue with regard to a potential violation of S.C. Code Ann. §14-5-950 (1976); however, she has failed to show same.

Under that S.C. Code Ann. §14-5-950 (1976), “[a]t any special session of the court of common pleas and held under the provisions of this article no cause shall be tried unless same shall have been previously docketed upon some one of the calendars of the last preceding regular term; *provided*, that any cause may be docketed and tried by mutual consent of attorneys of record of such cause.” S.C. Code Ann. §14-5-950 (1976). With regard to this statutory provision, the intention of the legislature was to limit the jurisdiction of the circuit judge, when presiding at an extra term of the court, to the unfinished business of the court. Simms v. Phillips, 46 S.C. 149, 24

S.E. 2d 97 (1896), *overruled on other grounds by Woodard v. Westvaco*, 319 S.C. 240, 460 S.E. 2d 392 (1995).

As applied to this case, Appellant has failed to show the trial court called a special session of the court of common pleas. Also, the case had not been set for trial at that time.<sup>4</sup> Rather, the trial court simply scheduled a hearing upon Appellant's Motion to Vacate, which she labeled as ex-parte, and Appellant, of her own volition, did not appear.

Accordingly, there has been no violation of S.C. Code Ann. §14-5-950.

**C. Appellant has failed to show any evidence that the trial court violated Canon 3 of the South Carolina Code of Judicial Conduct.**

For the first time on appeal, Appellant appears to raise an issue regarding a violation of Canon 3 of the South Carolina Code of Judicial Conduct. However, she has not shown any evidence that a violation occurred.

Pursuant to Canon 3 of the South Carolina Code of Judicial Conduct, “[t]he judicial duties of a judge take precedence over all the judge’s other activities.” Canon 3(A), Rule 501, SCACR. The judicial duties include all the duties of the judge’s offices prescribed by law.” In performance of these duties.... A judge shall accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law. Canon 3(B)(7), Rule 501, SCACR. A judge shall not initiate, or permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding, except that: (a) where circumstances require ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substance matters or

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<sup>4</sup> Subsequent to the filing of this appeal, a final foreclosure hearing has been held on April 13, 2016 on Respondent’s foreclosure claim and defenses related thereto. Prior to the foreclosure hearing, Appellant filed a Motion for Continuance that was denied by the Honorable S. Bryan Doby, Master In Equity for Lee County. Appellant did not attend the foreclosure hearing and Judge Doby dismissed Appellant’s claims for failure to prosecute pursuant to Rule 41(b), SCRCF.

issues on the merits are authorized; provided: (i) the judge reasonably believes no party will gain a procedural or tactical advantage as a result of the ex parte communication; and (ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.” Canon 3(B)(7)(a), Rule 501, SCACR. Relatedly, “[a] judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and given an opportunity to respond to the proposed findings and conclusions.” Canon 3(B)(7) cmt., Rule 501, SCACR.

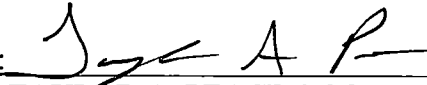
As stated above, Appellant has not presented any evidence the trial judge violated Canon 3. The aforementioned notwithstanding, Appellant appears base her argument in the issuance of the Order for Summary Judgment. (Appellant’s Initial Br.) However, Appellant has not presented any evidence that the trial court initiated, permitted or considered an ex parte communication. (Tr. of Hr’g on Am. Notice of Ex-Parte Application and Ex-Parte Application to Vacate Order.) Also, the trial court informed Appellant of the decision with regard to the Order for Summary Judgment, requested Respondent draft same, and gave Appellant an opportunity to respond, which she failed to do. (Tr. of Hr’g on Am. Notice of Ex-Parte Application and Ex-Parte Application to Vacate Order.) These are actions the trial court is authorized to take with regard to the Order for Summary Judgment, and Appellant has not presented any evidence that an ex parte communication occurred at the hearing on the Amended Motion to Vacate. (Tr. of Hr’g on Am. Notice of Ex-Parte Application and Ex-Parte Application to Vacate Order.) She simply failed to appear and be heard after being given an opportunity to respond to the issuance of the Order for Summary Judgment. (Tr. of Hr’g on Am. Notice of Ex-Parte Application and Ex-Parte Application to Vacate Order.)

As a result, the trial judge did not violate Judicial Canon 3.

**CONCLUSION**

Since Appellant has failed to show that the issuance of the Order for Summary Judgment constitutes reversible error, that the Order Denying Amended Motion to Vacate constitutes an abuse of discretion, that her due process rights were violated, and that the trial court violated Canon 3 of the South Carolina Code of Judicial Conduct, the present appeal should be dismissed.

**TYLER, JACKSON, PEACE  
& SILVER, LLC**

By:  \_\_\_\_\_

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IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM LEE COUNTY  
R. Ferrell Cothran, Jr., Circuit Court Judge

Lower Case No. 2009-CP-31-131

United States of America, acting through the  
Farmers Home Administration, United States  
Department of Agriculture..... Plaintiff/Respondent

v.

Maxie Lee Thomas, Jr. a/k/a Maxie Lee  
Thomas, deceased, and all other heirs at law  
and/or distributes of Maxie Lee Thomas, Jr.  
a/k/a Maxie Lee Thomas, deceased, his  
heirs, personal representatives, executors,  
administrators, successors and assigns, and  
any spouses if any he has, and all persons  
entitled to claim under or through him or  
any of them; all persons unknown claiming  
any right, title, estate, interest in or lien upon  
the real estate described in the Complaint  
herein, any and all persons who may be in  
the military service of the United States of  
America, being a class designated as John  
Doe; and any unknown minors or persons  
under a disability being a class designated as  
Richard Roe, Laura Ann Toney, and  
Brittany Nicole Thomas.....Defendants

Of Whom Laura Ann Toney is..... Appellant

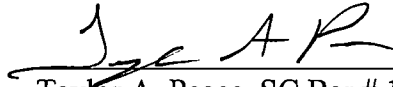
APPELLATE CASE NO. 2015-002380

PROOF OF SERVICE

I certify that I have served the **Initial Brief of Respondent and the Designation of Matter To Be Included in the Record on Appeal** upon Appellant, by depositing a copy of the same in

the United States Mail, postage prepaid, on May 6<sup>th</sup>, 2016, upon Appellant Laura Ann Toney, addressed to P.O. Box 722, Bishopville, South Carolina 29010.

May 6<sup>th</sup>, 2016



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May 6, 2016

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
1015 Sumter Street  
Columbia, South Carolina 29201

RE: United States of America, acting through the Farmers Home Administration,  
United States Department of Agriculture v. Maxie Lee Thomas, Jr., et al.  
Of Whom Laura Ann Toney is Appellant  
Appellate Case No. 2015-002380  
Our File No.: 2518.23031/DWT

Dear Ms. Kitchings:

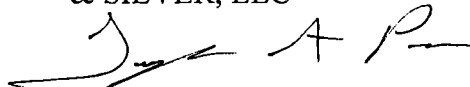
With regard to the above referenced matter, enclosed please find the original and one (1) copy each of the **Initial Brief of Respondent** and **Designation of Matter To Be Included in the Record on Appeal**, along with a **Proof of Service** of same. Please file the original with the Court and return a clocked copy to me in the enclosed self-addressed return envelope.

By copy of this letter, I am herewith serving the above documents on Appellant Laura Ann Toney.

If you have any questions or need anything further in this regard, please do not hesitate to contact us at any time.

Sincerely,

TYLER, JACKSON, PEACE,  
& SILVER, LLC



Donald W. Tyler  
Taylor A. Peace

TAP/rd

Enclosures

cc: Laura Ann Toney, Appellant