

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Appeal from Sumter County
Court of Common Pleas
R. Ferrell Cothran, Jr., Circuit Court Judge

AUG 09 2017

SC Court of Appeals

Appellate Case No. 2017-000998.
Civil Action No. 2015-CP-43-596

Paul Branco and Branco Investments,
Inc., d/b/a Great American Cookie Co. Respondents,

v.

Hull Storey Retail Group, LLC, and
Sumter Mall, LLC, Appellants.

RESPONDENTS' RETURN IN OPPOSITION TO APPELLANTS' MOTION FOR
REMAND WITHOUT PREJUDICE FOR THE DISPOSITION OF THEIR POST-
TRIAL MOTION

This case comes before the Court in a unique procedural posture. Following the bench trial in the underlying case, Judge Cothran circulated a Proposed Order among counsel. Without waiting for the Order to be reviewed, edited, signed, and entered, Appellants filed a Rule 52(b) Motion to Alter or Amend. An Order was then entered two days after Appellants' Rule 52 Motion was filed.¹ Appellants did not renew their Rule 52 Motion or make a new Motion to Alter or Amend after the Order was filed. Instead, Appellants filed a Notice of Appeal.

¹ The Rule 52(b) Motion was filed on March 21, 2017. The Order was entered on March 23, 2017.

Now—three and a half months after the Notice of Appeal was filed—Appellants ask this Court to remand the case for a ruling on the improperly filed and untimely Rule 52 Motion. Respondents respectfully request that this Court deny Appellants' Motion to Remand and allow this appeal to proceed in the ordinary course.

I. Appellants' Rule 52 Motion was Not Properly Filed and There is No Pending Motion for the Circuit Court to Adjudicate.

Rule 52(b), SCRPC states, " Upon motion of a party made not later than 10 days after receipt of written notice of entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly, and the motion may be made with a timely motion for a new trial." (emphasis added). This language is clear and unambiguous. A Rule 52(b) motion may only be filed after an Order is received. *See id.* The reason for this is simple, as a trial court's order is not final and binding "until reduced to writing, signed by the judge, and delivered for recordation." *Brailsford v. Brailsford*, 380 S.C. 443, 452, 669 S.E.2d 342, 346 (Ct. App. 2008) (citation omitted). Indeed, Rule 58(a) of the South Carolina Rules of Civil Procedure states that "[a] judgment is effective only when so set forth and entered in the record." Such a rule is necessary because a trial judge is free to change his mind at any time prior to entry of the written order. *Brailsford*, 380 S.C. at 451–52, 669 S.E.2d at 346.

Here, Appellants concede—as they must—that the Rule 52 Motion was filed two days prior to entry of judgment in this case. Therefore, their Motion was a nullity as there were no findings for the trial court to alter or amend. Indeed, at the time Appellants' filed their Rule 52 Motion, "[t]he lack of a final written judgment entered by the clerk of the [trial]court [was] not a technicality. A final written judgment is an indication to the parties and to [the appellate court] that the [trial] court considers its task completed. Entry of

a final written judgment also provides a definite date for computing the timeliness of post judgment motions and notices of appeal." *Wood v. Coast Frame Supply, Inc.*, 779 F.2d 1441, 1442–43 (9th Cir. 1986) For this reason, Respondents contend that a remand or dismissal is inappropriate as there is no pending motion for the trial court to rule on.

II. In the Alternative, Dismissal Rather Than Remand Would Be Appropriate, and Appellants' Risk Later Filing an Untimely Appeal.

Even assuming Appellants are correct that there is a pending motion in the Circuit Court, remand is not the appropriate remedy. While Appellants cite *Hudson v. Hudson*, 290 S.C. 215, 349 S.E.2d 341 (1986) and *Otten v. Otten*, 287 S.C. 166, 337 S.E.2d 207 (1985), they ignore the remedy in those cases—dismissal without prejudice. The reason for this is simple. Appellants do not want to run the risk of the trial court holding that their Rule 52 Motion was improperly filed, untimely, and a nullity, which would render any subsequent Notice of Appeal untimely. Yet, that is the risk Appellants run by attempting to proceed with litigating their Rule 52 Motion.²

The language in Appellant's Motion to Remand is critical in that they ask for "leave to refile [a Notice of Appeal] within 30 days after receiving written notice of the trial court's ruling [on the Rule 52 Motion] or declining to rule on the motion." (Mot. to Remand at 2). That is a remedy without reason or grounding in our Rules of Civil Procedure or Rules of Appellate Procedure, for even if this appeal is dismissed without prejudice, Appellants will only have 30 days to file a subsequent Notice of Appeal if the trial court finds that the Rule 52 Motion was timely. See Rule 52(c), SCRPC. Put simply, Appel-

² Indeed, the undersigned—who was retained on this case only a few days ago—contacted counsel for Appellants on the morning of August 7, 2017, prior to learning that Appellants had filed the instant motion, and requested that Appellants jointly consent to removal of the Rule 52 Motion from the docket so that the appeal can proceed. Appellants' counsel declined that request.

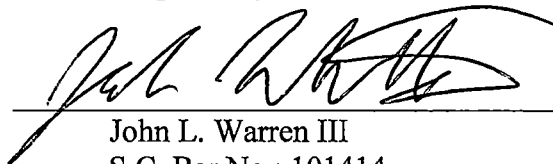
lants cannot circumvent the plain language of Rule 52, SCRPC or mitigate the risk they take by dismissing this appeal by requesting a mandate from this Court that would allow them to appeal even if the trial court finds that there is no motion to rule on.

III. Conclusion

The issue before the Court is a problem of Appellants' own creation. Rather than acknowledging that their Rule 52 Motion was improperly filed, untimely, and a nullity, Appellants have requested a safeguard remand from this Court. This Court should decline Appellants' invitation and allow this appeal to proceed in the ordinary course, or alternatively, dismiss the appeal without prejudice. The latter remedy—which is essentially the remedy that Appellant has requested—puts Appellants at risk of forever losing their right to appeal if the trial court determines that the Rule 52 Motion was improperly filed, untimely, and a nullity, and Respondents respectfully reserve the right to raise the issue of timeliness in a future Motion to Dismiss if necessary.

August 9, 2017

Respectfully submitted,



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Attorney for Respondents

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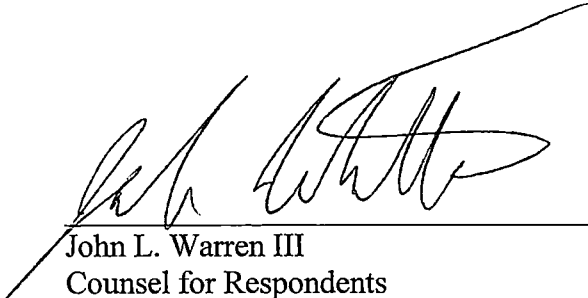
Hull Storey Retail Group, LLC, and
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CERTIFICATE OF SERVICE

I, John L. Warren III, certify that I have served a copy of the Notice of Appearance and Respondents' Return in Opposition to Appellants' Motion for Remand Without Prejudice for the Disposition of Their Post-Trial Motion on Appellants by depositing the same in the United States Mail, postage prepaid, this 9th day of August, 2017, addressed to:

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