

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.: 207-000772

RECEIVED
MAY 15 2017
SC Court of Appeals

John E. Harbin, Appellant,

v.

April Blair and Tracy Dunn, Defendants,

Of whom April Blair is the Respondent, Respondent,

RESPONDENT APRIL BLAIR'S REPLY TO APPELLANT'S OPPOSITION TO
MOTION TO DISMISS UNTIMELY APPEAL

Robert D. Corney (S.C. Bar No. 80167)
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**ATTORNEYS FOR RESPONDENT
APRIL BLAIR**

Respondent April Blair (hereinafter “Respondent”) hereby submits the following Reply to Appellant’s Opposition to Respondent’s Motion to Dismiss Untimely Appeal. For the foregoing reasons, and those previously analyzed in her Memorandum in Support of Motion to Dismiss Untimely Appeal, Respondent submits Appellant’s notice of appeal dated March 27, 2017 was not timely and must be dismissed.

REPLY TO APPELLANT’S OPPOSITION TO MOTION TO DISMISS

In response to Respondent’s Motion to Dismiss Untimely Appeal and Memorandum in Support of that motion, Appellant first contends the notice of appeal dated March 27, 2017 *was* in fact timely served because his submission of a post-trial Rule 60(b), SCRCF motion alleging newly-discovered evidence tolled the time to appeal the jury’s verdict. That contention is wholly without merit. The filing of a motion pursuant to Rule 60, SCRCF, does *not* stay or otherwise toll a party’s time to serve a notice of appeal. *See Coward Hund Constr. Co. v. Ball Corp.*, 336 S.C. 1 (Ct. App. 1999); *see also Baracco v. Beaufort County*, 2016 S.C.App. LEXIS 628 (Ct. App. 2016) (“[A] Rule 60 motion does not toll the time for serving a notice of appeal”). Accordingly, Appellant’s contention is erroneous. Pursuant to Rule 203(b)(1), SCACR, Appellant’s notice of appeal had to be served within thirty days after receipt of written notice of entry of the judgment. As detailed in Respondent’s previous Memorandum, that deadline expired on January 3, 2017. Appellant’s notice of appeal was dated and served March 27, 2017. Accordingly, it was untimely and must be dismissed by this Court.

It is also important to note that the trial court’s order denying Appellant’s Rule 60(b) motion has **not** been appealed to this Court. Rather, Appellant’s March 27, 2017 notice of appeal *only* seeks appellate review of the “judgment...dated November 30, 2016.” That is the date the jury returned its verdict following the trial of this case. The notice of appeal makes no mention of

Judge Sprouse's order denying Appellant's Rule 60(b) motion entered on February 23, 2017, nor does it refer to the subsequent order entered March 20, 2017 denying Appellant's Motion to Reconsider the Rule 60(b) motion. As such, the only issue raised in the March 27, 2017 notice of appeal is the judgment entered in favor of Respondent on December 2, 2016 following the jury's verdict on November 30, 2016. As detailed in Judge Sprouse's Order Denying/Dismissing Appellant's Post-Trial Motions for New Trial, Appellant's Rule 59(a) motion was not timely filed. Appellant has not appealed that ruling. Because an untimely post-trial motion does **not** toll the time for serving a notice of appeal, Appellant's time for serving a notice of appeal expired thirty (30) days after receipt of written notice of entry of judgment. *See* Rule 203(b)(1), SCRCR. The Court entered judgment on December 2, 2016, in accordance with the jury's verdict. Electronic notice of the entry of judgment was provided to counsel for the parties on that same date. As such, Appellant's deadline to serve a notice of appeal expired Tuesday, January 3, 2017. Appellant served the current notice of appeal on March 27, 2017. The Notice of Appeal is not timely. Accordingly, Appellant's March 27, 2017 notice of appeal must be dismissed.

Appellant further contends in his Response that his purported "substantial compliance" with the "procedural technicalities" for filing a post-trial motion as set forth in Rule 59(b), SCRCP excuses the late filing of his motion for new trial and, therefore, tolled his time for serving the notice of appeal. As further set forth in Respondent's Memorandum in Support of Motion to Dismiss Untimely Appeal, "substantial compliance" with Rule 59(b) will not excuse the untimely filing of a Rule 59 post-trial motion. Rather, the strict ten day deadline for filing such a motion as outlined in Rule 59(b), SCRCP is a jurisdictional requirement that 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); see also Russell v. Wachovia Bank, N.A., 370 S.C. 5, 20, 633 S.E.2d 722, 730 (2006)(“Generally, a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed.”); 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). Therefore, Appellant’s failure to effectuate the filing of his Rule 59(a) motion for new trial within the strict ten (10) day timeline set forth in Rule 59(b) *cannot* be excused or disregarded on the basis of his alleged “substantial compliance” with the Rule. The time for Appellant to serve his notice of appeal of the jury’s verdict was not stayed by the filing of an untimely post-trial motion. Accordingly, and the March 27, 2017 notice of appeal is untimely.¹

Of one final note, on April 3, 2017, Appellant filed an Amended Notice of Appeal with the Anderson County Clerk of Court through which he supplemented the basis of the current appeal to also include “the judgment of the Honorable R. Scott Sprouse dated...March 1, 2017.” Judge Sprouse entered his “Order Granting Defendant Blair’s Motion for Costs and Enforcing Judgment Pursuant to Rule 68, SCRCF” on March 1, 2017. By way of brief background, during the litigation of the underlying case at issue, Respondent served Appellant with an Offer of Judgment pursuant to Rule 68, SCRCF in the amount of Forty-Five Thousand (\$45,000.00) Dollars. That offer was not accepted by Appellant within twenty days of service and was, therefore, withdrawn. A copy of the offer of judgment was filed with the Anderson County Clerk of Court’s Office on July 5, 2016. At the trial of the case in November 2016, the jury returned a

¹ As an aside, Respondent takes this opportunity to reiterate that the trial court’s order finding Appellant’s post-trial motion to have been untimely has **not** been raised to this Court in the Appellant’s notice of appeal. Therefore, whether Appellant’s Rule 59(a) motion was timely or excused by “substantial compliance” is not preserved for this Court’s consideration.

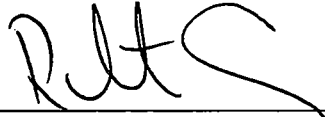
verdict in favor of Respondent. Because Respondent obtained a more favorable verdict at the trial of the case than the previous offer of judgment to Appellant, she was entitled to recover a number of costs and expenses pursuant to Rule 68, SCRPC. Following a hearing in February 2017, Judge Sprouse entered the above-referenced order on March 1, 2017, awarding Respondent costs and expenses pursuant to Rule 68, SCRPC. Notice of the entry of that order was served electronically upon all counsel of record simultaneously with the filing of the order on March 1, 2017. Appellant filed the Amended Notice of Appeal with the Anderson County Clerk's Office on April 3, 2017, the thirtieth (30th) day after receipt of notice of the entry of Judge Sprouse's Order Awarding Costs. Filed with the Amended Notice was a copy of a letter to counsel for Respondent dated April 3, 2017, purportedly serving a copy of the Amended Notice of Appeal. No Certificate of Service was filed therewith. If the Amended Notice of Appeal was in fact served on April 3rd as purported by Appellant, Respondent does not take issue with or otherwise challenge the timeliness of Appellant's Amended Notice of Appeal *solely* as it relates to Judge Sprouse's March 1, 2017 order awarding Respondent costs. However, for the reasons previously set forth, the Amended Notice of Appeal must also be dismissed to the extent it seeks appellate review of the November 30, 2016 jury verdict as it was untimely.

CONCLUSION

For all of these reasons, and those previously set forth in Respondent's Memorandum in Support of Motion to Dismiss Untimely Appeal, Appellant's March 27, 2017 notice of appeal is untimely. Accordingly, this Court is without jurisdiction to entertain that appeal and it must be dismissed.

[Signature on Next Page]

Respectfully submitted,



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**ATTORNEY FOR RESPONDENT
APRIL BLAIR**

May 12, 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

Case No. 2014-CP-04-2908

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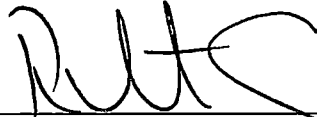
PROOF OF SERVICE

The undersigned counsel certifies that I have this 12th day of May, 2017, served a copy of the following documents:

1. Respondent April Blair's Reply to Appellant's Opposition to Motion to Dismiss 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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ATTORNEYS FOR RESPONDENT APRIL
BLAIR

May 12, 2017

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SC Court of Appeals

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

**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:

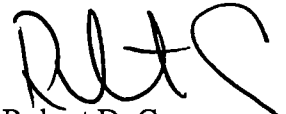
Enclosed please find the original and six copies of Respondent April Blair's Reply to Appellant's Opposition to Motion to Dismiss Untimely Appeal and Proof of Service. We would appreciate if you would please file the original and return to us the file-stamped copies using the addressed, stamped envelope 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.



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RDC/pls
Enclosures
cc: Donald L. Smith, Esq.

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