

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Case No. 2016-CP-23-03431

Phyllis B. Thomas,

Appellant,

v.

Barbara R. Merline, Diane P.
Meacham, MHA's LLC,
TAXLAW, LLC, David A.
Merline, Jr., Keith G.
Meacham and Merline &
Meacham, P.A.

Respondents.

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REPLY IN SUPPORT OF MOTION TO DISMISS APPEAL

Respondents submit their reply in support of their motion to dismiss this appeal as follows.

I. THIS COURT DOES NOT HAVE JURISDICTION OVER THIS APPEAL

Because this Court lacks jurisdiction over this appeal, it must dismiss it. *Wells Fargo Bank, N.A. v. Fallon Props. S.C., LLC*, 413 S.C. 642, 646, 776 S.E.2d 575, 577 (Ct. App. 2015) (when a notice of appeal is untimely, the Court of Appeals “lacks appellate jurisdiction” and is “required to dismiss the appeal”). “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. DOT*, 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004), citing *Mears v. Mears*, 287 S.C. 168, 337 S.E.2d 206 (1985).

Appellant makes a number of arguments to the effect that the deadline should be extended: much of the ten-day period for filing a Rule 59(e) motion ran during an out-of-town vacation (p. 3); the deadline fell in the middle of a holiday weekend (p. 9); an employee of the Greenville County Clerk of Court’s office researched the matter and gave incorrect advice (p. 6, 10); Respondents’ counsel failed to notify Appellant’s counsel that the 59(e) motion was untimely (p. 14); e-filing is relatively new to Greenville County (p. 10, n. 3); this case is exceptionally worthy of appellate review (p. 7, 12-13); and so on. The problem with all of these arguments is that they cannot give this Court jurisdiction that it does not have. Appellant does not dispute that the Rule 59(e) motion was in fact untimely under applicable law. As such, no matter how compelling the above-referenced arguments may otherwise be, they do not matter. This appeal must be dismissed.

II. APPELLANT IS NOT ENTITLED TO FILE AN UNTIMELY APPEAL

Appellant’s core argument is that “equitable tolling” should apply because it was reasonable to rely on the advice rendered by a member of the Greenville County Clerk of Court’s staff to the effect that Appellant had five extra days to file her Rule 59(e) motion. This argument is not supported by any authority on point. Appellant cites *Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 386 S.C. 108, 687 S.E.2d 29 (2009), but *Hooper* was

a case in which equitable tolling was applied to toll the running of a statute of limitations. A statute of limitations defense is an affirmative defense (SCRCP 8(c)); it is not jurisdictional. Moreover, *Hooper* involved a finding that the plaintiff “diligently pursued service” but was unable to serve the defendant timely because of the defendant’s unlawful failure to designate an agent. *Id.*, 386 S.C. 108, 117-18, 687 S.E.2d 29, 33-34.

Appellant does not contend that she diligently attempted to file her Rule 59(e) motion within the ten-day period but was stymied by Respondents. Rather, she contends she made a mistake of law, misconstruing the legal rules that establish the deadline for filing a Rule 59(e) motion. The standard for extending a deadline based on a mistake is “excusable neglect.” *Hillman v. Pinion*, 347 S.C. 253, 256-57, 554 S.E.2d 427, 429 (Ct. App. 2001). A mistake of law is not excusable neglect. *Id.*

As articulated in Respondents’ initial memorandum, the Rule 59(e) deadline runs from receipt of written notice of the order, not from service. Thus, Rule 6(e) does not apply to the deadline established by Rule 59(e). *Witzig v. Witzig*, 325 S.C. 363, 366, 479 S.E.2d 297, 299 (Ct. App. 1996) (“Rule 6(e) is a pleadings rule and applies only when service is effective upon mailing”).¹ *See also*, SCRCP 6(b) (a Rule 59 deadline may not be extended except as provided in the Rule itself, and the time for filing a notice of appeal is jurisdictional and may not be extended by consent or order). These rules have been in place for decades – they are not unique to the electronic filing system in Greenville County.

¹ Rules 6(e) and Rule 59(e) derive from, and are largely consistent with, the Federal Rules of Civil Procedure. Federal courts have uniformly held that Rule 6(e) does not apply to Rule 59(e) motions. *See e.g.*, *Russ v. Hewett*, 69 F. App’x 185, 187 (4th Cir. 2003); *FHC Equities, L.L.C. v. MBL Life Assurance Corp.*, 188 F.3d 678, 681-82 (6th Cir. 1999) (collecting cases); *Halicki v. La. Casino Cruises*, 151 F.3d 465, 467-68 (5th Cir. 1998).

Respondents do not fault Ms. Mansel, an employee of the Greenville County Clerk’s Office, for attempting in good faith to assist with questions about court deadlines. However, the affidavit submitted by Appellant indicates Ms. Mansel did not know the applicable deadline and specifically advised that she had to “research” the issue. Respectfully, Respondents do not believe it is appropriate to outsource the research of legal issues to employees of the Clerk’s office. *See, e.g., Craps v. Mercury Constr. Corp.*, 275 S.C. 546, 549, 273 S.E.2d 770, 771 (1981) (“reliance upon a lay person for legal assistance . . . does not establish excusable neglect”).

It appears that Ms. Mansel was citing language from the *Electronic Filing Policies and Guidelines*. 415 S.C. 1, 780 S.E.2d 600 (2015). However, the cited portion applies only to “[c]omputation of the time for a response after service.” *Id.*, ¶ 4(e)(4); Mansel Aff. ¶ 4. The very same legal authority provides a different rule for deadlines based on receipt of written notice, such as Rule 59(e):


Receipt of Written Notice of Entry of Order or Judgment. An Authorized E-Filer has receipt of written notice of the entry of a judgment or the filing of an order upon receipt of the emailed NEF. It shall be the responsibility of an Authorized E-Filer to review the content of the E-Filed order to determine its force and effect; however, any delay in accessing the E-Filing System to review the order does not affect the time of receipt.

415 S.C. 1, 780 S.E.2d 600, ¶ 6(d). It is unclear whether Ms. Mansel reviewed Paragraph 6(d), and if so, whether she discussed it with Appellant’s counsel.² In either case, she could

² Appellant contends her counsel contacted the Clerk of Court’s office “regarding the appropriate time computation for filing [a] motion for reconsideration.” (Return p. 4.) But Ms. Mansel’s affidavit states that she was asked for advice concerning the deadline for filing a notice of appeal. (Mansel Aff. ¶ 3.) Her affidavit does not indicate that she gave any advice concerning the deadline for filing a Rule 59(e) motion.

not reasonably have been expected to provide an authoritative legal opinion. Thus, even if this Court had jurisdiction to excuse the untimely Notice of Appeal, Appellant does not meet the standard for any form of equitable tolling.

Respectfully submitted,



Thomas L. Stephenson (S.C. Bar No. 5332)
Jeffrey P. Dunlaevy (S.C. Bar No. 16978)
Stephenson & Murphy, LLC
207 Whitsett Street
Greenville, South Carolina 29601
(864) 370-9400
tom@stephensonmurphy.com
jeff@stephensonmurphy.com

Counsel for Respondents

September 1, 2017

Other Counsel of Record:

D. Randle Moody, II
JACKSON LEWIS P.C.
15 South Main Street, Suite 700
Greenville, SC 29601

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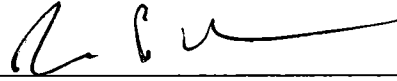
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PROOF OF SERVICE

I certify that I have served a copy of Respondents' Reply in Support of Motion to Dismiss Appeal by depositing a copy of it in the United States Mail, postage prepaid, on September 1, 2017, addressed to its attorney of record:

D. Randle Moody, II, Esq.
JACKSON LEWIS P.C.
15 South Main Street, Suite 700
Greenville, SC 29601

Respectfully submitted,



Jeffrey P. Dunlaevy (S.C. Bar No. 16978)
Stephenson & Murphy, LLC
207 Whitsett Street
Greenville, South Carolina 29601
(864) 370-9400

September 1, 2017

Other Counsel of Record:

D. Randle Moody, II
JACKSON LEWIS P.C.
15 South Main Street, Suite 700
Greenville, SC 29601

STEPHENSON + MURPHY

ATTORNEYS AT LAW LLC

September 1, 2017

Jenny Abbott Kitchings
Clerk of Court
1220 Senate Street
P.O. Box 11629
Columbia, South Carolina 29211

RE: *Phyllis B. Thomas v. Barbara R. Merline, et al*
Case No. 2016-CP-23-03431

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Dear Ms. Kitchings:

Enclosed for filing with the Court, please find an original and six (6) copies of Respondents' Reply in Support of Motion to Dismiss Appeal and Proof of Service in the above matter.

Thank you for your assistance in this regard.

Respectfully,



Lisa Romaniello
Legal Assistant

Enclosures

cc: D. Randle Moody, II, Esq. (w/encl.)



STEPHENSON + MURPHY
ATTORNEYS AT LAW

207 WHITSETT STREET | GREENVILLE | SC 29601

Jenny Abbott

Sen. Clerk

Jenny Abbott Kitchings
Clerk of Court
1220 Senate Street
P.O. Box 11629
Columbia, South Carolina 29211

