

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

Case No. 2014-CP-04-2908

Court of Appeals Case No.: 2017-000772

John E. Harbin, Appellant,

v.

April Blair and Tracy Dunn, Defendants,

Of whom April Blair is the Respondent, Respondent,

RESPONDENT APRIL BLAIR'S MOTION TO DISMISS UNTIMELY APPEAL

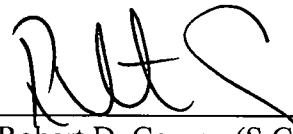
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ATTORNEYS FOR RESPONDENT
APRIL BLAIR

RECEIVED
APR 21 2017
SC Court of Appeals

The undersigned, as attorney for Respondent April Blair (hereinafter "Respondent"), hereby moves this Court for an order dismissing Appellant John E. Harbin's Notice of Appeal dated March 27, 2017, pursuant to Rules 203(b) and 260(a) of the South Carolina Appellate Court Rules. The grounds for this motion are that Appellant's Notice of Appeal is untimely, thus the Court of Appeals is without jurisdiction to entertain this appeal. Therefore, the appeal must be dismissed.

AND IT IS SO MOVED.



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**ATTORNEY FOR RESPONDENT
APRIL BLAIR**

April 20, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

RECEIVED

APR 21 2017

Case No. 2014-CP-04-2908

SC Court of Appeals

Court of Appeals Case No.: 207-000772

John E. Harbin, Appellant,

v.

April Blair and Tracy Dunn, Defendants,

Of whom April Blair is the Respondent, Respondent,

RESPONDENT APRIL BLAIR'S MEMORANDUM IN SUPPORT OF HER MOTION
TO DISMISS APPELLANT'S UNTIMELY APPEAL

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**ATTORNEYS FOR RESPONDENT
APRIL BLAIR**

Respondent April Blair (hereinafter “Respondent”) submits this Memorandum in Support of her Motion to Dismiss Plaintiff/Appellant John E. Harbin’s Notice of Appeal as it was not timely filed and, accordingly, this Court is without jurisdiction to entertain the appeal. For that reason, the appeal must be dismissed.

FACTUAL AND PROCEDURAL HISTORY

In this attempted appeal, Appellant seeks to challenge a jury verdict returned in the Anderson County Court of Common Pleas on November 30, 2016 (**Exhibit A**). The jury was discharged promptly following the reading of the verdict on the afternoon of November 30, 2016. Appellant did not present any post-trial motions to the trial court at that time, nor did he request the court exercise its discretion in allowing him an additional ten (10) additional days to file any such post-trial motions. On December 13, 2016, thirteen (13) days after the jury had been discharged by the trial court, Appellant filed a motion for new trial pursuant to Rule 59(a), SCRCF. In its order dismissing Plaintiff’s post-trial motion, the trial court analyzed the Appellant’s motion and the timing of the same, and determined that pursuant to Rule 6(a), SCRCF the deadline for Appellant to file a post-trial motion expired on December 12, 2016 (**Exhibit B**). However, Plaintiff’s Rule 59(a) motion was not filed until the evening of December 13, 2016. As such, the trial court ruled Plaintiff’s post-trial motion was not filed within the mandatory ten (10) day timeframe set forth in Rule 59(b), SCRCF, and it was dismissed as untimely. The trial court’s “Order Denying Plaintiff’s Post-Trial Motions for New Trial” detailing the analysis of the timeliness issue been attached and provided herewith. Respondent was served with Appellant’s Notice of Appeal on Wednesday, March 29, 2017, one-hundred and nineteen (119) days after the discharge of the jury and one-hundred and seventeen (117) days

after the Anderson County Clerk of Court's office served electronic notice on all counsel of record confirming the entry of judgment on December 2, 2016 (**Exhibit C**).

APPLICABLE LAW

Rule 59(b), SCRCP mandates "motion[s] for new trial shall be made promptly after the jury is discharged, or in the discretion of the court not later than 10 days thereafter." Rule 59(b), SCRCP. That ten day timeframe for filing post-trial motions is strictly enforced and cannot be extended or enlarged. *See* Rule 6(b), SCRCP ("The time for taking any action under rules 50(b), 52(b), **59**, and 60(b) may not be extended except to the extent and under the conditions stated therein.") (emphasis added); *accord* Citizens & S. Nat'l Bank of S.C. v. Easton, 310 S.C. 458, 427 S.E.2d 640 (1993). "Generally, a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed." Russell v. Wachovia Bank, N.A., 370 S.C. 5, 20, 633 S.E.2d 722, 730 (2006); *see also* Pitman v. Republic Leasing Co., 351 S.C. 429, 570 S.E.2d 187 (Ct. App. 2002) (noting a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed). Under Rule 203(b)(1), SCACR, "[w]hen a **timely** motion...for a new trial (Rule 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." Rule 203(b)(1), SCACR (emphasis added). Conversely, an **untimely** motion pursuant to Rule 59, SCRCP, will **not** stay the time for appeal. *See* Canal Ins. Co. v. Caldwell, 338 S.C. 1, 524 S.E.2d 416 (Ct. App. 1999).

"Whenever it appears that an appellant or a petitioner has failed to comply with the requirements of these Rules, the clerk shall issue an order of dismissal, which shall have the same force and effect as an order of the appellate court." Rule 260(a), SCACR. Furthermore, Rule 263(b) SCACR expressly states an appellate court cannot extend the time period for filing

an appeal. *See* Rule 263(b), SCACR (“[T]he time prescribed by these Rules for performing any act except the time for serving the Notice of Appeal under Rules 203 and 243 may be extended or shortened by the appellate court, or by any judge or justice thereof.”). *See also* Rule 6(b), SCRCPP (“The time for filing notice of intent to appeal is jurisdictional and may not be extended by consent or order.”).

“[S]ervice of the Notice of Appeal is a jurisdictional requirement, and [appellate courts] ha[ve] 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, 384 (2000). Thus, a party’s failure to comply with Rule 203(b), SCACR “divests this court of subject matter jurisdiction and results in dismissal of the appeal.” USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 651, 661 S.E.2d 791, 795 (2008) (quoting Canal Ins. Co. v. Caldwell, 338 S.C. 1, 4, 524 S.E.2d 416, 418 (Ct. App. 1999)). “The requirement of service of the Notice of Appeal is jurisdictional, *i.e.*, if a party misses the 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.” Elam v. S.C. Dep’t of Transp., 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004); *See also* Panhorst v. United States, 241 F.3d 367, 369-70 (4th Cir. 2001) (noting that the United States Supreme Court has repeatedly emphasized that the requirement of a timely Notice of Appeal is “mandatory and jurisdictional.”) (quoting Browder v. Director, Dep’t of Corrections, 434 U.S. 257, 264, 98 S.Ct. 556 (1978)).

ARGUMENT

Appellant’s Notice of Appeal dated March 27, 2017 is untimely and, therefore, must be dismissed. As noted above, Rule 203(b)(1), SCACR requires the Notice of Appeal be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or

judgment. Because Appellant's Rule 59(a) motion for new trial was **not** timely filed within ten days of the discharge of the jury, his time to serve the notice of appeal was not stayed. *See Canal Ins. Co. v. Caldwell*, 338 S.C. 1, 524 S.E.2d 416 (Ct. App. 1999) (an untimely Rule 59, SCRPC motion does not stay the time to appeal). In his March 27, 2017 Notice of Appeal, Appellant seeks appellate review of the "November 30, 2016 judgment" entered in favor of Respondent at the conclusion of the jury trial. The Notice of Appeal does request appellate review of the trial judge's subsequent order dismissing Appellant's Rule 59(a) motion for new trial as untimely filed. Therefore, Appellant has not challenged the trial court's finding that the post-trial motion was untimely, and Appellant's time to serve the current appeal was not stayed upon filing of the Rule 59(a) motion.

Accordingly, under to Rule 203(b)(1), SCACR, Appellant's Notice of Appeal had to be served on Respondent within thirty (30) days of Appellant's receipt of written notice of entry of the judgment in favor of Respondent following the jury trial. As evidenced by the attached Notice of Electronic Filing, the Anderson County Clerk of Court served written notice of entry of judgment on all counsel of record, including counsel for Appellant, on December 2, 2016 at 9:04:55 a.m. Hence, Appellant's thirty day deadline to file the current appeal expired on Tuesday, January 3, 2017.¹ Appellant did not serve the current Notice of Appeal on Respondent until March 27, 2017, eighty-three (83) days after the expiration of his time to appeal.

Appellant's Notice of Appeal was untimely. As noted above, service of the Notice of Appeal is a jurisdictional requirement, and the appellate court does not have authority to extend or expand the time in which to serve the Notice of Appeal. *See Sadisco of Greenville, Inc. v.*

¹ Monday, January 2, 2017 was a federal holiday (*New Year's Day*). As such, the Rules provide that the period for serving the appeal extends through the next day which is neither a Saturday, Sunday or holiday. In this instance, the following day: Tuesday, January 3, 2017.

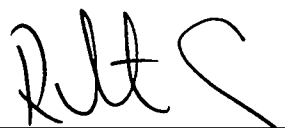
Greenville Cnty. Bd. of Zoning Appeals, 340 S.C. 57, 59, 530 S.E.2d 383, 384 (2000). Thus, Appellant's failure to comply with Rule 203(b), SCACR has divested this court of subject matter jurisdiction to consider the appeal and requires it be dismissed. See USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 651, 661 S.E.2d 791, 795 (2008). Accordingly, the current appeal must be dismissed.

CONCLUSION

As ruled upon by the trial court, Appellant's post-trial motion pursuant to Rule 59(a), SCRCR was not timely filed and, therefore, did not stay the time for Appellant's service of the Notice of Appeal. Appellant has not raised any challenge to the trial court's findings on the untimeliness of his post-trial motion. Appellant's deadline to serve the Notice of Appeal expired on Tuesday, January 3, 2017. The current Notice of Appeal was served upon Respondent eighty-three (83) days after the expiration of that timeline to appeal. Accordingly, this Court is without subject matter jurisdiction to entertain the appeal and it must be dismissed.

For those foregoing reasons, Respondent April Blair respectfully submits that Appellant's untimely Notice of Appeal must be dismissed.

Respectfully submitted,



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**ATTORNEY FOR RESPONDENT
APRIL BLAIR**

April 20, 2017

EXHIBIT A
Verdict Form

EXHIBIT A
Verdict Form

Plaintiff and what percentage is attributable to the Defendant April Blair?
[The percentages must add up to 100%].

Plaintiff: _____ %

Defendant: _____ %

Go to Question 5.

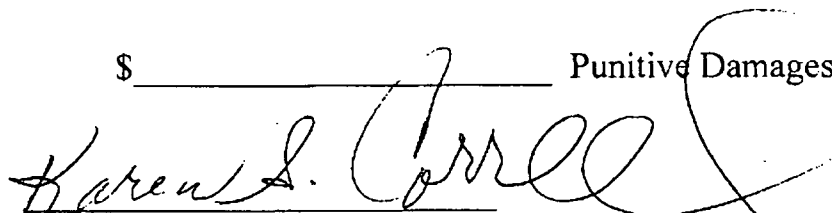
- 5. Was the Plaintiff's negligence greater than 50%?
 _____ YES – Stop your deliberations, sign the bottom of the form and
 notify the bailiff.
 _____ NO – Go to Question 6.

- 6. State the amount of damages, if any, sustained by the Plaintiff. [DO NOT
 reduce the Plaintiff's total damages based on the percentage of negligence by
 any party. You are to determine *only* the total amount of the Plaintiff's
 damages and enter that amount below.]

\$ _____ Actual Damages

- 7. What amount of punitive damages should be awarded for reckless, willful,
 wanton, or grossly negligent proven to a level of clear and convincing
 evidence?

\$ _____ Punitive Damages



Karen S. Correl, Forelady

November 30, 2016

[NOTIFY THE BAILIFF WHEN YOU ARE FINISHED.]

EXHIBIT B
Order Denying Plaintiff's Post-Trial
Motions for New Trial

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF ANDERSON)	FOR THE TENTH JUDICIAL CIRCUIT
)	
John E. Harbin,)	ORDER DENYING PLAINTIFF'S
)	POST-TRIAL MOTIONS FOR NEW
Plaintiff,)	TRIAL
)	
vs.)	
)	C.A. No.: 2014-CP-04-2908
April Blair and Tracy Dunn,)	
)	
Defendants.)	
)	

This matter comes before the Court on the Motion for a New Trial filed by the plaintiff, John E. Harbin (hereinafter "Plaintiff"), with the Anderson County Clerk of Court's Office on December 13, 2016. A hearing was convened for Plaintiff's motions on February 2, 2017 at the Anderson County Courthouse. Present at that time were counsel for the Plaintiff, Donald L. Smith of Donald Smith Law Firm, and counsel for Defendant April Blair, Robert D. Corney of Gallivan, White & Boyd, P.A. After careful consideration of the pleadings, the record from the trial of the case, Plaintiff's post-trial motions, memoranda submitted by the parties relating to the current motions, the arguments made at the motion hearing, and other relevant information submitted, this Court finds Plaintiff's Motions for New Trial must be denied. Accordingly, for the reasons set forth herein, Plaintiff's Motions for New Trial are denied.

FACTUAL BACKGROUND

The current case arises out of a shooting incident that occurred on June 21, 2014 in Iva, South Carolina. On that date, Plaintiff was shot in the lower right extremity by defendant Tracy Dunn (hereinafter "Dunn") while in the front yard of April Blair's (hereinafter "Defendant") home located at 2760 Lake Secession Road after the men were involved in a verbal and physical altercation. According to the testimony at trial, at the time the shot was fired, Defendant was

sitting on the back porch of the home smoking a cigarette. The evidence was undisputed that Defendant neither saw the shooting, nor was an active participant in the shooting. Rather, Defendant Tracy Dunn testified he intentionally shot Plaintiff in the leg as a direct result of the physical altercation the two men were involved in. As a result of the gunshot wound suffered, Plaintiff was airlifted to AnMed Health's Emergency Department where he received treatment and remained for three (3) days before being discharged on June 27, 2014. Plaintiff filed the current lawsuit with the Anderson County Clerk of Court's office on February 9, 2015, against both the owner of the property where Plaintiff was shot (*Defendant Blair*) and the individual who had shot Plaintiff (*Defendant Dunn*).

This matter proceeded to jury trial before this Court on November 28, 2016 at the Anderson County Courthouse. After three (3) days of testimony and evidence, the jury returned a unanimous verdict in favor of Defendant on November 30, 2016, finding Plaintiff had failed to meet his burden in proving Defendant Blair failed to use reasonable care in keeping her premises in a reasonably safe condition. Plaintiff's counsel presented no post-trial motions upon discharge of the jury on November 30, 2016, and did not request leave of Court for additional ten (10) days to file his post-trial motions. The current Motion for New Trial was received and filed by the Anderson County Clerk of Court's Office on December 13, 2016.

APPLICABLE LAW

Under Rule 59(a), SCRCP, a "new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trial have heretofore been granted in actions at law in the courts of the State." Rule 59(a), SCRCP. "The grant or denial of a new trial motion rests within the trial court's discretion, and its decision will not be disturbed on appeal unless the court's findings are

wholly unsupported by the evidence or its conclusions are controlled by an error of law.” Vinson v. Hartley, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct. App. 1996). Rule 59(b), SCRCPC establishes that all “motion[s] for a new trial shall be made promptly after the jury is discharged, or in the discretion of the court not later than 10 days thereafter.” “Generally, a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed.” Russell v. Wachovia Bank, N.A., 370 S.C. 5, 20, 633 S.E.2d 722, 730 (2006); *see also* Pitman v. Republic Leasing Co., 351 S.C. 429, 570 S.E.2d 187 (Ct. App. 2002)(noting a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed).

“A trial court may relieve a party from a final judgment, order, or proceeding if ‘newly discovered evidence which by due diligence could not have been discovered in time to move from a new trial under Rule 59(b)’ is presented to the trial court.” Southeastern Hous. Found. V. Smith, 380 S.C. 621, 636 – 637, 670 S.E.2d 680, 688 (Ct. App. 2008). “In order to warrant the granting of a new trial on the ground of newly discovered evidence, it must appear, (1) that the evidence is such as will probably change the result, if a new trial is granted; (2) that it has been discovered since the trial; (3) that it could not have been discovered before the trial by the exercise of due diligence; (4) that it is material to the issue; and (5) that it is not merely cumulative or impeaching.” Johnston v. Belk-McKnight Co., 188 S.C. 149, 153, 198 S.E. 395, 397 (S.C. 1938), *citing* McCabe v. Sloan, 184 S.C. 158, 191 S.E.905 (S.C. 1937).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Plaintiffs’ Rule 59, SCRCPC Motion for New Trial Was Not Timely Filed

Plaintiff’s Motion for New Trial pursuant to Rule 59 of the *South Carolina Rules of Civil Procedure* was not timely filed within the ten (10) day timeline outlined in the Rules and, therefore, must be denied and dismissed by this Court. As noted above, under Rule 59(b) a

“motion for a new trial” pursuant to Rule 59 “shall be made promptly after the jury is discharged, or in the discretion of the court **not later than 10 days thereafter.**” Rule 59(b), SCRPC (emphasis added). After the ten (10) day timeframe to file post-trial motions lapses, the trial court is divested of jurisdiction over the matter. See Russell v. Wachovia Bank, N.A., and Pitman v. Republic Leasing Co., *supra*.

The jury in this case reached its verdict and was discharged by this Court on the afternoon of Wednesday, November 30, 2016. Plaintiff’s counsel neither presented any post-trial motions on the record at that time, nor did he request leave of court for ten (10) additional days to file any such post-trial motions. Notwithstanding Plaintiff’s failure to request leave of court for ten (10) additional days to file his post-trial motions, based upon the November 30, 2016 verdict date and discharge of the jury, the ten (10) day timeline for either party to file post-trial motions under Rule 59(b), SCRPC, would have expired on Saturday, December 10, 2016. However, since the final day for computing deadlines cannot fall on a weekend or holiday under Rule 6(a), SCRPC, Plaintiff’s deadline to file the current Motion for New Trial pursuant to Rule 59, SCRPC, expired at the close of the next day which was not a Saturday, Sunday or holiday. In this instance, that was Monday, December 12, 2016. Accordingly, in order to comply with the mandatory deadline set forth in Rule 59(b), SCRPC, Plaintiff had to file his post-trial motions at or before 11:59 p.m. on Monday, December 12, 2016. However, Plaintiff did not file the current motion with the Anderson County Clerk of Court’s Office until the *following* day, Tuesday, December 13, 2016. Therefore, Plaintiff’s Motion for New Trial pursuant to Rule 59, SCRPC, is not timely and must be dismissed.

The deadline for filing post-trial motions within ten (10) days under Rule 59(b), SCRPC, is not discretionary, but rather a deadline imposed by the *South Carolina Rules of Civil*

Procedure which carries jurisdictional significance for the trial court. As noted above, once the time for filing post-trial motions under Rule 59, SCRCP, has expired, the trial court is divested of jurisdiction and can no longer consider post-trial motions under Rule 59 irrespective of the reason or explanation for the late filing. *See Russell* and *Pitman*, *supra*. Plaintiff contends he attempted to file his post-trial motion within ten (10) days after the discharge of the jury, but encountered “technical difficulties” with the e-filing system on the evening of December 12, 2016 which restricted his timely filing. It should be noted that Plaintiff’s law office is located only a few blocks from the Anderson County Courthouse; however, there is no record of Plaintiff attempting to file a hard copy of the motion with the Clerk of Court’s office within the ten (10) day timeline by submitting an Affidavit of Technical Difficulty to the Clerk of Court. Further, neither this Court nor counsel for Defendant received any communications, written or otherwise, from Plaintiff’s counsel on the evening of December 12th or morning of December 13th to advise of the technical difficulties encountered, or to otherwise provide a copy of the motion he had attempted to electronically file. In fact, it appears the first time Plaintiff ever raised the alleged technical difficulties to this Court’s attention was *after* Defendant Blair’s Reply to Plaintiff’s Post-Trial Motions was filed detailing a challenge to the timeliness of the motion. Accordingly, even if this Court *did* have discretion to allow the motion to be filed out of time, Plaintiff has failed to present sufficient good cause to justify the untimely filing.

Notwithstanding the above, the plain letter of Rule 59(b), SCRCP, dictates that post-trial motions pursuant to Rule 59 “**shall** be made promptly after the jury is discharged, or in the discretion of the court **not later than 10 days thereafter.**” Rule 59(b), SCRCP (emphasis added). Plaintiff’s counsel did not request, and this Court did not grant, Plaintiff an additional ten (10) days to make post-trial motions after the discharge of the jury on November 30, 2016. No

post-trial motions were made by Plaintiff after the discharge of the jury on November 30, 2016. Further, even if leave had been granted in the discretion of this Court for ten (10) additional days to file the motion in accordance with Rule 59(b), SCRCP, Plaintiff's motion was not timely filed within that strict ten (10) day timeline. Accordingly, regardless of Plaintiff's retrospective explanations attempting to justify his late filing of the motion, the fact remains that the Motion for New Trial pursuant to Rule 59, SCRCP, was not timely filed in accordance with Rule 59(b), SCRCP. As such, the motion must be denied and dismissed.

II. Plaintiff's Rule 59, SCRCP Motion for New Trial is Without Merit

As set forth above, Plaintiff's Motion for New Trial was not timely filed and, accordingly, is not properly before this Court for consideration on the merits. However, it should be noted that even assuming *arguendo* Plaintiff had timely filed the motion and it could have been considered on the merits by this Court, the motion would have been denied. Plaintiff alleges in his motion that this Court erred in sustaining the defense's objections to the introduction of testimony relating to Defendant's alleged drug use on the date of the incident at issue, as well as relating to the number of times counsel for Defendant visited unrepresented Defendant Dunn prior to trial.

Of initial note, the legal arguments set forth in Plaintiff's post-trial motion were not articulated contemporaneously by Plaintiff's counsel for consideration by this Court at the time defense counsel raised the objections referenced. Therefore, this Court doubts Plaintiff's current arguments, even if they had been made through timely post-trial motion, would be properly before this Court. See Patterson v Reid, 318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1995) (a party cannot for the first time raise an issue by way of Rule 59 motion which could have been raised at trial). Nevertheless, even if Plaintiff's current motion *was* timely filed *and* the arguments set

forth therein were raised contemporaneously during the trial or otherwise appropriately raised for the first time through post-trial Rule 59(a), SCRCP motion, this Court reiterates and affirms its rulings on the objections.

First, in analyzing the objection made to introduction of testimony and/or evidence of Defendant Blair's alleged drug use, the Court determined such evidence was improper under Rules 403 and 404(b), SCRE. The purported evidence/testimony relating to Defendant's prior bad acts (*i.e. alleged drug use*) was not presented by Plaintiff's counsel to prove motive, identity, the existence of a common scheme or plan, absence of accident or mistake, or intent. Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). Plaintiff never presented an argument to the Court that the testimony on Defendant's alleged drug use *was* being offered for any purpose allowable under Rule 404(b), SCRE. Further, even if evidence of Defendant Blair's alleged drug use would have been permitted for an allowable purpose under Rule 404(b), SCRE, the probative value of that evidence was substantially outweighed by its prejudicial effect in light of the totality of the circumstances. Rule 403, SCRE. Therefore, the Court affirms its ruling on those objections.

Likewise, Plaintiff's counsel's leading question to Defendant Dunn regarding the number of times counsel for Defendant Blair had gone to "see" Dunn prior to trial was a blatant attempt by Plaintiff's counsel to testify to facts not previously entered into evidence and not properly considered by the jury; to introduce erroneous facts and evidence not supported by any evidence before the Court; and to introduce facts that were not relevant to the critical issues in the case, but which would have served only to confuse and mislead the jury. *See* Rules 401 and 403, SCRE. Despite his best efforts to retroactively argue for the relevance of that information in the current post-trial motion, Plaintiff was unable to articulate any compelling relevant reason for the

question being posed at the time the objection was lodged by Defendant during trial. Further, Plaintiff was unable to provide any evidentiary support for the facts he was attempting to introduce through the improper leading questions posed. As such, this Court affirms its ruling on the objection made to that question.

Further, it should be noted that in light of the totality of the evidence and testimony introduced during the trial of this case, there is no reasonable probability the outcome of this case would have been any different had the evidence sought by Plaintiff's counsel been allowed into evidence for consideration by the jury.

For those reasons, the Court sustained defense counsel's objections to the questions posed by Plaintiff's counsel in accordance with the applicable legal standards and within its discretion. Accordingly, even if Plaintiff's post-trial motion had been timely filed and was proper for consideration on the merits by this Court, Plaintiff's Rule 59(a), SCRPC motion for new trial would be denied.

III. Plaintiff's Motion for New Trial Based Upon Newly-Discovered Evidence

Plaintiff finally alleges he has come into the possession of newly-discovered evidence since the entry of the verdict in this case which would have changed the outcome of the trial had that alleged evidence been available prior to trial. In support of that contention, Plaintiff asserts he learned through Defendant's filing of an affidavit attached to her Post-Trial Motion for Costs that she had retained the services of a private investigator during the course of the litigation whose identity was not disclosed to Plaintiff in discovery. Further, Plaintiff also he never received a copy of audio recordings produced to Defendant by the Abbeville County Sheriff's Department pursuant to FOIA request. After a thorough review of the record before this Court, the motions submitted, the arguments by counsel for both parties, and the applicable legal

standards, this Court denies Plaintiff's Motion for New Trial based upon the alleged newly-discovered evidence.

"In order to warrant the granting of a new trial on the ground of newly discovered evidence, it must appear, (1) that the evidence is such as will probably change the result, if a new trial is granted; (2) that it has been discovered since the trial; (3) that it could not have been discovered before the trial by the exercise of due diligence; (4) that it is material to the issue; and (5) that it is not merely cumulative or impeaching." Johnston v. Belk-McKnight Co., 188 S.C. 149, 153, 198 S.E. 395, 397 (S.C. 1938), *citing* McCabe v. Sloan, 184 S.C. 158, 191 S.E.905 (S.C. 1937). As a preliminary note, Plaintiff's contention that he was not provided with copies of the 911 audio recordings created by the Abbeville County Sheriff's Department is erroneous and wholly without merit. In fact, the record before this Court plainly establishes that CD's containing the 911 audio recordings at issue were in fact produced by Defendant to Plaintiff's counsel on July 15, 2016, more than four (4) months prior to the trial of this case. Therefore, Plaintiff's claims in that regard are erroneous.

Further, Plaintiff has not, and cannot, meet the legal standard for proving a claim of newly-discovered evidence sufficient to justify the grant of a new trial. First, the audio recordings at issue not only "could have been discovered" by Plaintiff prior to the trial of this case, but Plaintiff was in fact well aware of their existence prior to trial as they were disclosed during the deposition of Lt. Tripp Crosby with the Abbeville County Sheriff's Department. In addition, Plaintiff has failed entirely to make any showing that the audio tapes at issue would "probably change the result" of the case if a new trial was granted, or that they contain any information which is more than merely cumulative or impeaching. For those reasons, this Court

denies Plaintiff's motion for new trial based upon the alleged newly-discovered evidence in the form of the 911 audio tapes created by the Abbeville County Sheriff's Department.

Turning next to Plaintiff's claim that Defendant's failure to disclose the retention of her non-testifying private investigator serves as newly-discovered evidence sufficient to warrant the grant of a new trial, this Court finds that contention to be without merit. It should first be noted that this issue was never addressed prior to the start of trial through discovery motion despite Defendant's objections to Plaintiff's interrogatory requesting the identification and production of information relating to investigations performed on Plaintiff. Plaintiff did not seek an order compelling the disclosure of further information over those objections from Defendant. Further, because Defendant retained the services of the private investigator only as a non-testifying consultant for the defense and his services were never proposed for use at trial, this Court questions whether Defendant had any duty to disclose the identity of that non-testifying private investigator in her written discovery responses, especially in light of the fact the investigator never obtained any firsthand knowledge of the facts at issue in this case. *See* Rule 26(b)(3), SCRPC.

Notwithstanding whether or not Defendant had a duty to disclose her retention of the private investigator, Plaintiff's recent enlightenment to Defendant's retention of a non-testifying private investigator as a consultant for the defense does not amount to newly-discovered evidence sufficient to warrant the grant of a new trial. The private investigator at issue was retained by counsel for Defendant Blair to conduct surveillance on Plaintiff over the course of three (3) days in July 2016. The private investigator visited various locations in and around Iva, South Carolina, over the course of those three days, but was never able to locate, observe, interact with, photograph, videotape, or otherwise surveil Plaintiff in any way. Accordingly, no

photographs or video surveillance of Plaintiff were ever created or obtained by the investigator.¹ Further, because the private investigator was never able to locate Plaintiff, he did not obtain any firsthand knowledge about Plaintiff, Plaintiff's physical condition, or Plaintiff's activities during the course his work in July 2016. For that reason, the private investigator certainly was not a "witness concerning the facts of the case," nor was he proposed as, or called by Defendant as, a witness for the trial of this case.

With that information in mind, the record before this Court, and the arguments presented by counsel at the post-trial motion hearing, it is clear Defendant's retention of the non-testifying private investigator as a consultant for the defense does not meet the newly-discovered evidence standard or warrant the grant of a new trial. "In order to warrant the granting of a new trial on the ground of newly discovered evidence, it must appear, (1) that the evidence is such as will probably change the result, if a new trial is granted; (2) that it has been discovered since the trial; (3) that it could not have been discovered before the trial by the exercise of due diligence; (4) that it is material to the issue; and (5) that it is not merely cumulative or impeaching." Johnston v. Belk-McKnight Co., 188 S.C. 149, 153, 198 S.E. 395, 397 (S.C. 1938), *citing* McCabe v. Sloan, 184 S.C. 158, 191 S.E.905 (S.C. 1937). Because the private investigator was not able to locate, identify or observe Plaintiff at any point in time during the course of his three (3) days of surveillance in July 2016, he was not able to glean any new information relevant to the issues presented to the jury during trial. The investigator did not observe Plaintiff, did not photograph Plaintiff, did not videotape Plaintiff, and did not otherwise interact with Plaintiff in any way

¹ In his motion, Plaintiff cites to Samples v. Mitchell in support of his arguments. *See* Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997). However, in stark contrast to Samples, no video surveillance tape of the Plaintiff was ever created by the private investigator in this case. Consequently, no surveillance videotape of Plaintiff existed which could be introduced into evidence during trial. With those distinctions in mind, it is clear the Samples decision relates to a very different set of facts than present here.

during the course of his work in this case. The private investigator could neither confirm, nor deny, the physical limitations alleged by Plaintiff, and could not provide any information on Plaintiff's whereabouts or activities during the three days he attempted to surveil Plaintiff in July 2016. Accordingly, the private investigator had no useful or relevant information he could provide to the jury in this case relating to any fact in dispute. As such, it is clear there is no probability the disclosure of Defendant's retention of the private investigator would have changed the outcome of this case with the jury.

Further, for those same reasons, Defendant's retention of the private investigator and the surveillance he attempted to conduct were not "material to any issue" in dispute as required to be proven to succeed on a claim of newly-discovered evidence. Finally, even if the private investigator *had* been able to locate Plaintiff while conducting surveillance in July 2016, the investigator's observations of Plaintiff's physical condition and activities could *only* have reasonably served to impeach Plaintiff on his claims of permanent injury (*i.e. if Plaintiff was witnessed performing activities inconsistent with the physical limitations being claimed*), or conversely, would have been cumulative to Plaintiff's testimony about his alleged impairments (*i.e. if Plaintiff was witnessed acting in conformity with the permanent impairments and lasting physical limitations he alleged at trial*). Plaintiff has failed to present any evidence with his motion, or any compelling arguments to this Court, to suggest the private investigator would have provided some other non-impeaching, non-cumulative, relevant evidence to the jury at the trial of this case.

Accordingly, because there is no probability the alleged newly-discovered evidence would change the result if a new trial was granted, the alleged newly-discovered evidence is not material to the issues in this case, and any alleged information gleaned by the investigator would

have been nothing more than impeaching or cumulative, this Court denies Plaintiff's motion for a new trial on the basis of newly-discovered evidence.

CONCLUSION

After a thorough review of the record before this Court, the arguments presented by the parties at the motion hearing, and a review of the applicable law, this Court hereby denies Plaintiff's Post-Trial Motions for New Trial.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff's Post-Trial Motions for New Trial be, and hereby are, **DENIED**.

IT IS SO ORDERED.

Walhalla, South Carolina.

[Judicial signature page to follow]



Anderson Common Pleas

Case Caption: John E Harbin VS April Black , defendant, et al

Case Number: 2014CP0402908

Type: Order/Other

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

Electronically signed on 2017-02-23 09:20:46 page 14 of 14

EXHIBIT C
Electronic Notice of Filing
Confirming Entry of Judgment

From: efiledonotreply@sccourts.org
To: Robert Corney
Cc: RDC E-File
Subject: Courtesy NEF RE: 2014CP0402908
Date: Friday, December 2, 2016 9:05:17 AM

***** IMPORTANT NOTICE - READ THIS INFORMATION *****
NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2014CP0402908

Official File Stamp: 12-02-2016 09:04:55 AM
Court: CIRCUIT COURT
Common Pleas
Anderson
Case Caption: John E Harbin VS April Black , defendant, et al
Document(s) Submitted: Filing/Other
Filed by or on behalf of: Leah Howell

This notice was automatically generated by the courts auto-notification system.

The following people were served electronically:

Robert Daniel Corney for April Blair
Donald Loren Smith for John E Harbin

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

Tracy Dunn
John Samuel West
David Hill Keller

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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY  
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

Case No. 2014-CP-04-2908

Court of Appeals Case No.: 2017-000772

**RECEIVED**  
APR 21 2017  
SC Court of Appeals

John E. Harbin, ..... Appellant,

v.

April Blair and Tracy Dunn, Defendants,

Of whom April Blair is the Respondent, ..... Respondent,

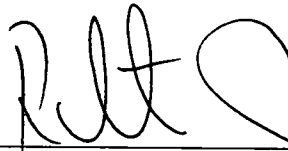
**PROOF OF SERVICE**

The undersigned counsel certifies that I have this 20th day of April, 2017, served copies of the following documents:

1. Respondent April Blair's Motion to Dismiss Untimely Appeal; and
2. Respondent April Blair's Memorandum in Support of her Motion to Dismiss Appellant's Untimely Appeal

upon counsel or record by causing them to be deposited in the United States Mail, first-class postage prepaid, addressed to:

Donald L. Smith, Esq.  
122 N. Main Street  
Anderson, SC 29621



---

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April 20, 2017

The Honorable Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
P O Box 11629  
Columbia, South Carolina 29211

**RECEIVED**  
APR 21 2017  
SC Court of Appeals

**Re: *John E. Harbin, Appellant v. April Blair and Tracy Dunn, Defendants  
Of Whom April Blair is the Respondent, Respondent  
C.A. No.: 2014-cp-04-2908  
Court of Appeals Case No.: 2017-000772***

Dear Ms. Kitchings:

Enclosed please find the original and six copies of Respondent April Blair's Motion to Dismiss Untimely Appeal and Memorandum in Support thereof in the above-referenced matter. Our Proof of Service and firm check in the amount of \$25.00 for the filing fee are also enclosed. We would appreciate if you would please file the original and return to us the file-stamped copies using the addressed, stamped envelope provided.

Thank you for your attention to this matter. Should you have any questions or concerns, please do not hesitate to contact me.

With kind regards, we are

Very truly yours,

GALLIVAN, WHITE & BOYD, P.A.

Robert D. Corney

Direct Dial: (864) 271-5436

Email: [rcorney@gwblawfirm.com](mailto:rcorney@gwblawfirm.com)

RDC/mbm  
Enclosures

cc: Donald L. Smith, Esq.

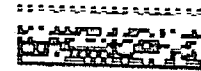
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The Honorable Jenny Abbott Kitchings  
Clerk of South Carolina Court of Appeals  
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