THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Appellate Case No. 2016 – 001266

J. C. Nicholson, Jr., Circuit Court Judge

Case No. 2013-CP-10-1396

PERSONAL CARE, INC. ..... Appellant,

vs.

JERRY N. THEOS; URICCHIO, HOWE, KRELL, JOHNSON, TOPOREK THEOS & KEITH, PA; CHERYL D. SHOUN; AND TAYLOR SHOUN, BOWLEY & BYRD, LLC..... Respondents.

RESPONDENTS' JOINT RETURN TO THE MOTION FOR LEAVE TO AMEND NOTICE OF APPEAL

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COME NOW the Respondents, by their respective counsel, and file their Joint Return to the Motion for Leave to Amend Notice of Appeal (hereinafter "Motion to Amend Notice"). In Appellant's Motion to Amend Notice, Appellant requests leave to amend its Notice of Appeal, filed with the Circuit Court on June 15, 2016, so that Appellant can add the Final Order issued by the Circuit Court in the case below. This final order, titled "Substituted Modified Order on Plaintiff's Motion to Alter or Amend Judgment," was signed by Circuit Court Judge Nicholson on June 13, 2016, and filed on June 14, 2016 (hereinafter "June 14th Final Order").[1] Notice was mailed to all counsel of record on June 15, 2016.

Appellant does not dispute that it received the June 14th Final Order, which Appellant incorrectly refers to as "the July 15 Order." Moreover, Appellant admits that it did not timely file a Notice of Appeal of the June 14th Final Order, which failure is the basis for Respondents' pending Motion to Dismiss. Nonetheless, Appellant asserts that the June 14th Final Order was "non-substantive" and of "no substance," thereby excusing Appellant's failure to timely file a Notice of Appeal of the June 14th Final Order. In essence, Appellant argues that its failure to notice an appeal of the June 14th Final Order is inconsequential because the June 14th Final Order was meaningless. Appellant is incorrect. Far from being inconsequential, the June 14th Final Order explicitly replaced the Circuit Court's May 23, 2016 Order and modified the Circuit Court's March 3, 2015 Order. Thus, Appellant failed to appeal the Final Order in the case below and instead appealed interlocutory orders that have been modified or replaced completely.

[1] The Notice of Entry of Judgment/Order Pursuant to Rule 77 SCRCP, which was entered on June 14, 2016, expressly refers to Judge Nicholson's "Substituted Modified Order on Plaintiff's Motion to Alter or Amend Judgment." The Clerk of Court advised that, because the conclusion of the Substituted Modified Order set forth "Based on the foregoing discussion, I hereby order that Personal Care's Motion to Restore Case is denied," the Rule 77 entry adopted such express language for the notice of entry. Accordingly, the Notice of Entry's "Order/Personal Care's Mot. To Restore Case is Denied" notice is Judge Nicholson's Order titled "Substituted/Modified Order on Plaintiff's Motion to Alter or Amend Judgment," filed on June 14, 2016.

Appellant's arguments in support of its Motion to Amend Notice are contrary to this Court's rules and the law, and its Motion to Amend Notice should be denied.

I. This Court Lacks Jurisdiction to Review the June 14th Final Order.

Appellant and Respondents agree that no timely Notice of Appeal of the June 14th Final Order was made in accordance with the jurisdictional rules of the court. SCRCP Rule 203, titled "Notice of Appeal," sets forth, in relevant part:

> (a) **Notice.** A party intending to appeal must serve and file a notice of appeal and otherwise comply with these Rules. Service and filing are defined by Rule 262.
>
> (b) **Time for Service.**
>
> (1) *Appeals from the Court of Common Pleas.* A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment. When a timely motion to alter or amend a judgment Rule 52 and 59 SCRCP, has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the Order granting or denying such motion. When a form or other short order or judgment indicates that a more full and complete order or judgment is to follow, a party need not appeal until receipt of written notice of entry of the more complete order or judgment.

Here, the June 14th Final Order was mailed to Appellant's counsel on June 15, 2016, and Appellant did not file a Notice of Appeal of the June 14th Final Order within the thirty-day jurisdictional requirement set forth in SCACR Rule 203(b). Thus, as an initial matter, the Court of Appeals lacks jurisdiction to hear the Appeal attempted by Appellant.

South Carolina law is clear that a failure to timely appeal a final order of the Court within thirty days is a jurisdictional defect that requires dismissal of the appeal. See USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 651, 661 S.E.2d 791, 795 (2008). Because service of a Notice of Appeal is a jurisdictional requirement, courts have "no authority to extend or expand the time in which the Notice of Appeal must be served." Sadisco of Greenville, Inc. v. Greenville Cnty. Bd. of Zoning Appeals, 340 S.C. 57, 59, 530 S.E.2d 383 (2000). If a party

misses the thirty-day deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to "rescue" the delinquent party by extending or ignoring the deadline for service of the notice. Clegg, 377 S.C. at 651, 661 S.E.2d at 795 (quoting Elam v. S.C. Dep't of Transp., 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004)). Appellant's failure to timely appeal the June 14th Final Order is a jurisdictional defect and bars the Appellant from attempting to appeal the June 14th Final Order thereafter.

Despite acknowledging Appellant's failure, Appellant asserts several excuses in an attempt to convince the Court of Appeals to ignore the dispositive, jurisdictional defect of this present appeal. Such arguments, however, are without merit for the reasons set forth below.

II. Appellant's Failure to Appeal the June 14th Final Order is No Clerical Error.

Appellant cites Moody v. Dickinson, 54 S.C. 526, 32 S.E. 563 (1899), for the proposition that a party may amend a notice of appeal so long as there is no prejudice to a non-moving party. Simply put, Appellant misconstrues and overstates the holding in the 1899 case, which was decided prior to the adoption of the Appellate Court Rules in their present form.

In Moody, the Supreme Court held that the appellate court may properly allow the appellant to correct a mere non-prejudicial clerical error in the title of his notice of appeal where the title referred to "H.J. Moody, et al.," instead of "H.J. Moody, Administrator." 54 S.C. at 534, 32 S.E. at 566. Recently, the Supreme Court distinguished the "mere clerical error" in Moody from another asserted "clerical error." In Connor v. City of Forest Acres, 348 S.C. 454, 560 S.E.2d 606 (2002), the Supreme Court held that a notice of appeal's failure to include the names of two individual defendants was not a "mere clerical error" that could be corrected by an untimely amended notice of appeal. Id. at 462. The Supreme Court reaffirmed that the service of the notice of appeal is a jurisdictional requirement and that courts have no authority to extend

or expand the time in which the notice of appeal must be served. Id. at 461. Thus, the Supreme Court held that the Court of Appeals had erred both in granting the appellant's motion to correct the record and in accepting the amended Notice of Appeal. Id. at 462.

Here, Appellant's failure to include the June 14th Final Order in its Notice of Appeal was no mere typographical or clerical error. It appears, and Appellant does not state to the contrary, that Appellant filed its Notice of Appeal prior to receipt of the June 14th Final Order.[2] If, after receipt of the June 14th Final Order, Appellant had decided that it wanted to also appeal the June 14th Final Order, then Appellant should have, within thirty days of receipt of the June 14th Final Order, either (1) filed a Notice of Appeal of the June 14th Final Order or (2) otherwise moved to amend its original Notice of Appeal to include the June 14th Final Order. Appellant chose not to do either, instead waiting for over two months following receipt of the June 14th Order to file the Motion to Amend Notice of Appeal. Here, in contrast to Moody, Appellant's failure did not constitute a mere clerical or typographical error in the title of the Notice of Appeal itself. Rather, Appellant's failure in this case is an outright failure to appeal the final order of the Circuit Court in accordance with SCACR Rule 203. This failure results in a jurisdictional defect that cannot be corrected by an untimely amended Notice of Appeal. See Clegg, 377 S.C. at 651; Connor, 348 S.C. at 462.

III. Appellant's Invocation of Judicial Economy Cannot Cure the Jurisdictional Defects in its Notice of Appeal.

Finally, Appellant argues that the Court of Appeals should permit Appellant to amend the Notice of Appeal in the interest of judicial economy and "in keeping with a longstanding policy

[2] SCACR Rule 203(e)(1)(C) provides that a notice of appeal shall contain "if appropriate for the determination of the timeliness of the appeal, a statement of when the appealing party received notice of the order or judgment from which the appeal is taken." The Amended Notice of Appeal, attached to Appellant's Motion to Amend Notice, states that the June 14th Final Order was "mailed to counsel for Appellant on June 15, 2016."

of the Courts of South Carolina to adjudicate issues on the merits and not on technicalities." Mot. to Am. Notice of Appeal at 3. Jurisdiction is not a technicality. Jurisdiction is required before the Court of Appeals can consider the merits of any appeal. The cases cited by Appellant are not to the contrary.

Appellant failed to file and serve a Notice of Appeal of the June 14th Final Order within thirty days after receiving written notice of the entry of the June 14th Final Order. Appellant's failure to do so was not a clerical error that can be remedied by its untimely Motion to Amend Notice. Rather, Appellant's failure to timely file a Notice of Appeal of the June 14th Final Order divests this Court of subject matter jurisdiction over the appeal.

For the foregoing reasons, Respondents respectfully request that the Court deny Appellant's Motion for Leave to Amend Notice of Appeal. Respondents jointly reassert their position and case law as referenced in its initial Joint Motion to Dismiss the Appeal supporting this present Joint Return as well.

Respectfully submitted,

Barnwell Whaley Patterson & Helms, LLC By: /s/ Phillip Ferderigos M. Dawes Cooke, Jr. Phillip S. Ferderigos 288 Meeting Street, Suite 200 Charleston, SC 29401 *Attorneys for Jerry N. Theos and Uricchio, Howe, Krell, Jacobson, Toporek, Theos & Keith, P.A.*	K&L Gates, LLP By: /s/ Richard Farrier Richard A. Farrier 134 Meeting Street, Suite 500 Charleston, SC 29401 *Attorney for Cheryl D. Shoun*	By: /s/ Oana Johnson Oana D. Johnson Attorney at Law 151 King Street Second Floor Charleston, SC 29401 *Attorney for Taylor Bowley and Byrd, LLC*
Date: 10/4/16	Date 10/4/16	Date: 10/4/16

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JERRY N. THEOS; URICCHIO, HOWE, KRELL,
JOHNSON, TOPOREK THEOS & KEITH, PA;
CHERYL D. SHOUN; AND TAYLOR SHOUN,
BOWLEY & BYRD, LLC.....Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of October, 2016, I served a copy of the foregoing Respondents' Joint Return To The Motion For Leave To Amend Notice Of Appeal on counsel for the Appellant via U.S. Mail with sufficient postage, correctly addressed as follows:

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October 4, 2016

Jenny Abbott Kitchings, Clerk of Court
Court of Appeals for the State of South Carolina
PO Box 11629
Columbia, SC 29211

Re: **Personal Care, Inc., Appellant v. Jerry N. Theos; Uricchio, Howe, Krell, Johnson, Toporek Theos & Keith, PA; Cheryl D. Shoun; and Taylor, Shoun, Bowley & Byrd, LLC, Respondents**

Appellate Case No. 2016-001266

Dear Ms. Kitchings:

Enclosed for filing please find the original and seven copies of Respondents' Joint Return to the Motion for Leave to Amend Notice of Appeal ("Joint Return") and Certificate of Service in regard to the above-referenced matter. Please file the original and six copies of the Joint Return and Proof of Service. Please return the clocked copy to me in the stamped, self-addressed return envelope enclosed for your convenience.

Thank you for your assistance with this matter.

Very truly yours,

Richard Farrier/jbt

Richard A. Farrier

RAF/kbt
Enclosures
cc w/ encls.: Thomas A. Pendarvis, Esquire
Phillip S. Ferderigos, Esquire
M. Dawes Cooke, Jr., Esquire
George J. Kefalos, Esquire
Oana D. Johnson, Esquire

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OCT 10 2016
SC Court of Appeals

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