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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

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SC Court of Appeals

Maite Murphy, Circuit Court Judge

Appellate Case No. 2015-001718

Wanda Mack ....Appellant,

v.

Carmen Gates ....Respondent.

APPELLANT'S PETITION FOR REHEARING

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, the Appellant respectfully moves the Court for Rehearing and/or to Alter its Opinion number 2017-UP-144 filed on April 5, 2017. This Court's Opinion affirmed the trial court's **(i)** denial of Appellant's Motion to Restore her case to the active general docket when Appellant was never served with a filed copy of the Order or written notice of entry of the Order striking the case pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure, and **(ii)** denial of restoring the case pursuant to Rule 40(j) when the Appellant had previously filed her Complaint within the statute of limitations and the case was stricken from the active general docket and placed in an inactive status. The opinion currently issued should be reheard and/or altered because the opinion overlooks and misapprehends the facts underlying the issue. In fact, respectfully the opinion entirely

fails to apply the facts at bar to the well-established legal standards that apply under the proper analysis.

I. UNDER EXISTING PRECEDENT APPELLANT'S MOTION TO RESTORE HER CASE TO THE ACTIVE GENERAL DOCKET SHOULD HAVE BEEN GRANTED WHEN APPELLANT WAS NEVER SERVED WITH A FILED COPY OF THE ORDER OR WRITTEN NOTICE OF ENTRY OF THE ORDER STRIKING THE CASE PURSUANT TO RULE 40(J).

Rehearing is appropriate because the Court's unpublished Opinion fails to address the issue in the Appellant's Motion in that Appellant was never served with a filed copy of the Order striking the Appellant's case pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure or notice of entry of the Order by the Clerk of Court. The Court's unpublished Opinion cites a list of authorities and partial holdings of those authorities, but fails to apply the law to the facts of the case and those binding authorities. The Court cites three cases and Rule 77(d) of the SCRCP as it relates to the issues of entry, service and notice of entry of an order.

The Court first cites *Bowman v. Richland Mem'l Hosp.*, 335 S.C. 88, 91, 515 S.E.2d 259, 260 (Ct. App. 1999) holding that "{[a]n order is not final until it is written and entered by the clerk of court." In *Bowman*, the Court of Appeals dealt with the issue of when an order becomes final. The trial Judge in *Bowman* signed an order on September 19, 1996 granting the Plaintiff 10 days to amend her complaint. The order was filed with the clerk of court and entered on September 23, 1996. On October 2, 1996, 13 days after the judge signed the order and 10 days after the order was entered by the clerk of court, the Plaintiff amended her complaint. The trial Court held that the amended complaint was not timely filed and the Plaintiff appealed. The Court of Appeals held that an order is not final until it has been written and entered by the clerk

and reversed the trial court. The Court's holding in *Bowman* does not address the issue of when an order becomes effective on the parties by proper entry.

The Court's unpublished Opinion next cites sections of Rule 77(d) of the South Carolina Rules of Civil Procedure which states in part:

> **(d) Notice of Orders or Judgments.** Immediately upon the entry of an order or judgment the clerk **shall** serve a notice of the entry by first class mail upon every party affected thereby .... Such mailing or electronic transmission shall not be necessary to parties who have already received notice.

The opinion does not explain why these specific sections are referenced in the opinion or their application to the facts of the case. However, rules of civil procedure, like statutes, should be given their plain meaning. *Valentine v. Davis,* 319 S.C. 169, 173, 460 S.E.2d 218, 220 (Ct. App. 1995). Rule 77(d) SCRCP requires that the Clerk **shall** serve a notice of entry of the Order by first class mail upon every party. In the instant case, it is undisputed that the notice of entry of Judge Dickson's Order striking the case from the docket was not served on the Appellant. In its initial Order denying Appellant's motion to restore, the trial court held that although Appellant was never served with notice of the entry of the Order, because Appellant's attorney signed the Consent Order and forwarded it to the Respondent's attorney, and the Respondent's attorney copied Appellant's attorney on the letter forwarding the proposed Order to the Court for approval, the restoring was improper. The trial court further held that since the attorney for the Appellant had signed the Consent Order, that the attorney was on notice that the Order would eventually be signed. This position does not comport with the plain meaning of the language of Rule 77(d) SCRCP and therefore the case was not properly

stricken from the active general docket and should therefore still be pending before the Court.

Finally, it appears that the Court bases its interpretation of Rule 77(d) SCRCP on the holding in *Rosen, Rosen & Hagood v. Hiller*, 307 S.C. 331, 332-34, 415 S.E.2d 117, 117-18 (Ct. App. 1992) which held "appellants received sufficient notice of the filing of an order in compliance with Rule 77(d) SCRCP when they received a letter enclosing an unsigned copy of the order." In *Rosen*, the Appellants filed a motion for change of venue in Charleston County. The chief administrative judge set the motions calendar and the appellants did not appear at the motion hearing. On April 11, 1989 the chief administrative judge issued an order that the change of venue motion had been abandoned, stricken and denied. On April 17, 1989, the respondent mailed a letter to counsel for the appellant enclosing an unsigned, undated, and unfiled copy of the April 11, 1989 order. Appellants appealed the trial court's ruling arguing that Rule 77(d) SCRCP requires service of a signed and dated order. The Court of Appeals held that service of an actual signed and dated order was not necessary; however, the Court did not remove the requirement that the clerk of court serve the parties with notice of entry of the order.

The central issue in *Rosen* was whether the April 17, 1989 letter from the respondent to counsel for the appellants constituted notice of entry of the order. The Court of Appeals held that the April 17, 1989 letter "minimally" complied with Rule 77(d) SCRCP. The facts in *Rosen* are distinguishable from the facts of the instant case. In *Rosen*, the April 17, 1989 letter from the respondent to counsel for the appellants was written and sent to the appellants after the trial judge had filed his order. The Order was

filed on April 11, 1989 and the letter was sent to counsel for the Appellants on April 17, 1989. The letter in Rosen stated "[i]n case you have not received copies directly from the clerk's office, I am enclosing copies of an order denying your motion for Change of Venue …." The Court of Appeals discussed the fact that the letter does not specifically state that the order had been filed, but it was implicit in the letter that it had been filed. In the instant case the Court is attempting to suggest that the Appellant had notice of entry of an order based strictly on being copied on a letter from counsel for the Respondent forwarding a proposed order to the Judge for consideration. If the Court in *Rosen* held that a letter written after the order had been entered "minimally" complied with Rule 77(d) SCRCP, then the letter in the instant case fails to meet the requirements of Rule 77(d) SCRCP. Therefore the case was not properly stricken from the active general docket and should therefore still be pending before the court.

Even if this Court is convinced by *Rosen* that a letter enclosing an unsigned, undated, and unfiled order could provide notice, the Court must consider the subsequent Supreme Court holing in *Upchurch v. Upchurch,* 367 S.C. 16, 624 S.E.2d 643 (2006). In *Upchurch* the Supreme Court addressed the issue of when an order becomes valid on the parties. The Supreme Court held that the Court of Appeals erred in dismissing wife's appeal of a Family Court Order as untimely where the order was signed by the judge and sent by the judge's administrative assistant with a letter to the Clerk of Court for entry into the record. The letter enclosing the signed order was carbon copied to the husband and wife's attorney. However, neither the wife nor the wife's attorney ever received written notice from the Clerk of Court that the order had been entered into the record. The Supreme Court held that wife's time to appeal pursuant to 203 (b), of the SCACR, begins to run when

written notice that the order has been entered into the record by the Clerk of Court **has been received**. Accordingly, the Court held that being carbon copied on the letter from the judge's administrative assistant was not sufficient notice of entry of judgment. *Id.* 367 S.C. 16, 24; 624 S.E. 2d 643, 647. The *Upchurch* Court went on to say that "parties to an action are not provided notice of a judge's ruling at the time the judge signs an order. Rather, only after the order is filed with the clerk of court are the parties given notice of the order." *Id.* 367 S.C. 16, 24; 624 S.E. 2d 643, 646. (Citing *Bowman v. Richland Mem'l Hosp.*, 335 S.C. 88, 92, 515 S.E.2d 259, 261 (Ct. App. 1999)). "To hold Wife responsible for notice of an event that had not yet occurred runs afoul of the notions of fairness and equity articulated in *Bowman*." *Id.* 367 S.C. 16, 24; 624 S.E. 2d 643, 646-7. (Citing *Bowman v. Richland Mem'l Hosp.*, 335 S.C. 88, 92, 515 S.E.2d 259, 261 (Ct. App. 1999)).

In the instant case, neither Appellant nor Appellant's attorney ever received written notice that the order had been entered into the record by the Clerk of Court. Based on the Supreme Court's holding in *Upchurch*, the Court's interpretation of the South Carolina Appellate Court Rules, and the South Carolina Rules of Civil Procedure, the Appellant's one year period of time to file her motion to restore would not begin until the appellant or her attorneys received written notice that the order has been entered into the record. In the instant case, because neither the appellant nor her counsel ever received written notice that the order had been entered, the Order would not be effective as to Appellant. Additionally, in the instant case, the letter that the Court relies on to establish notice of entry of the order by the clerk of court was a letter written by Respondent's attorney coping Appellant's attorney forwarding the proposed Order to the Court for approval. This letter was written prior to the judge having signed the Order or the Clerk of Court having entered the Order.

Based on the holdings in *Rosen* and *Bowman* a party can only be given notice of the order after the order is filed and to hold the Appellant in this case responsible for notice of an event that had not yet occurred would run afoul of the notion of fairness and equity. *Id.* 367 S.C. 16, 24; 624 S.E. 2d 643, 646-7. (Citing *Bowman v. Richland Mem'l Hosp.*, 335 S.C. 88, 92, 515 S.E.2d 259, 261 (Ct. App. 1999)). While it is true that the attorney for the Appellant signed the Consent Order and was copied on the letter forwarding the Consent Order to the Court, the Court should not be excused from following the rules governing notice. Therefore, the case was not properly stricken from the active general docket and should therefore still be pending before the Court.

This court should specifically address the facts presented to it, apply the binding precedent, and issue an opinion reversing the trial court denial of the motion to restore.

II. THE APPELLANT HAD PREVIOUSLY FILED HER COMPLAINT WITHIN THE STATUTE OF LIMITATIONS AND THE CASE HAS BEEN STRICKEN FROM THE ACTIVE GENERAL DOCKET AND PLACED IN AN INACTIVE STATUS.

The Court did not consider Appellant's argument that the Appellant had filed her Summons and Complaint within the statute of limitations and therefore the tolling provisions of Rule 40(j) SCRCP were not relevant. The Court cites several cases holding that an issue cannot be raised for the first time on appeal. It is true that the Appellant did not raise this issue in its oral argument before the trial Court, however, the Appellant raised the issue on appeal based on the opinion subsequently issued in *Goodwin v. Landquest Dev., LLC,* Op. No. 5342 (S.C. Ct. App. Filed Aug. 12, 2015, Withdrawn, Substituted and Refiled Dec. 16, 2015) (Few Adv. Sh. No 49 at 12) which was issued after the oral argument in the instant case.

Based on the holding in *Goodwin,* Rule 40(j) does not set a deadline for restoring a case therefore the applicable deadline remains the statute of limitations. *Goodwin v. Landquest Dev., LLC,* Op. No. 5342 (S.C. Ct. App. Filed Aug. 12, 2015, Withdrawn, Substituted and Refiled Dec. 16, 2015) (Few Adv. Sh. No 49 at 12). Because the Appellant commenced her lawsuit within the statute of limitations, there was nothing to toll and the tolling provision in Rule 40(j) would have been irrelevant. Additionally, the requirement of complying with the statute of limitations after a case is stricken pursuant to Rule 40(j) depends on the event of "striking" being considered a dismissal. (Id.) While there is a basis in our law for considering a case stricken pursuant to the rule as the equivalent of a dismissal, our rules do not clearly provide that striking a case pursuant to Rule 40(j) is a dismissal. (Id.)

In the notes to the 1994 amendments to the South Carolina Rules of Civil Procedure, Rule 40(j) is described as "substantially revis[ing] the procedure for *dismissing* a case previously found in Rule 40(c)(3)." (Id.) Rule 40, SCRCP Notes, Notes to 1994 Amendments (emphasis added). Rule 40(c)(3) SCRCP was the predecessor to the current Rule 40(j) SCRCP. The interpretation of the prior Rule 40(c)(3) regarding the treatment of a case that was "stricken" from the docket varied. *See Graham v. Dorchester Cnty. Sch. Dist.*, 339 S.C. 121, 122, 125 n.1, 528 S.E.2d 80, 81, 82 n.1 (Ct. App. 2000) (stating in a case "struck . . . from the trial roster . . . pursuant to former Rule 40(c)(3), SCRCP" that "the statute of limitations clearly expired" before the motion to restore was filed). *But see Robinson v. J.F. Cleckley & Co.*, 751 F. Supp. 100, 105 (D.S.C. 1990) (stating for purposes of calculating timely removal pursuant to 28 U.S.C. § 1446(b) (2012), "an action which has been removed

from the docket pursuant to [Rule] 40(c)(3) is pending while it is off of the docket" and is not "commenced when it is restored to the calendar").

While it is unclear under the prior Rule 40(c)(3) whether a case "stricken" from the roster is a dismissal, there is one important distinction in the current Rule 40(j) SCRCP. Striking a case pursuant to Rule 40(j) may be done **only** by consent. *See* Rule 40(j), SCRCP (providing the party asserting a claim may strike it only when "all parties adverse to that claim . . . agree in writing that it may be stricken"). In determining the status of a case stricken from the active docket the most logical place for the Court to look is at the language in the Consent Agreement between the parties. In the instant case the Consent Agreement between the Appellant and the Respondent states that "this action shall stricken from the active docket with leave to restore pursuant to Rule 40(j) SCRCP." (Order of Honorable Edgar W. Dickson). The Consent Agreement goes on to say "that while the case remains in an **inactive status**, the parties are allowed to continue with all forms of discovery provided for and authorized under the South Carolina Rules of Civil Procedure and to pursue mediation." (Id.) Based on the language of the Consent Agreement between Appellant and Respondent, it is clear that the parties did not intend for the case to be dismissed, but rather placed in an inactive status. Since the case had not been dismissed and because the lawsuit was commenced within the time limits prescribed by the statute of limitations, the tolling provisions under Rule 40(j) SCRCP are irrelevant.

For the reasons stated above, the Appellant respectfully seeks reconsideration and alteration of the Court's Opinion on these issues and that the case be restored to the active general trial docket.

(Signature on following page)

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CERTIFICATE OF SERVICE

I, the undersigned legal assistant, of the law offices of Peters, Murdaugh, Parker, Eltzroth & Detrick, attorneys for the Respondents, do hereby certify that I have served all counsel in this action with a copy of the Appellant's Petition for Rehearing by mailing a copy of the same to counsel via Untied States Mail, postage prepaid, at the following address(es):

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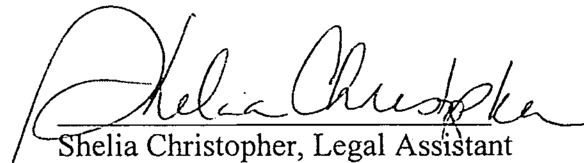
April 20th, 2017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