

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable R. Scott Sprouse, Circuit Court Judge

Case No. 2014-CP-04-02908
Court of Appeals Case No.: 2017-000772

John E. Harbin,

Appellant,

v.

April Blair and Tracy Dunn,

Respondents.

**APPELLANT'S OPPOSITION TO RESPONDENT'S
MOTION TO DISMISS UNTIMELY APPEAL**



Donald L. Smith, SC BAR # 6699
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Anderson SC 29621
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Attorney for Appellant

Other Counsel of Record:

Robert D. Corney, Esquire
Gallivan, White & Boyd
55 Beattie Place
Suite 1200
Greenville SC 29601

Tracy Dunn, Inmate #SID-SC00745855
Abbeville County Detention Center
21 Old Calhoun Falls Road
Abbeville SC 29620

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Appellant, by and through his counsel, respectfully submits this Opposition to Respondent's Motion to Dismiss. In support of which, Appellant presents the following:

FACTUAL AND PROCEDURAL HISTORY

Appellant filed this action for tortious acts perpetrated by Respondent. The Anderson County Court of Common Pleas returned a jury verdict on November 30, 2016, On December 12, 2016, the tenth (10 day of the mandatory filing of appeal under Rule 59(a) of SCRPC, Appellant's counsel attempted to file his Motion for New Trial. Despite his numerous attempts to upload the above-mentioned motion, Appellant's Counsel was unsuccessful. When the office manager brought a copy of the motion to the courthouse for filing, the agent thereof refused to accept the same and insisted on electronically filing the same. It took one whole day for the motion to be filed. Appellant filed the Motion for New Trial on December 13, 2016. The lower court denied said Motion, thus this Appeal.

ARGUMENT

APPELLANT'S NOTICE OF APPEAL IS TIMELY FILED

Appellant's amended motion for new trial is filed within the prescribed period

Plaintiff submits that Rule 59 SCRPC, which requires a motion for new trial to be filed not later than ten (10) days after the jury has been discharged, should be read together with Rule 60 (b). Gray v. Bryant, 298, S.C. 285, 286-87, 379 S.E.2d 894, 895 (1989). Rule 60 (b) SCRPC states that,

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: ... (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);...

The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered

or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.”

In this case, even with due diligence, Plaintiff could not have discovered about the Defendant’s act of employing a private investigator to surveil herein Plaintiff because Defendant did not disclose the same in her discovery proceedings. Plaintiff became aware of such evidence when it received Defendant’s Affidavits and Exhibits for the Purpose of Collecting Costs as a Result of Offer of Judgment. Plaintiff believes that due to Defendant’s act of withholding such important information and evidence, Plaintiff is entitled to move for new trial within a reasonable time based on the second paragraph of Rule 60. The motion was filed on December 13, 2016, well within the period for filing post-trial motions under Rules 59 and 60 SCRPC.

Respondent, in her Motion to Dismiss Appellant’s Appeal, argued that the Notice of Appeal was filed beyond the ten (10) timeframe set forth in Rule 59(b) SCRPC. Appellant contends that he has substantially complied with the procedural technicalities. On December 12, 2016, Counsel for Appellant started uploading his Motion for New Trial into the Court’s website. Despite several attempts to file the motion electronically, a technical failure occurred. Thereafter, the office manager went to the courthouse to manually file the abovementioned motion. An agent in the courthouse refused to accept the motion, insisting that the same should be filed electronically. Counsel for Appellant resumed efforts in filing the motion electronically, which remained unsuccessful until the following day. This series of unfortunate events prevented the Plaintiff from filing the said motion on December 12, 2016.

Appellant’s Notice of Appeal is filed on time.

Rule 203(b) of the SCACR provides “...

“When a timely motion for judgment n.o.v. (Rule 50, SCRPC), motion to alter or amend the judgment (Rules 52 and 59, SCRPC), or a motion for a new trial (Rule 59, SCRPC) 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. xxx "

Appellant avers that since the Motion for New Trial was filed within the period prescribed in Rules 59(a) in relation to Rule 60(b), then it tolls the filing period for the Appeal in this case. Since the lower court filed its Order Denying Plaintiff's Post-Trial Motion for New Trial on February 23, 2017, the Appellant has thirty (30) days, or until March 25, 2017 to file his Appeal. Appellant served and filed his Notice of Appeal on March 23, 2017, well within the prescriptive period.

In the event that this Honorable Court decides to apply Rule 59(a), solely, Appellant respectfully asserts that he has substantially complied with the filing of the post-trial Motion for New Trial, and thus, the Appeal was filed on time.

CONCLUSION

Appellant pleads that this Court afford party-litigants the amplest opportunity to enable them to have their cases justly determined, free from constraints of technicalities. The ends of justice and fairness would best be served if the issues involved in the case are thoroughly threshed out.

WHEREFORE, for the above and foregoing reasons, Appellant moves for this court to dismiss Respondent's Opposition to Appellant's Appeal, and to direct Appellant to file his brief.

Respectfully submitted,



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Attorney for Appellant

April 26, 2017
Anderson, S.C.

**FORM 7
PROOF OF SERVICE
APPELLANT'S OPPOSITION TO RESPONDENT'S
MOTION TO DISMISS UNTIMELY APPEAL**

THE STATE OF SOUTH CAROLINA
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APPEAL FROM ANDERSON COUNTY
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John E. Harbin,

Appellant,

v.

April Blair and Tracy Dunn,

Respondents.

PROOF OF SERVICE

I certify that I have served a copy of Appellant's Opposition to Respondent's Motion to Dismiss Untimely Appeal, upon The Honorable Jenny Abbott Kitchings, Clerk, South Carolina Court of Appeals, at PO Box 11629, Columbia SC 29211, April Blair, by and through counsel of record, Robert D. Corney, Esquire, Gallivan, White & Boyd, at 55 Beattie Place, Suite 1200, Greenville SC 29601, Tracy Dunn, #SID-SC00745855, at Abbeville County Detention Center, 21 Old Calhoun Falls Road, Abbeville SC 29620, by depositing copies of it in the United States Mail, postage prepaid, on April 26, 2017.

April 26, 2017



Donald L. Smith, (SC Bar#6699)

Attorney for Appellant

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April 26, 2017

Robert D. Corney, Esquire
Gallivan, White & Boyd
55 Beattie Place, Suite 1200,
Greenville SC 29601

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SC Court of Appeals

**RE: John Harbin v. April Blair
Appellate Case No. 2017-000772**

Dear Mr. Corney:

Please find enclosed a copy of Appellant's Opposition to Respondent's Motion to Dismiss Untimely Appeal and Proof of Service for same which I have filed in the above-referenced matter.

If you should have any questions, please do not hesitate to contact my office.

With highest regards, I remain

Very truly yours,



Donald L. Smith
DLS/aaf
Enclosures

ATTORNEY OFFICE OF DONALD SMITH

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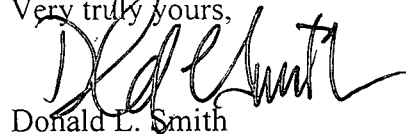
Dear Mr. Dunn:

Please find enclosed a copy of Appellant's Opposition to Respondent's Motion to Dismiss Untimely Appeal and Proof of Service for same which I have filed in the above-referenced matter.

If you should have any questions, please do not hesitate to contact my office.

With highest regards, I remain

Very truly yours,



Donald L. Smith

DLS/aaf

Enclosures

FORM 8
LETTER TO THE APPELLATE COURT CLERK
APPELLANT FILING OPPOSITION TO RESPONDENT'S
MOTION TO DISMISS UNTIMELY APPEAL

April 26, 2017

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

RE: John Harbin v. April Blair
Court of Appeals Case No. 2017-000772

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Dear Ms. Kitchings:

Please find enclosed the following materials:

- 1) Appellant's Opposition to Respondent's Motion to Dismiss Untimely Appeal;
- and,
- 2) Proof of Service for same.

I am respectfully submitting these motions and materials to the Honorable Court for consideration.

Sincerely,



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