THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Case No. 2016-CP-23-03431
Appellate Case No. 2017-001637

Phyllis B. Thomas,

Petitioner/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.

PETITION FOR A WRIT OF CERTIORARI OR MOTION FOR EXTRAORDINARY WRIT REGARDING JURISDICTION OF APPEAL

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CERTIFICATE OF COUNSEL

No hearing was given in this matter and the Court of Appeals dismissed the appeal on a procedural basis by Order dated October 18, 2017. The Court of Appeals determined the case on a motion by Respondents and a Return by Appellant. Petitioner seeks an extraordinary writ and/or writ of certiorari requesting the Supreme Court to exercise jurisdiction over this appeal.

QUESTIONS PRESENTED

1. Did the Court of Appeals correctly dismiss the appeal as lacking appellate jurisdiction when the extraordinary facts of the appeal indicated the date computation for the motion for reconsideration was provided by the Clerk of Court's office and the guidance was verified by affidavit?

2. Did the Court of Appeals correctly dismiss the appeal and not equitably toll the time for the notice of appeal when the facts and circumstances of the appeal indicated that the motion the reconsider was filed, considered, Respondents' counsel communicated

with the court regarding the motion to reconsider, the motion to reconsider was denied, and the notice of appeal was filed only four (4) days after the notice of appeal would have been due in the absence of a motion for reconsideration?

STATEMENT OF THE CASE

On October 18, 2017, Judge Paul E. Short, Jr. filed an Order in Appellate Case No. 2017-001637 dismissing Appellate Case 2017-001637 on the basis that Respondents filed a motion to dismiss the appeal and that an "untimely motion for reconsideration did not toll the time for service of the notice of appeal." (Attachment 1.) The Court of Appeals granted the motion to dismiss on the grounds that the motion for reconsideration—although filed on a date computation provided through assistance with the Greenville County Clerk's Office—should have been filed on July 3 and not July 7. This is an appeal that arose in the midst of the transition of an electronic filing system from the traditional mailing system. Notwithstanding counsel's seeking assistance with the Greenville County Clerk's Office for filing dates, and receiving assistance that the Court of Appeals apparently concludes was incorrect, the Court of Appeals stated that it did not have jurisdiction over the appeal because the motion for reconsideration did not toll the time for filing the notice of appeal.

The following is a summary of salient facts and dates provided in the Return filed with the Court of Appeals: (Attachment 2.)

- A motion for reconsideration was filed on a computation of time provided by assistance from the Greenville County Clerk's Office regarding time periods under electronic filing. An Affidavit of Sandra Mansel of the Greenville County Clerk's Office was provided to the court indicating the assistance.
- The motion for reconsideration was filed on July 7, 2017.
- The circuit court properly considered the motion for reconsideration.

- The circuit court allowed Respondents' counsel an opportunity to comment on the motion for reconsideration.
- The motion for reconsideration was denied on July 21, 2017.
- Counsel believed reconsideration by the circuit court tolled the period for filing a notice of appeal.
- The notice of appeal was filed and served on July 28—merely 7 days after the denial of the motion for reconsideration.
- A motion to dismiss the appeal was subsequently filed by Respondents on the basis that the motion for reconsideration was untimely (July 3 as opposed to July 7) and did not toll the time for the notice of appeal (July 24 as opposed to the file date of July 28).

Counsel requested that the Court of Appeals exercise equitable tolling powers of South Carolina Courts under the special circumstances of this case and conclude that the motion for reconsideration tolled the period of time to file a notice of appeal and that the appeal was timely filed. The Court of Appeals concluded that the motion for reconsideration filed by Appellant in this case did not toll the time period to file a notice of appeal. The facts and background of this matter indicate that the time should be tolled.

There were a number of special circumstances surrounding the order of the circuit court. In a summary judgment hearing on May 23, 2017 in Greenville County Court of Common Pleas, visiting Judge William Seals, Jr., conducted a hearing in this matter. Following that hearing, Judge Seals instructed that he was granting summary judgment to Respondents. There was back and forth regarding Respondents submitting a proposed Order, Judge Seals allowed Appellant to submit comments by letter—which were limited due to the approach and fundamental holding taken by the proposed Order, and on June 22 a Notice of Electronic Filing regarding a summary judgment order was generated by the court's electronic filing system.

Undersigned counsel for Appellant Thomas was away from the office on the evening of June 21 and was at the airport several hours after midnight on June 22 with his family for a day of travel across the country to attend a firm meeting and family weekend. The meeting and weekend was in California and concluded on Sunday, June 25. Undersigned counsel returned to Greenville on a cross country flight just after midnight on June 26. Upon returning to South Carolina counsel attempted to obtain a copy of the actual Order in this matter. Upon obtaining a copy of the Order, it was apparent from the contents of the Order that a Rule 59(e) motion for reconsideration would be appropriate in the case to preserve important issues for appeal. Counsel reviewed Rule 59 and was reminded of the ten (10) day time period to file a Rule 59 motion. Unclear from the Rule was the computation of the ten (10) day time period with the electronic filing pilot program in Greenville County. Prior to electronic filing, orders and other items were mailed to counsel. As part of the electronic filing pilot program in Greenville County, the court training program reiterated to practitioners that although a filing may occur electronically, the mail rule of five (5) days continued to apply.[1] On June 28, undersigned counsel had not received a mailed copy of the Order. Out of an abundance of caution, counsel contacted the Greenville County Clerk of Court's office for assistance with time computation under the electronic filing program for a Rule 59

[1] Another important issue is that there are differences between the existing federal electronic filing program and the South Carolina electronic filing program that was commonly referred to as a pilot program in Greenville. For example, an important distinction between Federal e-filing and South Carolina electronic filing is that the South Carolina electronic filing program does not provide the parties or practitioners with a link to the document or Order nor does it provide a response/filing time computation.

motion prior to an appeal.[2] Counsel conferred with the Greenville County Clerk's office on June 28 regarding the appropriate time computation for filing motion for reconsideration under the electronic filing pilot program. The clerk's office was very helpful and after consulting the electronic filing rules informed undersigned counsel that the mailing rule of five (5) days applied. The application of the mailing rule would make the due date for the motion to be Friday, July 7, instead of Monday, July 3—the day prior to Independence Day. Importantly, counsel's inquiry into the computation of time for Rule 59 under the electronic filing program occurred on June 28—unquestionably within the period to file a Rule 59 motion regardless of time computation methods.

This is a unique case that a Rule 59(e) motion was necessary in order to preserve and clarify the trial court's ruling on a fundamental issue of interpretation of an Operating Agreement, applying corporate shareholder law to a member dispute in a limited liability company, and rulings on ongoing discovery. Counsel was careful to comply with the standard of *I'on, LLC v. Town of Mount Pleasant,* 338 S.C. 406, 421, 526 S.E.2d 716, 724 (S.C. 2000)("important principle that all parties should raise all necessary issues and arguments to the lower court and attempt to obtain a ruling.") A seven page motion for reconsideration was prepared, not a perfunctory filing, addressing a number of issues in an attempt to preserve the issues for appeal as well as to allow the trial court the opportunity to clarify the ruling. (Attachment 2 at Exhibit 2.) The motion was filed on July 7 in accordance with the time outlined with the clerk of the Greenville County Court. The trial judge considered the motion. In fact the law clerk for Judge Seals allowed Defendants

[2] Undersigned counsel has successfully handled and argued a number of appeals before the South Carolina Court of Appeals and the South Carolina Supreme Court. A number of those decisions are reported. In each of those cases, counsel has worked with the Clerk's office or case managers for the cases to verify and confirm time computations, deadlines, and/or response dates. Specifically, in the case of Orders that were subject to a notice of appeal previously, physical Orders were always mailed and the response date was made from the actual receipt of the written order in the United States mail.

an opportunity to respond to the motion or submit a reply to the motion via email on Monday, July 17. (Attachment 2 at Exhibit 3.) Mr. Stephenson, counsel for Defendants, responded that he thought the motion "is all rehash and no reply is necessary. If you think we need to address an issue, we will be happy to." (Attachment 2 at Exhibit 3.) No mention was made of the motion for reconsideration allegedly being filed untimely. The trial judge filed a form 4 Order denying the motion for reconsideration without a hearing on Friday, July 21. (Attachment 2 at Exhibit 4.) The Order denying the motion for reconsideration was filed by electronic filing. Counsel, based on discussions with the Clerk on June 28 and the filing of the motion for reconsideration on July 7, considered the matter to be in compliance with Rule 59(e) and that the time for filing an appeal was tolled until the Order denying the motion for reconsideration. Rule 203(b)(1), SCACR. On July 28 notice of appeal was filed.

During the pendency of the motion for reconsideration, the transcript was ordered and received on or after August 4—therefore, putting the appeal on a fast track. Respondents filed the motion to dismiss via mail by certificate of service dated August 16. The motion was the first and only time that an issue of an untimely motion for reconsideration was raised.

After review of the Motion to Dismiss the Appeal, undersigned counsel contacted Paul Wickenshimer, the Clerk of Court for Greenville County for permission to follow up with Ms. Sandra Mansel regarding their June 28 discussion of the time computation for a motion for reconsideration filing prior to an appeal. Mr. Wickenshimer was polite enough to review the situation and informed undersigned counsel that he would look into the situation. Ms. Mansel contacted undersigned counsel on August 24 via telephone, was very kind, recalled the June 28 conversations, and offered to provide a statement or affidavit. On August 24, Ms. Mansel provided the following statement via email attachment.

August 24, 2017

RE: 2016-CP-23-03431

On June 28, 2017, Mr. Randle Moody called our office and spoke to me about service via electronic filing. He was concerned about how much time he had to file his appeal of the order that was filed on June 22, 2017 since Greenville County is now a mandatory e-filing county. Initially I told him that I did not know the answer, but I would research the e-filing rules on service and call him back. Upon what I thought was the correct response to his question, I called his office and informed him of the following rule:

Rule 4

(4) Time to Respond Following Electronic Service. Computation of the time for a response after service by NEF is governed by Rule 6, SCRCP. In accordance with Rule 6(e), SCRCP, service by electronic means via an NEF is treated the same as service by U.S. Mail for purposes of determining the time to respond; therefore, five days shall be added to the prescribed period to respond from the date set forth in the Official File Stamp on the NEF.

Sandra Mansel
Administrative Coordinator

(Attachment 2 at Exhibit 5.) Recognizing the importance of this issue and the June 28 conversations that counsel relied upon, Ms. Mansel has also offered her affidavit for this Court that complies with her August 24 email and attachment. (Attachment 2 at Exhibit 1.)

ARGUMENT

In this case, the timeline establishes a just, speedy, inexpensive determination of the action on appeal while also allowing the trial judge to reconsider the decision and preserving all issues on appeal for Petitioner/Appellant Phyllis Thomas. There is no prejudice to Respondents based upon the timeline of this appeal. Respondents were successful on this case at the summary judgment stage, Appellant's motion for reconsideration was denied, and Respondents are taking action to remove Petitioner/Appellant Phyllis Thomas from a limited liability company for which she has been a model member.

The case involves the duties among members in a limited liability company and the amendment of an Operating Agreement that Petitioner/Appellant contended unlawfully targeted her for expulsion. The Order granting summary judgment, however, instead of applying the Limited Liability Company Act, applied cases and precedents that apply to shareholders of corporations. The trial court used an analysis of corporate law shareholder disputes instead of limited liability company principles and partnership analysis. As an example, Appellant's claims included claims that the other members of the limited liability company breached the duty of good faith and fair dealing as well as their fiduciary duties owed to the company and other members when they took action to target her for expulsion. Therefore, this appeal presents unique and novel issues of law regarding the rights and duties of members of a limited liability company in South Carolina involving the decision to amend an Operating Agreement to target an individual member as well as the application of an amendment to that individual member. These are unique and novel issues of law that are similar to those that former Chief Justice Toal anticipated in the law review article that discussed the few judicial decisions in this area and the need for guidance for the courts and South Carolina citizens. *See generally, Fiduciary Duties of Partners and Limited Liability Company Members Under South Carolina Law: A Perspective from the Bench*, Toal, Jean H. & Riley, Bratton, 56 S.C. L. Rev 275 (Winter 2004)

I. The Court of Appeals Order Strictly Applies a Rule and Did not Consider that the Tolling of Time Periods for this Appeal Promoted Judicial Efficiency or That Guidance on the Rule was Given by the Clerk of Court's Representative.

There are a number of legal principles at play regarding the filing of a motion for reconsideration prior to an appeal. A party must raise issues and arguments in the trial court and obtain a ruling. When a party raises an issue and the judge does not rule on it, the party must file a Rule 59(e), SCRCP, motion in order to preserve the issue for appellate review. *See e.g. I'On,*

L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000) (reiterating the "important principle that all parties should raise all necessary issues and arguments to the lower court and attempt to obtain a ruling"); *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); *Summer v. Carpenter*, 328 S.C. 36, 43, 492 S.E.2d 55, 58 (1997) (where trial judge did not rule on issue at trial and party did not make Rule 59(e) motion for a ruling, issue is not preserved for review); Rule 210(c), SCACR (record on appeal shall not include matter which was not presented to lower court). A party is placed in a difficult position regarding the quick turnaround for a Rule 59(e) motion and meeting the standards of issue preservation recognized by *I'On, LLC* decision and the precedents of South Carolina Appellate Courts. In recognition of the appeal efficiencies obtained through the determination of a Rule 59 motion prior to the Appellate Court's review of the appeal, the rules of court establish that a party has 30 days from receipt of the written entry of the order denying post-trial motions (Rule 59) and entering the judgment to serve a notice of appeal. Rule 203(b)(1), SCACR. Likewise, the filing of a Rule 59(e) motion or other timely post-trial motion generally tolls the deadline for serving a notice of appeal for all parties until receipt of written notice of entry of the order granting or denying such motion. *See* Rule 203(b)(1), SCACR; Rules 50(e), 52(c), and 59(f), SCRCP.

While the filing of the notice of appeal may be a jurisdictional requirement, our rules and courts recognize that a trial judge should have ample power to reconsider an issue and that the burden for considering all issues in the lower court before an appeal lies with the Appellant. In the operation of the rules, there is a tolling of the time period for an appeal under Rule 59. The tolling occurs to afford the trial court an opportunity to consider all the issues as well as allows the

Appellant an opportunity to ensure all issues are properly preserved for appeal. The strain of the competing interests of filing an appeal as well as preserving issues for appeal are harmonized with the tolling of the time for an appeal while the court considers motions such as a motion for reconsideration.

In this appeal, there is no dispute that:

- A motion for reconsideration was filed.
- The circuit court addressed the motion for reconsideration.
- The circuit court allowed Respondents an opportunity to comment on the motion for reconsideration.
- Respondents counsel responded that "I believe it is all rehash and no reply is necessary. If you think we need to address an issue, we will be happy to." (Attachment 2 at Exhibit 3.)
- Respondents did not object to the jurisdiction of the circuit court to determine the motion for reconsideration.
- Respondents did not object or state that the motion for reconsideration was not timely.
- The circuit court denied the motion for reconsideration without a hearing. (Attachment 2 at Exhibit 4.)
- A Notice of Appeal was filed seven (7) calendar days after the denial of the motion for reconsideration.

The Order of the Court of Appeals dismissing the appeal strictly applies a difficult 10 day rule in this case. Based on the calendar, the alleged timely motion for reconsideration would have been due on Sunday, July 2—rolling by rule to Monday July 3. The due date would be in the midst of the July 4 weekend holiday. As filed in this case—the motion for reconsideration was filed on Friday, July 7—four days (counting Independence Day) following the date that the ten (10) day period would have rolled under the rules utilized by the Court of Appeals. This filing, however, has special circumstances as the Court of Appeals did not take into consideration the discussions

or guidance obtained from the Greenville County Clerk of Court's office. The June 28 guidance obtained by Petitioner's/Appellant's counsel regarding time computation for a Rule 59 motion prior to appeal in this case is an exceptional circumstance regarding a transition of our courts from traditional filing to electronic filing.[3] The June 28 guidance indicated that the deadline for a motion for reconsideration in this case would be Friday, July 7.

II. The Court of Appeals Should have Tolled the Time for the Notice of Appeal based upon the Special Facts and Circumstances of this Case under the authority of the Courts to Toll Subject Matter Jurisdiction Time Limits.

The Court of Appeals adopted Respondents' position on the Motion to Dismiss that the Notice of Appeal was filed more than 30 days from the electronic filing of the Notice of Electronic Filing regarding the summary judgment order. Notwithstanding the filing of a motion for reconsideration, the Court of Appeals Order concluded that the motion for reconsideration was ultimately untimely and did not operate to toll the time for filing a notice of appeal. As referenced above, this is a case in which Appellant's counsel got direction from the Greenville County Clerk's office on June 28 regarding the time computation for the filing of a motion for reconsideration prior to filing a notice of appeal. The guidance is corroborated by an affidavit from Sandra Mansel, Greenville County Clerk of Court's Administrative Coordinator. (Attachment 2 at Exhibit 1.)

This Court applies the equitable tolling of time limitations where the tolling of time limitations is justified under the circumstances. *Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*,

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[3] There is no doubt that there are many issues identified in the transition from traditional filing to electronic filing. As a county in the Electronic Filing Pilot Program, the Greenville County Clerk's office has been a great partner with the Bar in identifying issues and encouraging practitioners to contact the Clerk's office for assistance. In addition to the training program there is a continuing assessment and dialogue as the transition to electronic filing occurs. Undersigned counsel called the Clerk's office on June 28 to address what was a novel issue under electronic filing on how to calculate time under the electronic filing system for a motion for reconsideration prior to appeal. The guidance stating that the five (5) day mailing rule applied was utilized in calculating a July 7 filing date of the motion for reconsideration.

386 S.C. 108, 116-17, 687 S.E.2d 29, 33 (2009). This Court states that although equitable tolling is a doctrine that should be used sparingly, the interests of justice may compel it to be used. *Id.* In *Hooper*, this Court recognized that "[e]quitable tolling is judicially created; it stems from the judiciary's inherent power to formulate rules of procedure where justice demands it." (citing and quoting *Rodriguez v. Superior Court,* 176 Cal. App. 4th 1461, 98 Cal. Rptr. 3d 728 (Ct. App. 2009)("Where a statute sets a limitation period for action, courts have invoked the equitable tolling doctrine to suspend or extend the statutory period 'to ensure fundamental practicality and fairness.'" *Id.* at 736 (citation omitted))). This Court also reviewed the application of equitable tolling throughout the United States and held that "[i]n our view, the situations described above do not constitute an exclusive list of circumstances that justify the application of equitable tolling. 'The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other.'" *Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 386 S.C. 108, 116-17, 687 S.E.2d 29, 33 (2009)(quoting *Hausman v. Hausman,* 199 S.W.3d 38, 42 (Tex. App. 2006)). In reference to the difference between estoppel and equitable tolling, this Court referenced the Florida case of *Machules v. Dep't of Admin.,* 523 So. 2d 1132, 1134 (Fla. 1988) and cited it for the proposition that "the doctrine of equitable tolling, unlike equitable estoppel, does not require deception or misrepresentation by the defendant; rather, it serves to ameliorate the harsh results that sometimes flow from a strict, literalistic application of administrative time limits." *Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 386 S.C. 108, 116-17, 687 S.E.2d 29, 33 (2009). This Court recognizes in the context of a Rule 59 motion and filing a motion for issue preservation that "[w]e strive to avoid

an interpretation of procedural rules which routinely would place a party between the proverbial rock and a hard place." *Elam v. S.C. DOT*, 361 S.C. 9, 24-25, 602 S.E.2d 772, 780-781 (2004).

The circumstances of this case justify equitable tolling based upon the guidance given on June 28 from the Clerk as well as the importance of the issues in this appeal that deal with a summary judgment order that (1) makes a fundamental ruling that an amendment to the Operating Agreement did not violate a covenant of good faith and fair dealing because the amendment was the exercise of a contract right; (2) disregards the fact that a covenant of good faith and fair dealing is an integral part of limited liability company act that protects the membership interest of a minority member; (3) disregards the covenant of good faith and fair dealing as a statutory and contractual obligation in the Operating Agreement; (4) disregards that a decision to amend the Operating Agreement must be exercised by the members in good faith and fair dealing; (5) authorizes a majority to take targeted action against a minority member of a limited liability company; (6) allows an amendment to the Operating Agreement that violates the covenants of good faith and fair dealing as well as fiduciary duties owed to her in the application of the amendment; (7) fails to address the litany of problems in the terms of amendment as the structure of the forced sale provision of the amendment is applied to Appellant; (8) improperly applies corporate shareholder cases to determine that a buyout of Appellant's membership interest is an appropriate remedy for her in the case; (9) results in a judicial expulsion of a member in a limited liability company that has been a model member for over twenty (20) years only because the other members amended to get her out of the LLC; (10) denies a minority member of a limited liability company the protection of the court that she petitioned to protect her membership interest; (11) incorrectly applies corporate law to a limited liability case where partnership law principles apply to the relationship among members; (12) applies a fundamental ruling to dismiss

Appellant's tort causes of action as derivative causes of action; (13) disregards material issues of disputed fact as allegedly barred by the parol evidence rule that "do not matter"; (14) disregards fiduciary standards and takes a strict contractarian stance on the ability of members to amend an Operating Agreement; (15) bars evidence regarding the intent of the original Operating Agreement prior to the amendment that showed that the intent of the members was to not have a forced sale of a member interest; (16) improperly employs the parol evidence rule to bar evidence opposing summary judgment; (17) makes rulings on ongoing discovery that are unnecessary and are not supported by the record in the case.[4] These are issues that need the review of our appellate courts and this Court. There are little to no reported decisions on the operation of the limited liability company act and interpretations of the duties in llc operating agreements. These are important issues for judicial review.

This Court in *Hooper* recognized that "South Carolina law provides for tolling mechanisms '[i]n order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations.'" *Hooper*, 386 S.C. at 15, 687 S.E.2d at 32 (2009) (quoting 54 C.J.S. *Limitations of Actions* § 115 (2005)). Likewise the *Hooper* court recognized that "'Equitable tolling is a nonstatutory tolling theory which suspends a limitations period.'" *Id.* (quoting *Ocana v. Am. Furniture Co.*, 2004 NMSC 18, 135 N.M. 539, 91 P.3d 58, 66 (N.M. 2004)). In the circumstances of this case, Appellant's counsel thought that the motion for reconsideration was timely filed based upon guidance obtained from the Greenville County Clerk's office on June 28. Accordingly, the

[4] Each of these issues are identified and addressed in a seven (7) page motion for reconsideration filed on July 7. (Attachment 2 at Exhibit 2.) As indicated by the motion for reconsideration, these are complex, novel, business issues regarding the duties and relationships between members in a limited liability company.

tolling of the time for the notice of appeal would have been accomplished by Rule 203(b)(1), SCACR. Based upon the authority granted by the Supreme Court in *Hooper,* this appeal presents one of those rare circumstances where this Court should apply equitable tolling.

In fact, the circumstances of this case present a scenario where Respondents could lie in wait until the passage of the time for a notice of appeal and call "time," even when the Respondents' counsel was aware that the motion for reconsideration was filed on July 7, 2017, engaged with the circuit court when the circuit court allowed Respondents' counsel an opportunity to reply or address issues contained in the motion for reconsideration on July 17, and ultimately declined, said that no reply was necessary, but they would address an issue if the court felt it was needed. (Attachment 2 at Exhibit 3.) The scenario adopted by the Court of Appeals in the Order dismissing the appeal allows the Respondents to not raise the alleged timeliness of the motion for reconsideration before the circuit court while under consideration by the circuit court, wait the motion out until it is denied, and then raise it as an issue after the time to appeal has elapsed. Petitioner/Appellant submits that it would be inequitable to allow the Respondents to benefit from failing to object to the timeliness of the motion for reconsideration when the matter was under the review by the circuit court and especially when the circuit court invited a reply by the Respondents. Essentially, Respondents should have been estopped from bringing the motion to dismiss or they should be deemed to have waived the timeliness issue in their correspondence with the circuit court on July 17. As the date of the notice of appeal without tolling would be July 24, Appellant would have received notice from Respondents of their position that the time period was not tolled for the motion for reconsideration and Appellant's could have taken action to address or place the issue before the circuit court, or if Respondents had moved to dismiss the motion for reconsideration it would have given Appellant's counsel the opportunity to file a notice of appeal out of caution

within the unquestionable thirty (30) day window for the appeal alleged by Respondents. A motion to dismiss the motion for reconsideration or notice that Respondents viewed the motion for reconsideration as untimely would have given Appellant's counsel the right to go ahead and file the notice of appeal within the time computation urged by Respondents. The Order of the Court of Appeals allows Respondents to sit on the motion to dismiss and call "time" after the fact and after a notice of appeal is filed on July 28, the transcript is ordered, the transcript is received, and Appellant is in the process of preparing initial briefs to this Court. Even if the court were to allow Respondents to sit on a motion to dismiss or an objection to a motion for reconsideration due to timeliness and not subject the Respondents to estoppel or waiver, Petitioner/Appellant maintains that the circumstance of this case are extraordinary and that the filing of the motion for reconsideration and the filing of the notice of appeal should be ruled as timely under the application of the equitable tolling power of the courts. Equitable tolling may be applied by the courts, the facts of this appeal establish justification for the use of equitable tolling, and equitable tolling is justified in this appeal. *See Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009). The courts recognize other unique situations that the tolling of the time to file a notice of appeal is appropriate.

i. *The Courts Allow Wrongly Captioned and Titled Motions to Operate as Rule 59(e) Motions that Toll the Time Period to File a Notice of Appeal*

This Court has held that motions for reconsideration and other post-trial motions were timely filed when the motion was incorrectly labeled or titled. *Lucey v. Meyer*, 401 S.C. 122, 131-33 (Ct. App. 2012); *see Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 27, 609 S.E.2d 506, 510 (2005) (holding it was proper to treat plaintiff's written motion as a Rule 59(e) motion to the extent the motion addressed the trial court's evidentiary rulings, which the plaintiff challenged in

her briefly stated oral motion at the end of the trial, even though it was erroneously captioned as a motion for new trial). In *Lucey v. Meyer*, 401 S.C. 122, 131-33 (Ct. App. 2012), this Court of Appeals allowed a motion filed and captioned as a Rule 59(a) motion to be construed as a Rule 59(e) motion for reconsideration that tolled the time period to file a notice of appeal. The court held that the filing of the motion wrongly captioned as a Rule 59(a) motion was timely and tolled the time to file a notice of appeal, the notice of appeal filed by the Appellant law firm after the entry of judgment was timely, and that there was no prejudice to the adverse party as the trial court allowed the adverse party a period of ten days to file any applicable arguments after the hearing on the wrongly captioned motion. *Lucey*, 401 S.C. at 133. Basically, the Court has held that a wrongly captioned motion, which necessitated a hearing and additional court involvement did toll the time period for filing a notice of appeal and that a notice of appeal filed after entry of an initial judgment was timely due the court applying tolling for the wrongly captioned motion under Rule 59. *Id.*

The *Lucey* court analyzed and explained that "'A timely post-trial motion, including a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP, stays the time for an appeal for all parties until receipt of written notice of entry of the order granting or denying such motion.'" *Camp v. Camp*, 386 S.C. 571, 575, 689 S.E.2d 634, 636 (2010) (quoting *Elam v. South Carolina Dep't of Transp.*, 361 S.C. 9, 15, 602 S.E.2d 772, 775 (2004)); Rule 203(b)(1), SCACR; Rule 59(f), SCRCP. In reviewing the wrongly captioned motion, the court reviewed the applicable Rules of Civil Procedure and although the rules required particularity the court stated that "'[b]y requiring notice to the court and the opposing party of the basis for the motion, rule 7(b)(1) advances the policies of reducing prejudice to either party and assuring that the court can comprehend the basis of the motion and deal with it fairly.'" *Id.* (quoting *Calderon v. Kansas Dep't of Soc. & Rehab.*

Servs., 181 F.3d 1180, 1186 (10th Cir. 1999)). However, when neither party is prejudiced and the court is able to deal fairly with a motion for reconsideration, applying an overly technical application does not serve the purpose of Rule 7(b)(1), SCRCP. *Id.* at 575-76, 689 S.E.2d at 636-37. Therefore, the Court has recognized that when there is not prejudice, and a court deals fairly with a motion for reconsideration, technical applications of Rules of Civil Procedure may not meet the purpose of the Rules in certain circumstances.

Similarly the facts of this appeal indicate no prejudice to Respondents. The Respondents' participation in the motion for reconsideration removes any prejudice. In addition, the June 28 guidance regarding the application of the five (5) day mail rule for the time computation for filing a Rule 59 motion indicates that Petitioner/Appellant is the only party to be prejudiced is the time for appeal is not tolled. Petitioner/Appellant filed the motion for reconsideration within the time computation provided by the Clerk of Court and the time for filing an appeal should be tolled under the exception recognized in *Lucey v. Meyer, 401 S.C. 122, 131-33* (Ct. App. 2012).

ii. *The Courts have Allowed Parties to be in noncompliance with the Ten (10) Day Rule contained in Rule 59(g) and Tolled the Period for a Notice of Appeal.*

The courts have also granted tolling in a situation where a party did not comply with Rule 59(g) by providing a copy of a Rule 59 filing to the judge within ten (10) days after the filing of the motion. *Gallagher v. Evert*, 353 S.C. 59, 63-64, 577 S.E.2d 217, 219 (Ct. App. 2002). Rule 59(g) provides:

> **Judge to be Provided with Copy**. A party filing a written motion under this rule shall provide a copy of the motion to the judge within ten (10) days after the filing of the motion.

SCRCP 59(g). In the *Gallagher* case, the Court did not apply Rule 59(g) to dismiss the appeal even though the Rule was not met. *Gallagher v. Evert*, 353 S.C. 59, 63-64, 577 S.E.2d 217, 219

(Ct. App. 2002). In *Gallagher* the circuit court judge issued an order on May 26, 2000. *Id.* at 62, 218. A motion to alter or amend was served in the matter under Rule 59(e). *Id.* A copy of the motion was provided to the circuit court on December 12, 2000. *Id.* From the date of the order to the date of providing the copy to the judge—200 days passed. *Id.* Respondents contended that because the Appellant did not meet the requirement of Rule 59(g) that a copy of the motion *shall* be provided to the judge within ten (10) days of filing a 59(e) motion, that the time for appeal was not stayed and that the appeal was untimely under SCACR 203. *Id.* Judge Hearn's decision in *Gallagher* recognized that the circuit judge "went forward and considered the matters presented in Gallagher's memorandum in support of the motion." *Id.* Indeed, Judge Hearn recognized that there was no error in deciding the motion despite the noncompliance with Rule 59(g). *Id.* The circuit court denied the motion on December 27, 2000—15 days following receipt of the motion and approximately 215 days from the original order. *Id.* Judge Hearn's opinion stated that "[a]fter the circuit court denied the motion, only twenty days passed before Gallager filed his notice of appeal on January 16, 2001, thus Gallagher complied with Rule 203(b), SCACR." *Id.* at 64.

In the pending appeal, only seven (7) days passed following the circuit court's denial of the motion for reconsideration. As opposed to the *Gallagher* case, only 36 calendar days elapsed from the Notice of Electronic Filing until the filing of the notice of appeal. In that time period a motion to reconsider was filed, considered by the circuit court, an opportunity for reply was given to Respondents, and the circuit court denied the motion to reconsider. Based upon the *Gallagher* decision, Petitioner/Appellant requests that this Court toll the time to appeal based upon the motion to reconsider, exercise jurisdiction over the appeal, and overturn the Order of the Court of Appeals.

CONCLUSION

This appeal presents a limited circumstance in which the time limitations to file an appeal should be tolled by Rule or by equitable tolling applied by the Courts. In contrast to the situations where the Court of Appeals dismisses appeals for jurisdictional reasons, the facts of this case indicate an issue with a rule application in the transition from traditional filing to electronic filing of cases. Likewise, this is an appeal where a time computation for a filing of a motion for reconsideration was sought with assistance from the Clerk of Court's office and Petitioner's Counsel utilized that guidance in filing the motion for reconsideration. The motion for reconsideration balanced the competing issues recognized by the *I'On, LLC* principles of issue preservation and a seven (7) page motion for reconsideration was filed on July 7. While Respondents claimed on motion to the Court of Appeals that the motion for reconsideration was not timely filed, they did not raise the issue during the pendency of the motion for reconsideration and the circuit court ultimately denied the motion for reconsideration on July 21. The notice of appeal was filed seven (7) days later on Friday, July 28. A date that Petitioner's counsel felt was at least 23 days early under the Appellate Rules. In conjunction with moving the appeal forward promptly, the transcript in this case was ordered in July and received in early August.

The Supreme Court recognizes that the interests of justice require that there be flexibility in our rules to meet exigencies and that relief should be granted to prevent a wrong or to "'ameliorate the harsh results that sometimes flow from a strict, literalistic application of administrative time limits.'" *Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 386 S.C. 108, 116-17, 687 S.E.2d 29, 33 (2009)(quoting *Machules v. Dep't of Admin.*, 523 So. 2d 1132, 1134 (Fla. 1988)). The result of the Order of the Court of Appeals is that the appeal should be dismissed because the motion for reconsideration did not toll the time to file the notice of appeal. Therefore the notice of appeal should have been filed on Monday, July 24. Absent from the Order is a

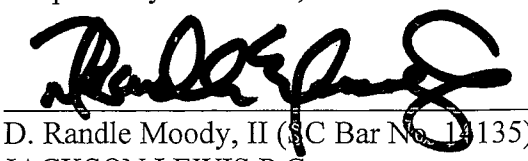
discussion or consideration of the exceptional and special circumstances present in the date computation and the issues encountered in the transition nature of our filing program to electronic filing. The Order does not mention the guidance received by Appellant's counsel from the Clerk of Court regarding computing time. The Order does not consider the fourteen (14) days from the filing of the motion for reconsideration until its denial on July 21. The Order does not consider the fact that no objection to the timeliness of the motion for reconsideration was raised. The Order also disregards the fact that the circuit court considered and sought input on the motion for reconsideration from Respondents counsel. Lastly, the Order, due to the operation of the rules allows Respondents to wait out the time period for the filing of a notice of appeal (without tolling the time with a timely filed Rule 59 motion) to call "time" after the fact.

This is an appeal that presents important issues for review by the Appellate courts in our state dealing with complex business issues and governance of limited liability companies. The Court of Appeals dismissed the appeal because the notice of appeal was filed on Friday, July 28—only four (4) days after the date for filing if tolling by rule did not apply to the motion for reconsideration.

Based upon these limited circumstances of this appeal and the above reasons, Appellant respectfully requests that the Supreme Court exercise its tolling powers, hold that the time was tolled for filing an appeal based upon the special circumstances, and assert jurisdiction over the appeal to determine if the circuit court correctly applied the law regarding limited liability company governance.

For the reasons stated, petitioner/appellant respectfully asks the Court to grant the petition for writ of certiorari or motion for extraordinary writ regarding jurisdiction of appeal and consider this appeal under the jurisdiction of the Supreme Court of South Carolina

Respectfully submitted,



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ATTORNEY FOR PETITIONER/APPELLANT

November 16, 2017

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Case No. 2016-CP-23-03431
Appellate Case No. 2017-001637

Phyllis B. Thomas,

Petitioner/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.

PROOF OF SERVICE

I certify that I have served a copy of **Petition For A Writ Of Certiorari Or Motion For Extraordinary Writ Regarding Jurisdiction Of Appeal** by UPS mail, on November 16, 2017, addressed to its attorney of record:

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1231 Gervais Street
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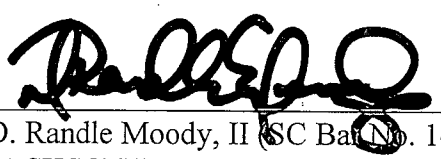
Respectfully submitted,



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November 16, 2017

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November 16, 2017

VIA UPS (Signature Required)

South Carolina Supreme Court
Supreme Court Building
1231 Gervais Street
Columbia, SC 29201

RE: Phyllis B. Thomas v. Barbara R. Merline
Appellate Case No. 2017-001637

Dear Clerk of Court:

Enclosed for filing is an original and seven copies of a *Petition For A Writ Of Certiorari Or Motion For Extraordinary Writ Regarding Jurisdiction Of Appeal* and *Appendix*, as well as a $100 check for fees. Please return a stamped copy to me, using the enclosed self-addressed, stamped envelope.

If you have any questions regarding this, please contact me at your convenience.

Sincerely,

JACKSON LEWIS P.C.

D. Randle Moody, II

DRM/msw
Enclosures

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