

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

AUG 10 2016

SC Court of Appeals

Marvin H. Dukes, III, Master-In-Equity

Civil Action No. 2007-CP-07-3212
Appellate Case No.: 2016-001277

H. Marshall Hoyler.....Appellant,

v.

The State of South Carolina, Merry Land Properties, LLC,
Sherbert Living Trust, Supan Living Trust, Elizabeth R. Levin,
Edward McCray Wise Revoc. Living Trust,
Carol Ann Devries Wise Revoc. Living Trust,
Amelie Cromer, Philip Cromer, Robert Chiavello, Tocharoen Living Trust,
Helen M. Olesak, Lesley Anne Glick a/k/a Lesley Ann Glick,
Shirley G. Lackey, Patricia Banfield, Bertrand Cooper, Jr.,
NHP SH South Carolina I, LLC n/k/a CCP Bayview 7176 LLC,
Oyster Cove Homeowners Assn., Shirley Ann Moyer,
Barry D. Malphrus, Garry D. Malphrus, Donnie Malphrus,
Rita Brown, Houston Family Partnership, Joan Taylor Trustee,
Michael Bull, Nancy Bull, Marny H. VonHarten, Dianne M. Donaldson,
Brian R. Evans, Stephen Durbin, Valerie Durbin, Phillip Marti,
Jane Marti, Michael Woodworth, Georgiana M. Cooke, Daniel B. Walsh,
Janet E. Walsh.....Respondents.

**APPELLANT'S RETURN TO RESPONDENT MERRY LAND PROPERTIES,
LLC'S MOTION TO DISMISS APPEAL**

Jefferson D. Griffith, III
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Attorneys for Appellant

ORIGINAL

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INTRODUCTION

Appellant, H. Marshall Hoyler hereby returns to the Motion to Dismiss Appeal of Respondent, Merry Land Properties, LLC, (hereinafter as “Merry Land”), (which Motion with Exhibits ran in length, over 85 pages and Respondent’s Motion contained 39 footnotes), and the one page concurrence filed by counsel for the State of South Carolina. Appellant’s counsel was granted until August 10, 2016, to file this Return, by this Court’s Order filed July 29, 2016. Appellant’s Return follows.

ARGUMENT IN RETURN

Respondent, Merry Land inexplicably devotes the first five pages and ten footnotes, of its Motion to two prior Orders¹ of the South Carolina Court of Appeals, which dismissed the Appellant's prior Appeals as being interlocutory. The Appeals were not on the merits and have no bearing on this Appeal.

Relief Sought by Respondents.

The relief sought in Respondent's Motion was stated to be, "This matter should be dismissed, without prejudice, and remanded to the Circuit Court to address Mr. Hoyler's pending motion." (See, page "12" of Respondent's Motion to Dismiss). Respondent's request for relief should be denied.

Respondents complain about Appellant's filing of this Appeal, because the Lower Court did not schedule a Hearing and rule on a **second** identical, or almost identical Motion under Rule 59(e), which was filed by counsel for Appellant, in the Lower Court after the Lower Court had previously denied Appellant's previous Rule 59(e) Motion.

Chronology of Events.

The following chronology of events before the Lower Court, explain and provide the basis for the timing of the filing of Appellant's Notice of Appeal herein, even though Appellant's a **second** identical, or almost identical Motion under Rule 59(e), had not been ruled upon by the Lower Court.

¹ S.C. Court of Appeals Orders filed September 26, 2011, and, August 20, 2013.

ARGUMENT IN RETURN, (Cont.)

- Counsel for Appellant, filed a Rule 59(e) Motion² before the Lower Court on **May 5, 2016**.
- The Lower Court **denied** Appellant's Rule 59(e) Motion, without a Hearing on **May 19, 2016**.
- The Lower Court then executed a formal Order on **May 27, 2016**.
- Counsel for Appellant then filed Appellant's **second**, identical, or almost identical Rule 59(e) Motion on **June 9, 2016**, so that **procedurally Appellant's Motion under Rule 59(e) would come after** the Lower Court's formal Order, which was adverse to Appellant.
- Counsel for Appellant then filed Appellant's Notice of Appeal herein, on **June 16, 2016**. The filing date of the Appellant's Notice of Appeal was triggered by the date of the Lower Court's **original** denial of Appellant's **first** Rule 59(e) Motion on **May 19, 2016**, (Appellant's Notice of Appeal was required to be filed within 30 days of the date of the Lower Court's denial of Appellant's **first** Rule 59(e) Motion)³.

³ The timing of filing of Appellant's Notice of Appeal was in recognition of the following South Carolina Supreme Court case, Elam v. South Carolina Dept. of Transp., 602 S.E.2d 772 (2004).

² Factually, the Appellant's Motion was pursuant to Rule 52(b) and Rule 59(e), SCRPC, but for the purposes of this Motion the only important component was the Rule 59(e) Motion.

ARGUMENT IN RETURN (Cont.)

Reasoning for Appellant's Filing First Rule 59(e) Motion.

Appellant filed Appellant's Motion under Rule 59(e), after the Lower Court's initial ruling, in light of this Court's decision in Wells Fargo Bank, N.A. v. Fallon Props. S.C., LLC, 413 S.C. 642, 776 S.E.2d 575 (S.C. App., 2015). It was not clear to counsel whether the Lower Court's decision, which was set forth in detail and memorialized by electronic mail to all parties would trigger a requirement, consistent with Wells Fargo Bank, supra, for Appellant's counsel to file a Motion under Rule 59(e).

The Lower Court Judge later candidly acknowledged, that,

"Sometimes I remember to add: "this email request for a proposed Order is not intended to be a ruling" or similar. That was my intent here and I do not believe that I have issued a ruling yet... Nevertheless, I fully understand that everyone needs to protect their clients' interests." (see, electronic mail from the Lower Court to the parties herein, dated May 5, 2016, at 12:36 PM), (copy attached hereto, as *Exhibit "A"*).

Reasoning for Appellant's filing of a Notice of Appeal.

Appellant could not reasonably delay filing Appellant's Notice of Appeal, after the filing of a **second** Motion under Rule 59(e), but before the Court could rule on the second Motion under Rule 59 (e) is because, it is settled law that the filing of a **second** identical, or almost identical, Rule 59(e) Motion, after the denial of a first Rule 59 (e) does not extend a party's time to file its Notice of Appeal. Elam v. South Carolina Dept. of Transportation, 361 S.C. 9, 18-19, 602 S.E.2d 772 (S.C. 2004).

ARGUMENT IN RETURN, (Cont.)

Respondent's Argument Misapprehends the Facts of this Case.

Respondent's argument encompasses a theme that there is, "one Rule 59(e)" filing by Appellant. In fact, Respondents go so far as to characterize Appellant's first Rule 59(e) filing as a "nullity" (see, page "7" of Respondent's Motion to Dismiss). It was not a nullity, but a necessity, if the Lower Court's initial decision triggered the time for the filing of a Rule 59(e) Motion. As noted hereinabove, the Lower Court Judge acknowledged that he did not follow his normal procedure when notifying the parties to a case of his decision and that he did not make his ruling clear (see, Lower Court's electronic mail dated May 5, 2016 attached hereto as, *Exhibit "A"*). Also as discussed hereinabove, Appellant's counsel were acting in a manner mindful of this Court's decision in Wells Fargo Bank. The Lower Court Judge acknowledged the importance of this Court's decision in Wells Fargo Bank, by adding a reference to the Wells Fargo Bank, decision in one of the Court's Notices to litigants after Appellant's counsel made reference to Wells Fargo Bank, in their electronic correspondence with the Lower Court. (See, *Exhibit "B"* attached hereto).

Respondents' Counsel Misstates the Facts of this Case.

Respondent's counsel provides a citation to, Hudson v. Hudson, 349 S.E.2d 341 (1986), for this Court's consideration. Losing sight of the facts of this case, Respondent's counsel argues, "Like in the present case, the Appellant [in the Hudson v. Hudson case] filed the Notice of Appeal and, thereafter, filed Rule 59(e), SCRCivP, (*sic*) post-trial motions." (See, page "12" of Respondent's Motion to Dismiss Appeal).

ARGUMENT IN RETURN, (Cont.)

Under the facts of this case, Appellant's Rule 59(e) Motion was not filed simultaneously with or subsequent to, Appellant's filing of a Notice of Appeal. In the case *sub judice*, the Appellant filed his second and almost identical Rule 59(e) Motion *after* his first Rule 59(e) Motion had been summarily denied by a form Order from the Lower Court dated May 19, 2016. The Appellant received a formal copy of the Order dated May 27, 2016, by electronic mail and filed a second, Rule 59(e) Motion on June 9, 2016. Within thirty days of the Lower Court's initial decision denying his first Rule 59(e) Motion, but prior to the Trial Court ruling on his second Rule 59(e) Motion the Appellant filed his Notice of Appeal. Hudson v. Hudson, does not apply⁴ and Respondent's statement, "Mr. Hoyler has heretofore failed to provide this Court of Appeals with the Hudson required notification.", in Respondent's footnote ³⁹ on page "12" of Respondent's Motion to Dismiss Appeal, is inapplicable, misapplied and should be disregarded.

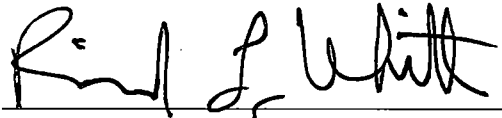
CONCLUSION

Based on the foregoing, and the cited Authorities, the relief sought in Respondent's Motion should be denied.

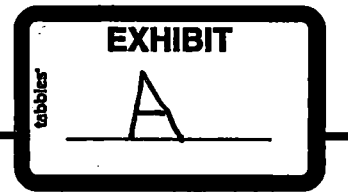
⁴Unlike Wicker v. Anderson County, 347 S.E. (2d) 96 (S.C. 1986) and Otten v. Otten, 287 S.C. 166, 337 S.E. (2d) 207 (1985), cited in the Hudson *supra*, case, the Lower Court has denied Appellant's first Rule 59(e) Motion by Form Order dated May 19, 2016.

[Signature Page Follows]

AUSTIN & ROGERS, P.A.

By: 
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Jefferson D. Griffith, III, S.C. Bar # 2299
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Attorneys for Appellant

August 10, 2016
Columbia, South Carolina



Carrie A. Schurg

From: Dukes, Marvin [mdukes@bcgov.net]
Sent: Thursday, May 05, 2016 12:36 PM
To: Richard L. Whitt; McLeod, Heather
Cc: Jeff Griffith - G-Mail; Shahid, Mary D.; Carrie A. Schurg; Emory Smith
Subject: RE: 2007-CP-07-3212- H. Marshall Hoyler vs. The State of South Carolina, et al

Dear Counsel,

Sometimes I remember to add: "this email request for a proposed Order is not intended to be a ruling" or similar. That was my intent here and I do not believe that I have issued a ruling yet. I am sure we will have the usual round of comments on the proposed order. Nevertheless, I fully understand that everyone needs to protect their clients' interests. Best to all,

From: Richard L. Whitt [rlwhitt@AustinRogersPA.com]
Sent: Thursday, May 05, 2016 11:16 AM
To: Dukes, Marvin; McLeod, Heather
Cc: Jeff Griffith - G-Mail; Shahid, Mary D.; Carrie A. Schurg; Emory Smith
Subject: RE: 2007-CP-07-3212- H. Marshall Hoyler vs. The State of South Carolina, et al

Judge Dukes:

This email is responsive to counsel opposite's email below.

Rule 52(b), SCRPC

1. Counsel opposite's email to Your Honor ignores the rubric of Plaintiff's Motion, which refers to both, "Rules 52(b) and 59(e)". Counsel opposite does not mention Rule 52(b). Rule 52(b), SCRPC, absolutely requires that Plaintiff make his Motion, "...not later than 10 days after receipt of written notice of entry of judgment...", Rule 52(b), SCRPC. Plaintiff's Motion was filed in compliance with the Rules and timely, based on Your Honor's written Notice by email ,to counsel .

Rule 59(e), SCRPC

2. Counsel opposite may not be aware of a recent Appellate Case, Wells Fargo Bank v. Fallon Properties 776 SE 2d 575, (S.C. Ct. of App. 2015). The attorneys in that case lost their right to Appeal, (and presumably committed malpractice), because of their failure to base their Notice of Appeal filing on the date of an email from the Judge giving written Notice of a decision, (it follows that the Rule 59(e), filing would be similarly treated). The same case clearly indicates that Notice from the Court, by email, to an attorney's email address consistent with the email address on file with the S.C. Bar (AIS), is sufficient written Notice.

3. In summary, the filing of the Rule 52(b) Motion by Plaintiff's counsel was filed on the required date and the Rule 59(e) Motion filing by Plaintiff's counsel was in compliance with the case cited hereinabove and an abundance of caution.

Respectfully Submitted,

Carrie A. Schurg

From: McLeod, Heather [hmcLeod@bcgov.net]
Sent: Friday, May 27, 2016 2:30 PM
To: Jeff Griffith - G-Mail; RLW Assist; Mary D. Shahid (mshahid@nexsenpruet.com); J. Emory Smith Jr. (agesmith@scag.gov); Steven Smith; Roy W. Boggs (roy@royboggsllaw.com); Adam N. Yount (ayount@hsblawfirm.com); Sharon Bernard for Adam N. Yount (sbernard@hsblawfirm.com); James Grimsley (jimgrimsley@tgdpa.com); Mary Gatch (marygatch@tgdpa.com); Mac White (MWhite@holcombebomar.com); Lori Floyd for Mac White (LFloyd@holcombebomar.com)
Cc: Richard L. Whitt; Colwell, Angelica M.
Subject: Hoyer vs. State of South Carolina, et al.; 07-3212
Attachments: 07-3212.pdf

Importance: High

To Whom it May Concern:

Please see attached copy of signed/filed Order, in regards to above case. Please note that this office does not serve any documents on any party. The appropriate party pursuant to SCRPC 5(a) should serve copies of this Order:

- (a) **Service: When Required.** Unless otherwise ordered by the court because of numerous defendants or other reasons, all (1) written orders (&)... other similar papers shall be served upon each of the parties of record. No service need be made on parties in default for failure to appear, except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for serving of summons in Rule 4, and notice of any trial or hearing on unliquidated damages shall also be given to parties in default.

Also see <http://www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2015-08-26-01> *

Please contact us immediately if you are waiting on a ruling and it has been more than 30 days.

If you have a motion older than 30 days, needing a hearing, please email me a filed copy and I will work with you on scheduling. Please note, there may be jurisdiction or conflict issues resulting in Judge Dukes' inability to hear a motion.

Thanking You in Advance,

Heather R. H. McLeod,
 Judicial Assistant to
 Hon. Marvin H. Dukes, III
 Beaufort County Master In Equity
 And Special Circuit Court Judge
 P. (843) 255-5710
 F. (843) 255-9505
hmcLeod@bcgov.net

Beaufort County Courthouse
 Post Office Drawer 1228
 Beaufort, SC 29901

* Link opens: Wells Fargo Bank, N.A. v. Fallon Props. S.C., LLC, 776 S.E. 2d 575 (2015)

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Brian R. Evans, Stephen Durbin, Valerie Durbin, Phillip Marti,
Jane Marti, Michael Woodworth, Georgiana M. Cooke, Daniel B. Walsh,
Janet E. Walsh.....Respondents.

AFFIDAVIT OF SERVICE

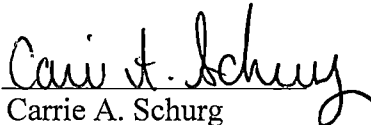
I, Carrie A. Schurg, an employee of Austin & Rogers, P.A., certify that I have caused Appellant's Return to Respondent Merry Land Properties, LLC's Motion to Dismiss Appeal, and this Proof of Service, to be served via U.S. Mail, on August 10, 2016, as addressed below.

ORIGINAL

Affidavit of Service
August 10, 2016
Page 2 of 2

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Mary D. Shahid, Esquire
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Charleston, South Carolina 29402


Carrie A. Schurg

August 10, 2016
Columbia, South Carolina