

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Maite' Murphy, Circuit Court Judge

Appellate Case No.: 2015-001718

RECEIVED
MAY 11 2017
SC Court of Appeals

Wanda Mack,Appellant,

v.

Carmen Gates,Respondent.

RESPONDENT'S RETURN TO APPELLANT'S PETITION FOR REHEARING

ARGUMENT

The basis of both arguments raised by the Appellant in her motion for rehearing are arguments previously raised by Appellant in her Final Brief, and were considered by the court in its per curiam decision. In considering a motion for rehearing, the Supreme Court of South Carolina has previously held in *Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 564 S.E.2d 322 (2001), that; “[t]he purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time.” Accordingly, Appellant may not simply raise identical claims to ones previously argued, considered and ruled upon. This is what Appellant attempts to do in her motion for rehearing.

Appellant re-raises the issue that the time limit to restore the case to the active docket does not begin to run until Appellant receives written notice that the order has been entered into

the record by the Clerk of Court, and that absent this written notice from the Clerk of Court, the case should still be on the active docket.

The Court obviously considered Appellant's arguments and included pertinent analysis of these issues within its per curiam opinion. In its decision, the Court analyzed the binding legal authority cited by the Appellant in the Petition for Rehearing and concluded that Appellant's arguments are not persuasive. The cases cited by the Appellant, most notably *Rosen, Rosen & Hagood v. Hiller*, 307 S.C. 331, 415 S.E.2d 117 (Ct.App.1992), and *Upchurch v. Upchurch*, 367 S.C. 16, 624 S.E.2d 643 (2006), along with Rule 77(d) SCRPC were all considered by the Court of Appeals for their precedential value as applied to the facts of this case. Given the arguments made in the Appellant's Final Brief and the cases cited by the Court in its per curiam opinion, it is clear that the Court did not fail to address, misapprehend and/or fail to give proper precedential value to the cases cited when issuing its per curiam opinion on April 5, 2017. Since the court considered these cases, Appellant's motion for rehearing fails to comply with the standard of review for of a petition for rehearing as outlined by the Court in *Kennedy v. South Carolina Retirement System*.

The Appellant raised this issue for the first time on appeal, and the court was correct in stating that because the issue was not properly raised to and ruled upon by the trial court, the issue has not been preserved for appellate review. Appellant cites a decision (*Goodwin v. Landquest Dev., LLC*, 441 S.C. 623, 779 S.E.2d 826 (2015)) issued after the instant case was heard by the trial court as a reason that the appellate court should consider this newly raised issue in Appellant's Motion for Rehearing. Assuming that this issue was preserved for appeal based upon *Goodwin v. Landquest Dev., LLC*, the procedural posture and facts of *Goodwin* are not comparable to the facts in the instant case. The court in *Goodwin* held as follows:


The Circuit Court also relied on Rule 40(j) of the South Carolina Rules of Civil Procedure. We find the court erred in relying on this rule for several reasons. First, the lot owners' action was stricken due to bankruptcy, not pursuant to rule 40(j).

In *Goodwin*, the case was not stricken from the docket pursuant to Rule 40(j) SCRCP, as was the case at hand, but rather it was stricken because of bankruptcy as provided by federal bankruptcy law. Since the case in *Goodwin* was stricken under bankruptcy law, any attempt by the Appellant to restore the case under Rule 40(j) rationale would be inapplicable. The court's description of a hypothetical 40(j) situation in the *Goodwin* case is merely dicta, and is not controlling in the instant case. Accordingly, even if this issue was preserved for appeal based on the court's decision in *Goodwin*, the facts of *Goodwin* are distinguishable from the facts in the instant case before the court. Nothing in *Goodwin* overrules the 40(j) analysis described in the *Rosen* and *Maxwell v. Genez* cases.

CONCLUSION

For the reasons set forth above, the Respondent respectfully requests that Order denying Appellant's Petition for Rehearing be denied and this court's prior per curiam opinion be affirmed.

Respectfully submitted,


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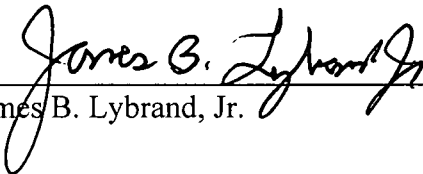
Columbia, South Carolina
May 11, 2017

CERTIFICATE OF SERVICE

I hereby certify that a copy of Respondent's Return to Appellant's Petition for Rehearing was served upon the counsel of record by depositing said papers in the United States Mail, Columbia, South Carolina, on the 11th day of May, 2017, with the first class postage duly affixed and a return address clearly indicated on the envelope, addressed and mailed as follows:

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Columbia, South Carolina

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May 11, 2017

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**Re: Wanda Mack v. Carmen Gates
State of South Carolina Court of Appeals – Case No.: 2015-001718**

Dear Ms. Kitchings:

Enclosed please find for filing the original and six (6) copies of Respondent's Return to Appellant's Petition for Rehearing in connection with the captioned case.

Thank you for your attention to this matter. If you have any questions or need any additional information, please feel free to contact me.

With kind regards,

Very truly yours,

James B. Lybrand, Jr.

JBLjr/bg

Enclosures

cc: R. Alexander Murdaugh, Esq.
Steven D. Murdaugh, Esq.