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THE STATE OF SOUTH CAROLINA  
in The Supreme Court

OCT 24 2012

S.C. Supreme Court

APPEAL FROM CHARLESTON COUNTY  
In the Family Court

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OCT 25 2012

Paul W. Garfinkel, Family Court Judge

S.C. Supreme Court

Unpublished Opinion No. 2012-UP-479 (S.C. Ct. App. filed August 15, 2012)

Mokhtar Elkachbendi, ..... Petitioner,

v.

Anne E. Elkachbendi, Suzanne H. Ruth  
Individually and as Trustee of the Suzanne H.  
Ruth Revocable Trust UDO February 25,  
2003, Daniel Ruth and Suzanne H. Ruth  
Revocable Trust ..... Defendants

of Whom Anne E. Elkachbendi is, ..... Respondent

v.

Nouhza Elkachbendi Waring is ..... Third Party Defendant

PETITION FOR A WRIT OF CERTIORARI

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Other Counsel of Record:  
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### **Certificate of Counsel**

Counsel for Petitioner (Husband) certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on September 25, 2012.

### **Question Presented**

1. If the Court of Appeals had concerns regarding the date Husband received written notice of the entry of the final order, should it have remanded the matter back for a hearing on that issue rather than dismissing his appeal?
2. Assuming the Court of Appeals should have remanded, rather than dismissed, Husband's appeal, should it have vacated its award of attorney's fees to Respondent (Wife)?
3. Even if the Court of Appeals correctly dismissed Husband's appeal, did it still err in awarding Wife attorney's fees from the Rule 59(e) motion defense?

### **Statement of the Case**

The parties were husband and wife and were divorced as part of this case. During the trial, the parties resolved all issues by consent other than the issue of attorneys' fees. R. 28-60; May 6, 2010 Final Order and Decree of Divorce. During the February 2, 2010 hearing, the parties agreed that the issue of attorneys' fees would be decided by the trial judge on submission of affidavits and other documents. R. 33; May 6, 2010 Final Order and Decree of Divorce, p. 6; R. 671; February 2, 2010 transcript, p. 21, lines 3-11. The Court issued its ruling on attorney's fees on May 6, 2010. R. 61-65; May 6, 2010 Order on the Issue of Attorney's Fees. In that order, it required Husband to pay \$105,000 of Wife's attorney's fees at a rate of \$2,500 a month on the 5<sup>th</sup> of each month. R. 65; May 6, 2010 Order on the Issue of Attorney's Fees and Costs, p. 5.

The family court clerk's office sent Husband's then-counsel, Jack Cordray, a copy of the attorney fee order on May 6, 2010. R. 70; Notice of Judgment. Wife's counsel served Mr. Cordray with the attorney fee order on May 10, 2010. R. 733; Bullet Deliveries receipt.

Husband retained new counsel, his counsel for this appeal, to file a motion to alter or amend the attorney fee award. On May 19, 2010, Husband's new counsel inquired of Wife's counsel what

date Husband had been served with the attorney fee order. R. 734; May 19, 2010 email from Gregory Forman to David DeVane. On May 20, 2010, Wife's counsel confirmed to Husband's new counsel that Husband's previous counsel had been served with the attorney fee order on May 10, 2010. R. 739-40; May 20, 2010 correspondence from Theresa Jenkins to Gregory Forman. Husband filed and served his motion to alter or amend on May 20, 2010. R. 251-59; Motion to Alter or Amend Judgment; R. 742; Gregory Forman's May 20, 2010 correspondence to Judge Garfinkel, courtesy copied to David Devane.

After a May 21, 2010 telephone conference between the parties' counsel and Judge Garfinkel, it was determined that the motion would be scheduled for a one-half hour hearing because no testimony would be required. On June 23, 2010 docketing confirmed that the motion hearing was set for August 9, 2010 from 4:00 to 4:30 p.m. R. 753; June 23, 2010 email of Ann Goulding.

Meanwhile, Wife filed a return on June 18, 2010. R. 26-72; Wife's return. In it, she alleged that Husband's motion was untimely. Husband filed a reply memorandum on July 9, 2010. R. 273-84; Plaintiff's Reply Memorandum of Law in Support of His Motion to Alter or Amend. In that reply, his counsel intended to include two emails he had received on May 20, 2010 from Maria Shendrick Frank, who worked for Husband's previous counsel Jack Cordray, regarding the date that Mr. Cordray had received the attorney fee order. However, that reply only provided the email he received at 10:25 a.m., in which Ms. Frank indicates they received a filed copy of the order on May 7, 2010. R. 735; May 20, 2010 10:25 a.m. email of Maria Shendrick Frank attached to Husband's Reply Memorandum as exhibit B.

Upon receipt of this reply, on July 14, 2010 Wife's counsel filed a return to the reply memorandum, arguing that Husband's motion was untimely because his previous counsel had received the order on May 7, 2010. R. 298-300; Defendant's Return to Plaintiff's July 9, 2010 Reply to Defendant's Return to Plaintiff's Motion to Alter or Amend. Upon being made aware of this error, Husband's counsel filed an Amended Reply on July 13, 2010. R. 285-97; Plaintiff's Amended Reply Memorandum of Law in Support of His Motion to Alter or Amend. This amended reply

included the subsequent 10:46 a.m. email in which Ms. Frank noted her previous email was in error and that the order had actually been received May 10, 2010. R. 736; May 20, 2010 10:46 a.m. email of Maria Shendrick Frank, attached to Husband's Amended Reply Memorandum as exhibit B.

Upon serving this amended reply memorandum, Husband's counsel asked Judge Garfinkel whether he desired to have testimony of Mr. Cordray or his paralegal taken at the hearing. R. 757; Gregory Forman's July 9, 2010 correspondence to Judge Garfinkel. Judge Garfinkel did not respond to this inquiry.

At the hearing, Judge Garfinkel determined, without testimony, that Mr. Cordray had received a filed copy of the attorney fee order on May 7, 2010 and that Husband had not met his burden of proving the motion to reconsider was filed timely. He therefore dismissed the motion without reaching the merits. R. 66-69; August 24, 2010 Order from Plaintiff's Motion to Alter or Amend Judgment. Judge Garfinkel did not award either party attorney fees and did not make any factual findings in denying the attorney fee claim. Wife did not seek reconsideration before filing her appeal.

The Court of Appeals filed its opinion on August 15, 2012. Appendix 1-4. It dismissed Husband's appeal finding he had not filed a timely Rule 59(e) motion. It reversed the lower court's decision not to award Wife her fees from defense of Husband's Rule 59(e) motion. Husband filed a timely Motion for Rehearing. Appendix 5-9. The Court of Appeals denied this motion on September 25, 2012. Appendix 10-11.

### **Argument**

1. If the Court of Appeals had concerns regarding the date Husband received written notice of the entry of the final order, it should have remanded the matter back for a hearing on that issue rather than dismissing his appeal

The Court of Appeals' opinion dismisses Husband's appeal as untimely because it found he filed an untimely Rule 59(e) motion. It found he filed an untimely Rule 59(e) motion because, "When challenged as to the timeliness of his Rule 59(e) motion, Husband failed to offer any evidence regarding the date he received the Form Four notice of entry of judgment." However the

lower court's order did not even address the date of receipt of the Form Four in deciding that his Rule 59(e) motion was untimely. Further, Husband took steps to present such evidence to the lower court but this request was ignored by the lower court.

After a May 21, 2010 telephone conference between the parties' counsel and Judge Garfinkel, it was determined that the motion would be scheduled for a one-half hour hearing because no testimony would be required. On June 23, 2010 docketing confirmed that the motion hearing was set for August 9, 2010 from 4:00 to 4:30 p.m. R. 753; June 23, 2010 email of Ann Goulding.

Meanwhile, Wife filed a return on June 18, 2010. R. 26-72; Wife's return. In it, she alleged that Husband's motion was untimely. Husband filed a reply memorandum on July 9, 2010. R. 273-84; Plaintiff's Reply Memorandum of Law in Support of His Motion to Alter or Amend. In that reply, his counsel intended to include two emails he had received on May 20, 2010 from Maria Shendrick Frank, who worked for Husband's previous counsel Jack Cordray, regarding the date that Mr. Cordray had received the attorney fee order. However, that reply only provided the email he received at 10:25 a.m., in which Ms. Frank indicates they received a filed copy of the order on May 7, 2010. R. 735; May 20, 2010 10:25 a.m. email of Maria Shendrick Frank attached to Husband's Reply Memorandum as exhibit B.

Upon receipt of this reply, on July 14, 2010 Wife's counsel filed a return to the reply memorandum, arguing that Husband's motion was untimely because his previous counsel had received the order on May 7, 2010. R. 298-300; Defendant's Return to Plaintiff's July 9, 2010 Reply to Defendant's Return to Plaintiff's Motion to Alter or Amend. Upon being made aware of this error, Husband's counsel filed an Amended Reply on July 13, 2010. R. 285-97; Plaintiff's Amended Reply Memorandum of Law in Support of His Motion to Alter or Amend. This amended reply included the subsequent 10:46 a.m. email in which Ms. Frank noted her previous email was in error and that the order had actually been received May 10, 2010. R. 736; May 20, 2010 10:46 a.m. email of Maria Shendrick Frank, attached to Husband's Amended Reply Memorandum as exhibit B.

Upon serving this amended reply memorandum, Husband's counsel asked Judge Garfinkel

whether he desired to have testimony of Mr. Cordray or his paralegal taken at the hearing, writing “if there is still a factual dispute as to when Mr. Cordray’s office received the filed final order, I suggest we subpoena him and/or his paralegal to the hearing and you can take testimony from them.” R. 757; Gregory Forman’s July 9, 2010 correspondence to Judge Garfinkel. Judge Garfinkel did not respond to this inquiry.

Faced with an uncooperative trial counsel, Husband did what he could to give the trial court information as to the date that counsel received notice of the entry of the final order, which he understood to be May 10, 2010, and which would make his Rule 59(e) motion timely. He further indicated that if the trial court did not accept this representation of date of receipt, he was willing to subpoena witnesses to the hearing.

It would have been extremely presumptuous of Husband to subpoena witnesses to a half-hour, non-testimonial hearing without the trial court’s consent. Husband cannot be held responsible for his unresponsive trial counsel or an unresponsive trial judge. Like the movant in *Green v. Green*, 320 S.C. 347, 350-51, 465 S.E.2d 130, 132-33 (Ct. App. 1995), Husband presented credible evidence that the date his trial counsel received written notice of the entry of the order was May 10, 2010. Given Husband’s willingness to subpoena witnesses to the Rule 59 hearing to provide testimony on the issue of timeliness, it was an error for the Court of Appeals to dismiss his appeal as untimely as opposed to remanding it for testimony on the issue of timeliness of the Rule 59 motion.

2. Assuming the Court of Appeals should have remanded, rather than dismiss, Husband’s appeal, it should have vacated its award of attorney’s fees to Wife

The basis of this request is that the Court of Appeals’ decision to reverse the family court and award Wife her attorney’s fees from the Rule 59(e) motion defense was based in part on “her efforts to show that Husband’s Rule 59(e) motion was untimely.” Assuming this timeliness issue was resolved incorrectly, the Court of Appeals should reverse this attorney fee award.

3. Even if the Court of Appeals correctly dismissed Husband’s appeal, it still erred in awarding Wife attorney’s fees from the Rule 59(e) motion defense

First of all the Court of Appeals opinion addresses the issue of the parties’ ability to pay fees,

an issue the family court's order from the Rule 59(e) motion did not address and which Wife failed to ask for a ruling on in any subsequent motion to reconsider. Where the trial court does not explicitly rule on the appellant's argument and the appellant made no Rule 59(e) motion to alter or amend the judgment, that issue is not preserved for appellate review. *Hawkins v. Mullins*, 359 S.C. 497, 597 S.E.2d 897, 899 (Ct.App. 2004).

Further the Court of Appeals fails to apply the correct legal standard in awarding Wife attorney's fees. In family court, a denial of a claim for attorney's fees is reviewed on an abuse of discretion standard. *Upchurch v. Upchurch*, 367 S.C. 16, 624 S.E.2d 643, 649 (2006); *Gartside v. Gartside*, 383 S.C. 35, 677 S.E.2d 621, 627 (Ct.App. 2009). Wife's initial brief did not even argue that the lower court abused its discretion in denying her attorney fee claim and the Court of Appeals opinion does not make this finding.

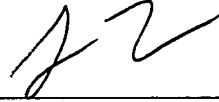
There are a couple of bases within the record upon which the lower court could have denied Wife's attorney fee claim despite finding Husband's motion was untimely. The family court could have denied Wife's claim based on her frivolous assertion that the service of an unfiled copy of the lower court's order started the time to run for Husband to file his motion to alter or amend. Compare Wife's Return to Motion to Alter or Amend, pp. 1-5 with *Upchurch, supra*, 624 S.E.2d 646-47 (unfiled copy of order does not start deadline for notice of appeal). The family court could have denied Wife's claim based on its previous award of \$105,000 in attorney's fees and its determination that Husband lacked the ability to pay further fees. As Wife did not file a Rule 59(e) motion, the Court of Appeals is left to guess at the lower court's reasoning in denying her fees. However there is evidence in the record from which the lower court could have denied Wife's fee claim without it being an abuse of discretion. For these reasons the Court of Appeals should reverse its award of attorney's fees to Wife.

**Conclusion**

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

Respectfully submitted,

October 16, 2012



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**THE STATE OF SOUTH CAROLINA  
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APPEAL FROM CHARLESTON COUNTY  
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Revocable Trust ..... Defendants

of Whom Anne E. Elkachbendi is, ..... Respondent

v.

Nouhza Elkachbendi Waring is ..... Third Party Defendant

**PROOF OF SERVICE**

The undersigned hereby certifies that on October 23, 2012 he served one copy of Petition for a Writ of Certiorari and one copy of the Appendix upon Respondent by placing same in an envelope with proper first class postage affixed thereto, and addressed as follows to her attorneys of record:

Mr. David L. Devane  
Ms. Theresa Wozniak Jenkins  
Ameika Devane & Mack  
110 North Main Street  
Summerville SC 29483



GREGORY S. FORMAN, ESQUIRE  
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October 23, 2012

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OCT 24 2012 GREGORY S. FORMAN, P.C.

S.C. Supreme Court

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October 23, 2012

South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

RE: Elkachbendi v. Elkachbendi, 2008-DR-10-949  
Tracking number 2010171286

Dear Sir/Madam:

Enclosed please find a copy of the proof of service of Mokhtar Elkachbendi's petition for a writ of certiorari.

Very truly yours,



Gregory S. Forman, Esquire

cc: South Carolina Supreme Court

*GREGORY S. FORMAN, P.C.*  
**RECEIVED**

OCT 25 2012

**S.C. Supreme Court**

**Attorney at Law**

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October 23, 2012

South Carolina Supreme Court  
P.O. Box 11330  
Columbia, SC 29211

**RECEIVED**

OCT 24 2012

**S.C. Supreme Court**

RE: Elkachbendi v. Elkachbendi, 2008-DR-10-949


Dear Sir/Madam:

I represent the Appellant in this case. Enclosed please find the following:

- 1) An original and six copies of a Petition for Certiorari
- 2) A bound and unbound Appendix
- 3) A proof of service
- 4) A check for \$100.00 for the filing fee.

By copy of this letter I am serving David DeVane and Theresa Wozniak Jenkins, Attorneys for Respondent, with a copy of the Petition, Appendix and the proof of service.

Very truly yours,

  
Gregory S. Forman, Esquire

Enclosures

cc: David DeVane and Theresa Wozniak Jenkins (w/enclosures)  
Mokhtar Elkachbendi (w/enclosures)



# The Supreme Court of South Carolina

Gregory S. Forman

10/25/2012

## RECEIPT #66012

<b>Fee Type:</b>	Case Initiation Fee
<b>Amount:</b>	\$100.00
<b>Payment Type:</b>	Check
<b>Reference No:</b>	4459
<b>Check/Money Order Date:</b>	10/23/2012
<b>Comments:</b>	Elkachbendi v. Elkachbendi