THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Phyllis B. Thomas
*Petitioner/Appellant*

v.

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



Case No. _____
Appellant Case No. 2017-001637
State Court Case No. 2016-CP-23-03431

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**APPENDIX**

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D. Randle Moody, II
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*Attorneys for Petitioner/Appellant*

INDEX

# The South Carolina Court of Appeals

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.

Appellate Case No. 2017-001637

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ORDER

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On June 22, 2017, the circuit court granted summary judgement in Respondents' favor and filed the order through the South Carolina Electronic Filing System. On the same day, the parties all received the automatically generated Notice of Electronic Filing (NEF). On July 7, 2017, Appellant filed a Rule 59(e), SCRCP, motion for reconsideration, which was denied. On July 28, 2017, Appellant served her notice of appeal. Respondents have now filed a motion to dismiss. Respondents argue this court lacks jurisdiction to consider the appeal because Appellant's untimely motion for reconsideration did not toll the time for service of the notice of appeal. This court agrees, and the motion to dismiss is granted. *See* Rule 203(b)(1), SCACR ("A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment. When a *timely* motion for judgment n.o.v. (Rule 50, SCRCP), motion to alter or amend the judgment (Rules 52 and 59, SCRCP), or a motion for a new trial (Rule 59, SCRCP) has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion." (emphasis added)); *In re S.C. Elec. Filing Policies & Guidelines*, 415 S.C. 1, 10–11, 780 S.E.2d 600, 605 (2015) ("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."); *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 14–15, 602 S.E.2d 772, 775 (2004) ("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."). The remittitur will be sent as required by Rule 221(b), SCACR.

Because this appeal is dismissed based on lack of appellate jurisdiction, this court will take no action on Appellant's motion for stay or injunction.

Paul G. Short, Jr.
FOR THE COURT

Columbia, South Carolina

cc:
D. Randle Moody, II, Esquire
Thomas L. Stephenson, Esquire
Jeffrey P. Dunlaevy, Esquire

FILED
October 18, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

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Case No. 2016-CP-23-03431

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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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**MOTION TO DISMISS APPEAL**

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Respondents Barbara R. Merline, Diane P. Meacham, MHA's LLC, TAXLAW, LLC, David A. Merline, Jr., Keith G. Meacham and Merline & Meacham, P.A., hereby move to dismiss this appeal, pursuant to Rule 240, South Carolina Appellate Court Rules. As reflected in the Notice of Appeal, appended Memorandum, and Exhibits, this Court lacks jurisdiction over this appeal because the Notice of Appeal was not timely filed. Respondents respectfully submit that this appeal must be dismissed.

Respectfully submitted,

Thomas L. Stephenson (S.C. Bar No. 5332)
Jeffrey P. Dunlaevy (S.C. Bar No. 16978)
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tom@stephensonmurphy.com
jeff@stephensonmurphy.com

*Counsel for Respondents*

August 16, 2016

Other Counsel of Record:

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15 South Main Street, Suite 700
Greenville, SC 29601

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

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Case No. 2016-CP-23-03431

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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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**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS APPEAL**

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Respondents Barbara R. Merline, Diane P. Meacham, MHA's LLC, TAXLAW, LLC, David A. Merline, Jr., Keith G. Meacham and Merline & Meacham, P.A., hereby submit this memorandum pursuant to Rule 240(c)(2), South Carolina Appellate Court Rules.

**BACKGROUND**

The Honorable William H. Seals, Jr., granted summary judgment to Respondents on all claims in this case on June 22, 2017. (Notice of Appeal.) The order granting summary judgment was filed that morning via the trial court's ECF system. (6/22/17 Order (filed with

Notice of Appeal).) All parties were notified that day via ECF. (Exh. A – 6/22/17 Notice of Electronic Filing.)

Appellant filed and served a motion for reconsideration, pursuant to Rule 59(e), South Carolina Rules of Civil Procedure, on July 7, 2017. (Notice of Appeal; Exh. B – Rule 59(e) Motion.) The trial court denied that motion in an order filed July 21, 2017. (Notice of Appeal; Exh. C – 7/21/17 Order.) The Notice of Appeal in this case was filed and served on July 28, 2017. (Notice of Appeal.)

**DISCUSSION**

This Court lacks jurisdiction over this appeal because Appellant's Notice of Appeal is untimely. Appellant filed an untimely Rule 59(e) motion in the trial court. Because it was untimely, that motion did not toll the thirty-day deadline for filing the Notice of Appeal, and Appellant missed the deadline. This appeal therefore must be dismissed. *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 deadline for serving a Notice of Appeal is as follows:

> A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment. When a timely . . . motion to alter or amend the judgment . . . has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion.

Rule 203(b)(1). The Rule establishes that in order for a Rule 59 motion to toll the thirty-day deadline, it must be timely. *Id. See also, Elam v. S.C. DOT*, 361 S.C. 9, 602 S.E.2d 772 (2004).

The ten-day deadline for filing a Rule 59(e) motion, like the deadline for filing a Notice of Appeal, runs from receipt of written notice of the original order. SCRCP 59(e) ("A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order."). Appellant received written notice of the entry of the original order via electronic mail on June 22, 2017. (Exh. A – Notice of Electronic Filing.) She served her motion on July 7, 2017. (Notice of Appeal; Exh. B – Rule 59(e) Motion, 7/7/17.) This was fifteen days after written notice of entry of the original order. As such, it was five days past Rule 59(e)'s ten-day deadline, and thus untimely.

Appellant is not saved by the five-day period added to certain deadlines pursuant to Rule 6(e) of the South Carolina Rules of Civil Procedure. Rule 6(e) only applies to deadlines that begin running from the date of service. By contrast, Rule 59(e) runs not from service but from receipt of written notice of the entry of the order. *See also,* SCRCP 6(b) ("The time for taking any action under [Rule 59] may not be extended except to the extent and under the conditions stated in [the Rule itself]".).

If there was any question about the inapplicability of Rule 6(e) to Rule 59 motions in the context of electronic filing and service, the South Carolina Supreme Court resolved it by adopting the *Electronic Filing Policies and Guidelines*. 415 S.C. 1, 780 S.E.2d 600 (2015). The following is the rule for deadlines running from service:

> **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.

*In re S.C. Elec. Filing Policies & Guidelines*, 415 S.C. 1, 8, 780 S.E.2d 600 (2015). The

very same guideline establishes a different rule for deadlines based on receipt:

> **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.

*In re S.C. Elec. Filing Policies & Guidelines*, 415 S.C. 1, 10-11, 780 S.E.2d 600 (2015). *See also, 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) (explaining that "receipt of written notice" of entry of an order occurs when email notice is received); *Witzig v. Witzig*, 325 S.C. 363, 366, 479 S.E.2d 297, 299 (Ct. App. 1996) ("Rule 6(e), SCRCP, does not provide an additional five days to file a notice of intent to appeal. . . . Rule 6(e) is a pleadings rule and applies only when service is effective upon mailing.").

Pursuant to the clear terms of the *Electronic Filing Policies and Guidelines*, Appellant received written notice of the original order on the day it was filed, June 22, 2017. (Exh. A – ECF Notice, 6/22/17.) She admits she filed a Rule 59 motion fifteen days later and the Notice of Appeal thirty-six days later. (Notice of Appeal.) Both were untimely as a matter of law. As such, this Court lacks jurisdiction over this appeal.

## CONCLUSION

For the reasons set forth herein, and based on the undisputed date of receipt of the relevant order, Respondents respectfully request that this appeal be dismissed for lack of jurisdiction.

Respectfully submitted,

Thomas L. Stephenson (S.C. Bar No. 5332)
Jeffrey P. Dunlaevy (S.C. Bar No. 16978)
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tom@stephensonmurphy.com
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*Counsel for Respondents*

August 16, 2016

Other Counsel of Record:

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

# EXHIBIT A

| | |
|---|---|
| **From:** | efiledonotreply@sccourts.org |
| **To:** | Jeff P. Dunlaevy |
| **Cc:** | Lisa |
| **Subject:** | Courtesy NEF RE: 2016CP2303431 |
| **Date:** | Thursday, June 22, 2017 9:03:18 AM |

****** IMPORTANT NOTICE - READ THIS INFORMATION *****

NOTICE OF ELECTRONIC FILING [NEF]

**A filing has been submitted to the court RE:** 2016CP2303431

| | |
|---|---|
| **Official File Stamp:** | 06-22-2017 09:02:51 AM |
| **Court:** | CIRCUIT COURT<br>Common Pleas<br>Greenville |
| **Case Caption:** | Phyllis B Thomas vs. Barbara R Merline , defendant, et al |
| **Document(s) Submitted:** | Order/Summary Judgment |
| **Filed by or on behalf of:** | William H. Seals |

This notice was automatically generated by the courts auto-notification system.

**The following people were served electronically:**

Jeffrey P. Dunlaevy for Barbara R Merline et al
D. Randle Moody, II for Phyllis B Thomas
Blaney A. Coskrey, III
Thomas L. Stephenson for Barbara R Merline et al

**The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:**

William M. Grant, Jr.

# EXHIBIT B

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF GREENVILLE | ) | C.A. 2016-CP-23-03431 |
| Phyllis B. Thomas, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| Barbara R. Merline, Diane P. Meacham, MHA'S LLC, TAXLAW, LLC, David A. Merline, Jr., Keith G. Meacham and Merline & Meacham, P.A., | ) | |
| | ) | |
| | ) | |
| Defendants. | ) | |
| | ) | |

**PLAINTIFF'S MOTION FOR RECONSIDERATION**

Phyllis Thomas ("Thomas") moves this Honorable Court, pursuant to Rule 59(e), SCRCP, for reconsideration of this Court's Order granting Summary Judgment to Defendants.

The Order entered by this Court equates to a judicial approval of unfair action by a majority vote of limited liability company membership shares against a member holding a substantial interest in the limited liability company. In reaching the conclusions in the Order, the Order disregards the statutory and contractual obligations of the majority to operate and act in accordance with the covenant of good faith and fair dealing and other fiduciary duties.

Plaintiff requests that the Court reconsider its ruling and the application of law concluding that the majority could pass an amendment to the Operating Agreement that is specifically targeted at a minority member to force that member to divest her interest in the limited liability company. The remainder of the Order is derivative of this finding/holding and Plaintiff requests that the Court reconsider its ruling granting summary judgment for the entire matter.

**I. The Covenant of Good Faith and Fair Dealing and Fiduciary Duties Among Members Prevents Unfair and Bad Faith Actions by the Majority and the Decision to Amend the Operating Agreement to Force a Buy Out Violates those Duties.**

The Court concluded that "the right to pass . . . an amendment was expressly included in the Operating Agreement" and that an "amendment does not violate the covenant of good faith and fair dealing because the Member Defendants merely did "what the provisions of the contract expressly gave [them] the right to do.'" (citations omitted) (Order at 5.) Plaintiff respectfully requests that the Court reconsider this ruling. This is a fundamental ruling addressing the claims of Plaintiff Phyllis Thomas. Absent from the discussion in the Order is the fact that the covenant of good faith and fair dealing is an integral aspect of limited liability company ("LLC") statutory law and must be followed for a minority member of an LLC to have protection. The approach taken by the Order defaults to the arguments of Defendants that because the TAXLAW, LLC Operating Agreement allows for an amendment by majority vote, the majority may adopt an amendment that permits the purchase of a minority member's interest in the LLC. The Order's conclusion that good faith and fair dealing does not apply because the Operating Agreement allows an amendment ignores the fact that the duty of good faith and fair dealing is set forth in the TAXLAW, LLC Operating Agreement and is required by the statute. Moreover, taken to its logical conclusion, the Order would allow the majority the right to adopt any provision.

The ruling does not encompass the complexities inherent in the relationship between LLC members. This ruling disregards the statutory obligation of LLC members to one another to operate in good faith and fairly with one another and the LLC. S.C. Code Section 33-44-409(d) imposes the obligation of good faith and fair dealing in the exercise of any rights that are owed to the LLC and other members. The Operating Agreement states in Section 6.3 titled Fiduciary Duties that "Each Member shall discharge his duties and exercise any of his rights consistently

with the obligation of good faith and fair dealing which he owes to the Company and other members." The *decision* to amend the Operating Agreement had to be exercised by the members with good faith and fair dealing. Therefore, the ruling that the Member Defendants exercised a "clear contractual right" disregards Section 6.3 and the statutory responsibility of Members to one another under South Carolina law. (Order at 5.) Just because the right to amend may be present in the Operating Agreement does not mean that the right to amend may be exercised without good faith and fair dealing. Phyllis Thomas maintains that the decision to amend the Operating Agreement was not taken in good faith and was unfair in that it targeted a minority member to force a sale of her membership interest. There is no clear contractual right for Member Defendants to take targeted action against another member who had been a model member. Targeting a member just to remove them from the limited liability company violates the covenant of good faith and fair dealing. Phyllis Thomas respectfully requests that the Court reconsider this ruling.

**II. The Application of the Amendment is Unfair and Violates the Covenant of Good Faith and Fair Dealing and Fiduciary Duties.**

Phyllis Thomas addressed on brief the problems and unfair nature of the Second Amendment and how it may be applied unfairly in breach of the covenant of good faith and fair dealing and in breach of the fiduciary duties owed to her. Phyllis Thomas maintains that the *application* of the Second Amendment, in addition to the *decision* to amend the Operating Agreement to include a forced sale provision violates the duties owed to her as a member. The Second Amendment is replete with a litany of problems identified by Phyllis Thomas. Phyllis Thomas presented Requests to Admit that addressed many of the problems and issues with the application of the Second Amendment and how the application of the Second Amendment violated the duties owed to her by the other members. Those problems are not addressed in the Order. The issues present in the application of the Second Amendment are important and Phyllis Thomas

respectfully requests that the Court reconsider its decision and address the application of the Second Amendment to Phyllis Thomas and the terms applied against her by the majority.

Defendants argued that Phyllis Thomas would allegedly receive "fair value" for her membership interest and argued that a purchase of her membership interest would be the remedy in a judicial action.[1] The Order adopts those arguments and concludes that a fair market buyout is an appropriate remedy. We respectfully request that the Court reconsider this holding and the application of corporate shareholder cases to a limited liability company member case.

In supporting the holding that a fair market buyout of the Second Amendment is an appropriate remedy for Phyllis Thomas, the Order cites South Carolina authority for shareholder cases. (Order at 6.) The situation in corporate cases is not applicable here because shareholder oppression cases are brought by shareholders who had trapped investments and could not get out of the company. In this case, Phyllis Thomas has been targeted to be forced out of a limited liability company for which she has been a model member for almost twenty (20) years. Indeed, the Order itself adopts the position that the majority simply wanted her out after the DART, LLC real property transaction. (Order at 3.) Therefore, in this case Phyllis Thomas is targeted for removal and is being retaliated against following a transaction in an unrelated LLC. That transaction, incidentally, is one in which all the parties admit was done following South Carolina statutory law. Phyllis Thomas is not in a trapped investment where she needs the assistance of the Court in ordering a fair market value. Phyllis Thomas is a substantial owner of a valuable long term investment that is appreciating. Phyllis Thomas' situation is very different from a shareholder oppression case and is essentially the inverse as she seeks the protection of the Court in order to

[1] In oral argument the issue of valuation calculations and the exclusion of goodwill in the calculation of "fair value" were addressed. This is an issue that goes to the "fair value" matter and Phyllis Thomas disputes that fair value is present when goodwill is excluded by the Second Amendment from the calculation of her membership interest.

protect her against unfair expulsion and removal. Based upon the Order, however, a minority member has no protection from the majority because if the majority wants a member out they can basically engage in oppression.

In sum, the Order does not correctly apply the law. The Order cites corporate law shareholder oppression cases that are not applicable to nor do they apply to this case. South Carolina limited liability companies are based upon partnership law and not corporate law. Therefore, the Order's reliance on the body of law arising in corporate shareholder cases misses a key distinction and legally significant component of the fiduciary relationship that exists between and among the members of a limited liability company. Duties in a limited liability company are akin to the duties among partners. These duties generally do not exist between shareholders. Plaintiff respectfully requests that the Court reconsider the application of the law to support the holdings of the Order.

### III. The Parol Evidence Rule Should Not be Utilized to Bar Evidence Regarding the Intent and Meaning of the Operating Agreement That Did Not Contain a "Forced Sale" Provision.

It is recognized in South Carolina that "where a contract is silent as to a particular matter and because of the nature and character of the transaction an ambiguity arises, parol evidence may be admitted in order to supply a deficiency in the language of the contract and to establish the true intent and meaning of the parties." *U.S Leasing Corp. v. Janicare*, 364 S.E.2d 202, 205, 294 S.E. 2d 312 (S.C. App. 1988). The Order bars a number of alleged disputes of fact on the basis that the disputes of fact are barred by the parol evidence rule and "therefore do not matter." (Order at 8-9.) Plaintiff respectfully requests that this Court reconsider this holding.

The Order takes a strict contractarian stance as to the ability to amend and those matters are addressed above. In addressing those matters, the Court addresses a non-related transaction

regarding DART, LLC as a basis for the amendment (Order at 3.) but specifically excludes evidence related to the actual Operating Agreement and the fact that a forced sale provision was not included in the original Operating Agreement. Interestingly enough, the Order addresses the fact that the Operating Agreement basically required an amendment "to authorize a buyout." (Order at 8.) If an amendment was required to afford a buyout in order for the majority to effect a forced sale against Phyllis Thomas, how can the intent of the original Operating Agreement specifically excluding such a forced sale provision be barred as evidence to grant summary judgment? The evidence of disputed facts offered in opposition to the summary judgment is not parol evidence, it is merely evidence establishing that the omission of a forced sale provision in the Operating Agreement was intentional and was meant by the parties to be excluded. *Cf. U.S Leasing Corp. v. Janicare*, 364 S.E.2d at 205. There is no ambiguity as the intent was to not force a sale of a member interest. Plaintiff is not attempting to add to the Operating Agreement but is merely explaining why the document says what it says and why it did not include a forced sale provision. Therefore, the parol evidence rule does not apply to the evidence opposing summary judgment. Accordingly, Plaintiff respectfully requests the Court to reconsider the exclusion of the disputed facts referenced in the Order using the parol evidence rule.

**IV. The Court's Rulings Regarding Discovery Are Not Necessary.**

The Order on page 10 and the top of page 11 addresses findings regarding discovery and Plaintiff's opposition to summary judgment on the grounds that discovery is continuing. The Court allowed Plaintiff an opportunity to provide comments and those concerns were addressed in a letter dated June 16 to this Court. Plaintiff respectfully incorporates those comments and concerns into this Motion and reiterates that the holding of the Court in closing discovery is not necessary in

light of the circumstances present in this case. Plaintiff respectfully requests that the Court reconsider its holding regarding discovery and summary judgment.

**V. The Order Addresses Derivative Claims Justifying Summary Judgment.**

The Order addresses Plaintiff's claims as derivative of the claim that the Operating Agreement was wrongfully amended. Therefore, Plaintiff's claims are dismissed on summary judgment largely due to the Court's holding that the Second Amendment was proper and lawful. As addressed previously in this Motion, Plaintiff respectfully requests the reconsideration of this fundamental issue and as a result requests reconsideration of the summary judgment dismissal of Plaintiff's claims for Breach of the Good Faith and Fair Dealing, Breach of Fiduciary Duty, Tortious Interference with Contract, Aiding and Abetting the Breaches, and Civil Conspiracy.

**CONCLUSION**

For the reasons discussed above, Plaintiff Phyllis Thomas respectfully moves this Honorable Court pursuant to Rule 59 for reconsideration of this Court's Order.

Respectfully submitted this 7h day of July, 2017.

*s/ D. Randle Moody, II*
D. Randle Moody, II (SC Bar No. 14135)
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Greenville, SC 29601
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**ATTORNEY FOR PLAINTIFF**
**PHYLLIS B. THOMAS**

# EXHIBIT C

FORM 4

**STATE OF SOUTH CAROLINA**
**COUNTY OF GREENVILLE**
**IN THE COURT OF COMMON PLEAS**

**JUDGMENT IN A CIVIL CASE**
**CASE NUMBER 2016CP2303431**

| | | | |
|---|---|---|---|
| **Phyllis B Thomas** | | **Barbara R Merline**<br>**Keith G Meacham**<br>**Taxlaw Llc**<br>**Diane P Meacham** | **Merline & Meacham PA**<br>**David A Merline Jr**<br>**MHAs Llc** |
| **PLAINTIFF(S)** | | **DEFENDANT(S)** | |

**Submitted by: Clerk of Court**

**Attorney for:** ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

**DISPOSITION TYPE (CHECK ONE)**

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:** ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

**ORDER INFORMATION**

**Plaintiff's Motion for Reconsideration is hereby denied without a hearing.**

**This order** ☒ ends ☐ does not end the case.

Additional Information for the Clerk: _____

**INFORMATION FOR THE JUDGMENT INDEX**

**Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.**

| Judgment in Favor of (List name(s) below) | Judgment Against (List name(s) below) | Judgment Amount To be Enrolled (List amount(s) below) |
|---|---|---|
| | | |
| | | |
| | | |

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional

taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**
**E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.**

| Circuit Court Judge | 2157<br>Judge Code | Date |
|---|---|---|

## For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

**D. Randle Moody II** 15 South Main Street Suite 700
Greenville, SC 29601

**Thomas L. Stephenson** 207 Whitsett St Greenville, SC 29601
**Jeffrey P. Dunlaevy** 207 Whitsett Street Greenville, SC 29601

**ATTORNEY(S) FOR THE PLAINTIFF(S)**

**ATTORNEY(S) FOR THE DEFENDANT(S)**

**Court Reporter**

**Paul B. Wickensimer Greenville County Clerk Of Court - Clerk of Court**

**Court Reporter:**

**E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.**

**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

Greenville Common Pleas

**Case Caption:** Phyllis B Thomas vs. Barbara R Merline , defendant, et al

**Case Number:** 2016CP2303431

**Type:** Order/Form 4

IT IS SO ORDERED

s/ The Honorable William H. Seals Jr. #2157

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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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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**PROOF OF SERVICE**

---

I certify that I have served a copy of Respondents' Motion to Dismiss Appeal by depositing a copy of it in the United States Mail, postage prepaid, on August 16, 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,

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August 16, 2016

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

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Case No. 2016-CP-23-03431

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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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**RETURN TO MOTION TO DISMISS APPEAL**

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Appellant Phyllis Thomas files this Return to Motion to Dismiss Appeal and Memorandum in Opposition to Motion to Dismiss in accordance with Rule 240(c)(2) of the South Carolina Appellate Court Rules on the grounds that:

- 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 regarding this assistance is provided as Exhibit 1 to this Response.
- 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.
- The 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.

The tolling of time periods for filing by operation of the Appellate Rules or by operation of the equitable tolling powers of South Carolina Courts under the special circumstances of this case require that the motion for reconsideration tolled the period of time to file a notice of appeal and that the appeal was timely filed.

## FACTS AND BACKGROUND

The motion to dismiss the appeal is based on the alleged fact 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 and that the notice of appeal is timely.

There were a number of special circumstances surrounding the Order at issue in this case. 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. 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 an opportunity to

[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.

respond to the motion or submit a reply to the motion via email on Monday, July 17. 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." Exhibit 3. No mention was made of the motion for reconsideration allegedly being filed untimely or the position that they now take on the motion to dismiss. The trial judge filed a form 4 Order denying the motion for reconsideration without a hearing on Friday, July 21. 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 counsel filed the notice of appeal.

During the pendency of the motion for reconsideration, counsel ordered the transcript from the court reporter and the transcript was 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. This motion is the first and only time that an issue of an untimely motion for reconsideration was raised. The counsel in this case have longstanding professional and personal relationships and the filing of the motion to dismiss was a surprise.

After review of the Motion to Dismiss the Appeal, undersigned counsel contacted Paul Wickenshimer, the Clerk of Court for Greenville County for permission to followup 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

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. Exhibit 1.

## DISCUSSION

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 Appellant Phyllis Thomas. There is no prejudice to Defendants based upon the timeline of this appeal. Respondents were successful on this case at the summary judgment stage and Appellant's motion for reconsideration was denied.

The case involves the duties among members in a limited liability company and the amendment of an Operating Agreement that 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 Tolling of Time Periods on An Appeal Promotes Judicial Efficiency.

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." 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. Exhibit 4.

· A Notice of Appeal was filed seven (7) calendar days after the denial of the motion for reconsideration.

· The transcript was ordered in July prior to the motion for reconsideration determination.

· The transcript has been received and the Appellant is in the time period to submit an initial brief.

Notwithstanding the above facts, Respondents now file a Motion to Dismiss the Appeal on the grounds that the Motion for Reconsideration was not timely, no tolling for the filing of a Notice of Appeal occurred, and that the appeal should be dismissed.

The filing of a notice of an order electronically and the application of the rules as urged by the Defendants make for a difficult situation in this case. Under a strict 10 day rule, 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 alleged date that Respondents contend the motion was to be filed. Respondents' contentions, however, do not take into consideration the discussions or guidance obtained from the Greenville County Clerk of Court's office. The June 28 guidance obtained by 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.

### A. South Carolina Allows the Tolling of Subject Matter Jurisdiction Time Limits

Respondents' position on the Motion to Dismiss is 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, Respondents claim that the motion for reconsideration did not operate to toll the time for filing a notice of appeal because the motion for reconsideration was not timely filed. 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. Exhibit 1.

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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.

The Supreme 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.*, 386 S.C. 108, 116-17, 687 S.E.2d 29, 33 (2009). The Supreme Court stated 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*, the Supreme 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))). The Supreme 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, our 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). Our courts have recognized 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 court.

The *Hooper* court 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 tolling of the time for the notice of appeal would have been accomplished by Rule 203(b)(1),

[4] Each of these issues are identified and addressed in a seven (7) page motion for reconsideration filed on July 7. 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.

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. *See* Exhibit 3.The scenario urged by Respondents on brief allow them 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. 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 be estopped from now 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. Under the argument of Respondents however, they allege that they are entitled 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 this 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, 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). This Court has held in other unique situations that the tolling of the time to file a notice of appeal is appropriate.

### i. *This Court Allows 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 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. This 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, this 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, this 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 Appellant is the only party to be prejudiced is the time for appeal is not tolled. 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. ***This Court has 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.***

This Court has 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, this 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, Appellant requests that this Court toll the time to appeal based upon the motion to reconsider.

## 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 this Court. In contrast to the situations where this Court 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 Appellant'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 claim 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 Appellant'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. Appellant is currently preparing an initial brief.

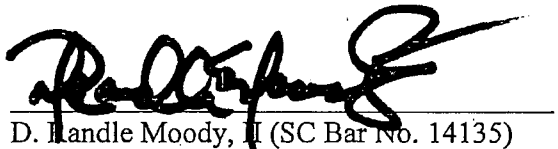
The Courts have recognized that the interests of justice require that there be flexibility in our rules to meet exigencies and that relief should be granted to prevent a wrong or to "'ameliorate the harsh results that sometimes flow from a strict, literalistic application of administrative time limits.'" *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 Respondents' position 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. The Respondents would have this Court disregard the transitional nature of our filing program to electronic filing, disregard the guidance received by Appellant's counsel from the Clerk of Court regarding computing time, disregard the fourteen (14) days from the filing of the motion for reconsideration until its denial on July 21, disregard the fact that no objection to the timeliness of the motion for reconsideration was raised, disregard the fact

that the circuit court considered and sought input on the motion for reconsideration from Respondents counsel, and due to the alleged operation of the rules would allow 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. All of the above activity occurred in this appeal and Respondents move that this Court dismiss 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 this Court deny the motion to dismiss, hold that the time was tolled for filing an appeal, and allow the appeal to proceed.

August 28, 2017



D. Randle Moody, II (SC Bar No. 14135)
JACKSON LEWIS P.C.
15 South Main Street, Suite 700
Greenville, SC 29601
Phone: (864) 232-7000
Facsimile: (864) 235-1381
E-mail: randy.moody@jacksonlewis.com

ATTORNEY FOR APPELLANT

4821-3527-4318, v. 1

Exhibit 1

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.

---

**AFFIDAVIT OF SANDRA MANSEL**

---

1. My name is Sandra Mansel.

2. I am an Administrative Coordinator with the Greenville County Clerk of Court.

3. 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.

4. 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.

5. Based upon Mr. Moody's call and my efforts, we were both trying to comply with the rules on time computation under e-filing.

Sandra Mansel
Sandra Mansel

Sworn to me this 28th day of August, 2017.

Margaret B. Turner
Notary Public for South Carolina
My Commission Expires: 10/21/2018

4830-1011-3102, v. 1

Exhibit 2

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF GREENVILLE | ) | C.A. 2016-CP-23-03431 |
| Phyllis B. Thomas, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| Barbara R. Merline, Diane P. Meacham, MHA'S LLC, TAXLAW, LLC, David A. Merline, Jr., Keith G. Meacham and Merline & Meacham, P.A., | ) | |
| | ) | |
| Defendants. | ) | |

**PLAINTIFF'S MOTION FOR RECONSIDERATION**

Phyllis Thomas ("Thomas") moves this Honorable Court, pursuant to Rule 59(e), SCRCP, for reconsideration of this Court's Order granting Summary Judgment to Defendants.

The Order entered by this Court equates to a judicial approval of unfair action by a majority vote of limited liability company membership shares against a member holding a substantial interest in the limited liability company. In reaching the conclusions in the Order, the Order disregards the statutory and contractual obligations of the majority to operate and act in accordance with the covenant of good faith and fair dealing and other fiduciary duties.

Plaintiff requests that the Court reconsider its ruling and the application of law concluding that the majority could pass an amendment to the Operating Agreement that is specifically targeted at a minority member to force that member to divest her interest in the limited liability company. The remainder of the Order is derivative of this finding/holding and Plaintiff requests that the Court reconsider its ruling granting summary judgment for the entire matter.

**I. The Covenant of Good Faith and Fair Dealing and Fiduciary Duties Among Members Prevents Unfair and Bad Faith Actions by the Majority and the Decision to Amend the Operating Agreement to Force a Buy Out Violates those Duties.**

The Court concluded that "the right to pass . . . an amendment was expressly included in the Operating Agreement" and that an "amendment does not violate the covenant of good faith and fair dealing because the Member Defendants merely did "what the provisions of the contract expressly gave [them] the right to do.'" (citations omitted) (Order at 5.) Plaintiff respectfully requests that the Court reconsider this ruling. This is a fundamental ruling addressing the claims of Plaintiff Phyllis Thomas. Absent from the discussion in the Order is the fact that the covenant of good faith and fair dealing is an integral aspect of limited liability company ("LLC") statutory law and must be followed for a minority member of an LLC to have protection. The approach taken by the Order defaults to the arguments of Defendants that because the TAXLAW, LLC Operating Agreement allows for an amendment by majority vote, the majority may adopt an amendment that permits the purchase of a minority member's interest in the LLC. The Order's conclusion that good faith and fair dealing does not apply because the Operating Agreement allows an amendment ignores the fact that the duty of good faith and fair dealing is set forth in the TAXLAW, LLC Operating Agreement and is required by the statute. Moreover, taken to its logical conclusion, the Order would allow the majority the right to adopt any provision.

The ruling does not encompass the complexities inherent in the relationship between LLC members. This ruling disregards the statutory obligation of LLC members to one another to operate in good faith and fairly with one another and the LLC. S.C. Code Section 33-44-409(d) imposes the obligation of good faith and fair dealing in the exercise of any rights that are owed to the LLC and other members. The Operating Agreement states in Section 6.3 titled Fiduciary Duties that "Each Member shall discharge his duties and exercise any of his rights consistently

with the obligation of good faith and fair dealing which he owes to the Company and other members." The *decision* to amend the Operating Agreement had to be exercised by the members with good faith and fair dealing. Therefore, the ruling that the Member Defendants exercised a "clear contractual right" disregards Section 6.3 and the statutory responsibility of Members to one another under South Carolina law. (Order at 5.) Just because the right to amend may be present in the Operating Agreement does not mean that the right to amend may be exercised without good faith and fair dealing. Phyllis Thomas maintains that the decision to amend the Operating Agreement was not taken in good faith and was unfair in that it targeted a minority member to force a sale of her membership interest. There is no clear contractual right for Member Defendants to take targeted action against another member who had been a model member. Targeting a member just to remove them from the limited liability company violates the covenant of good faith and fair dealing. Phyllis Thomas respectfully requests that the Court reconsider this ruling.

## II. The Application of the Amendment is Unfair and Violates the Covenant of Good Faith and Fair Dealing and Fiduciary Duties.

Phyllis Thomas addressed on brief the problems and unfair nature of the Second Amendment and how it may be applied unfairly in breach of the covenant of good faith and fair dealing and in breach of the fiduciary duties owed to her. Phyllis Thomas maintains that the *application* of the Second Amendment, in addition to the *decision* to amend the Operating Agreement to include a forced sale provision violates the duties owed to her as a member. The Second Amendment is replete with a litany of problems identified by Phyllis Thomas. Phyllis Thomas presented Requests to Admit that addressed many of the problems and issues with the application of the Second Amendment and how the application of the Second Amendment violated the duties owed to her by the other members. Those problems are not addressed in the Order. The issues present in the application of the Second Amendment are important and Phyllis Thomas

respectfully requests that the Court reconsider its decision and address the application of the Second Amendment to Phyllis Thomas and the terms applied against her by the majority.

Defendants argued that Phyllis Thomas would allegedly receive "fair value" for her membership interest and argued that a purchase of her membership interest would be the remedy in a judicial action.[1] The Order adopts those arguments and concludes that a fair market buyout is an appropriate remedy. We respectfully request that the Court reconsider this holding and the application of corporate shareholder cases to a limited liability company member case.

In supporting the holding that a fair market buyout of the Second Amendment is an appropriate remedy for Phyllis Thomas, the Order cites South Carolina authority for shareholder cases. (Order at 6.) The situation in corporate cases is not applicable here because shareholder oppression cases are brought by shareholders who had trapped investments and could not get out of the company. In this case, Phyllis Thomas has been targeted to be forced out of a limited liability company for which she has been a model member for almost twenty (20) years. Indeed, the Order itself adopts the position that the majority simply wanted her out after the DART, LLC real property transaction. (Order at 3.) Therefore, in this case Phyllis Thomas is targeted for removal and is being retaliated against following a transaction in an unrelated LLC. That transaction, incidentally, is one in which all the parties admit was done following South Carolina statutory law. Phyllis Thomas is not in a trapped investment where she needs the assistance of the Court in ordering a fair market value. Phyllis Thomas is a substantial owner of a valuable long term investment that is appreciating. Phyllis Thomas' situation is very different from a shareholder oppression case and is essentially the inverse as she seeks the protection of the Court in order to

[1] In oral argument the issue of valuation calculations and the exclusion of goodwill in the calculation of "fair value" were addressed. This is an issue that goes to the "fair value" matter and Phyllis Thomas disputes that fair value is present when goodwill is excluded by the Second Amendment from the calculation of her membership interest.

protect her against unfair expulsion and removal. Based upon the Order, however, a minority member has no protection from the majority because if the majority wants a member out they can basically engage in oppression.

In sum, the Order does not correctly apply the law. The Order cites corporate law shareholder oppression cases that are not applicable to nor do they apply to this case. South Carolina limited liability companies are based upon partnership law and not corporate law. Therefore, the Order's reliance on the body of law arising in corporate shareholder cases misses a key distinction and legally significant component of the fiduciary relationship that exists between and among the members of a limited liability company. Duties in a limited liability company are akin to the duties among partners. These duties generally do not exist between shareholders. Plaintiff respectfully requests that the Court reconsider the application of the law to support the holdings of the Order.

### III. The Parol Evidence Rule Should Not be Utilized to Bar Evidence Regarding the Intent and Meaning of the Operating Agreement That Did Not Contain a "Forced Sale" Provision.

It is recognized in South Carolina that "where a contract is silent as to a particular matter and because of the nature and character of the transaction an ambiguity arises, parol evidence may be admitted in order to supply a deficiency in the language of the contract and to establish the true intent and meaning of the parties." *U.S Leasing Corp. v. Janicare*, 364 S.E.2d 202, 205, 294 S.E. 2d 312 (S.C. App. 1988). The Order bars a number of alleged disputes of fact on the basis that the disputes of fact are barred by the parol evidence rule and "therefore do not matter." (Order at 8-9.) Plaintiff respectfully requests that this Court reconsider this holding.

The Order takes a strict contractarian stance as to the ability to amend and those matters are addressed above. In addressing those matters, the Court addresses a non-related transaction

regarding DART, LLC as a basis for the amendment (Order at 3.) but specifically excludes evidence related to the actual Operating Agreement and the fact that a forced sale provision was not included in the original Operating Agreement. Interestingly enough, the Order addresses the fact that the Operating Agreement basically required an amendment "to authorize a buyout." (Order at 8.) If an amendment was required to afford a buyout in order for the majority to effect a forced sale against Phyllis Thomas, how can the intent of the original Operating Agreement specifically excluding such a forced sale provision be barred as evidence to grant summary judgment? The evidence of disputed facts offered in opposition to the summary judgment is not parol evidence, it is merely evidence establishing that the omission of a forced sale provision in the Operating Agreement was intentional and was meant by the parties to be excluded. *Cf. U.S Leasing Corp. v. Janicare*, 364 S.E.2d at 205. There is no ambiguity as the intent was to not force a sale of a member interest. Plaintiff is not attempting to add to the Operating Agreement but is merely explaining why the document says what it says and why it did not include a forced sale provision. Therefore, the parol evidence rule does not apply to the evidence opposing summary judgment. Accordingly, Plaintiff respectfully requests the Court to reconsider the exclusion of the disputed facts referenced in the Order using the parol evidence rule.

**IV. The Court's Rulings Regarding Discovery Are Not Necessary.**

The Order on page 10 and the top of page 11 addresses findings regarding discovery and Plaintiff's opposition to summary judgment on the grounds that discovery is continuing. The Court allowed Plaintiff an opportunity to provide comments and those concerns were addressed in a letter dated June 16 to this Court. Plaintiff respectfully incorporates those comments and concerns into this Motion and reiterates that the holding of the Court in closing discovery is not necessary in

light of the circumstances present in this case. Plaintiff respectfully requests that the Court reconsider its holding regarding discovery and summary judgment.

**V. The Order Addresses Derivative Claims Justifying Summary Judgment.**

The Order addresses Plaintiff's claims as derivative of the claim that the Operating Agreement was wrongfully amended. Therefore, Plaintiff's claims are dismissed on summary judgment largely due to the Court's holding that the Second Amendment was proper and lawful. As addressed previously in this Motion, Plaintiff respectfully requests the reconsideration of this fundamental issue and as a result requests reconsideration of the summary judgment dismissal of Plaintiff's claims for Breach of the Good Faith and Fair Dealing, Breach of Fiduciary Duty, Tortious Interference with Contract, Aiding and Abetting the Breaches, and Civil Conspiracy.

**CONCLUSION**

For the reasons discussed above, Plaintiff Phyllis Thomas respectfully moves this Honorable Court pursuant to Rule 59 for reconsideration of this Court's Order.

Respectfully submitted this 7th day of July, 2017.

*s/ D. Randle Moody, II*
D. Randle Moody, II (SC Bar No. 14135)
JACKSON LEWIS P.C.
15 South Main Street, Suite 700
Greenville, SC 29601
Phone: (864) 232-7000
Facsimile: (864) 235-1381
E-mail: randy.moody@jacksonlewis.com

**ATTORNEY FOR PLAINTIFF**
**PHYLLIS B. THOMAS**

Exhibit 3

## Moody, D. Randle, II (Greenville)

**From:** Tom Stephenson <tom@stephensonmurphy.com>
**Sent:** Monday, July 17, 2017 1:53 PM
**To:** Seals, William Law Clerk (Thomas S. Phillips); Moody, D. Randle, II (Greenville)
**Cc:** Jeff P. Dunlaevy; Bill Coates
**Subject:** RE: Phyllis B. Thomas v. Barbara R. Merline, et al (2016-CP-23-3431)

I believe this is all rehash and no reply is necessary. If you think we need to address an issue, we will be happy to.

Thomas L. Stephenson
Stephenson & Murphy, LLC
207 Whitsett Street
Greenville, SC 29601

(864) 370-9400

tom@stephensonmurphy.com

**From:** Seals, William Law Clerk (Thomas S. Phillips) [mailto:wsealslc@sccourts.org]
**Sent:** Monday, July 17, 2017 10:36 AM
**To:** Moody, D. Randle, II (Greenville)
**Cc:** Jeff P. Dunlaevy; Tom Stephenson; Bill Coates
**Subject:** RE: Phyllis B. Thomas v. Barbara R. Merline, et al (2016-CP-23-3431)

Jeff/Tom,

Are you planning on submitting a reply to Randy's motion?

Thomas S. Phillips
Law Clerk to the Honorable William H. Seals, Jr.
Circuit Court Judge, At-Large, Seat 6
103 North Main Street
Marion, South Carolina 29571
Ph: (843) 423-0446
Cell: (843) 373-3203
Fax: (843) 423-0535

**From:** Moody, D. Randle, II (Greenville) [mailto:Randy.Moody@Jacksonlewis.com]
**Sent:** Friday, July 14, 2017 3:30 PM
**To:** Seals, William Law Clerk (Thomas S. Phillips) <wsealslc@sccourts.org>
**Cc:** Jeff P. Dunlaevy <Jeff@stephensonmurphy.com>; Tom Stephenson <tom@stephensonmurphy.com>; Bill Coates <wac@roecassidy.com>
**Subject:** RE: Phyllis B. Thomas v. Barbara R. Merline, et al (2016-CP-23-3431)

Thomas-

Attached is a motion for reconsideration regarding the summary judgment in the above case. Is the electronic copy sufficient or would you also like a paper courtesy copy?

Blessings,

Randy

**D. Randle Moody**
Attorney at Law
**Jackson Lewis P.C.**
15 South Main Street
Suite 700
Greenville, SC 29601
Direct: (864) 672-8037 |
Randy.Moody@Jacksonlewis.com | www.jacksonlewis.com
***Jackson Lewis P.C. is included in the AmLaw 100 and Global 100 law firm rankings.***

**From:** Moody, D. Randle, II (Greenville)
**Sent:** Friday, June 16, 2017 4:31 PM
**To:** Seals, William Law Clerk (Thomas S. Phillips) <wsealslc@sccourts.org>
**Cc:** Jeff P. Dunlaevy <Jeff@stephensonmurphy.com>; Tom Stephenson <tom@stephensonmurphy.com>; Bill Coates <wac@roecassidy.com>
**Subject:** Phyllis B. Thomas v. Barbara R. Merline, et al (2016-CP-23-3431)

Thomas-

Thank you for the opportunity to comment on the proposed order in the Thomas v. Merline matter in Greenville County. We have limited our comments to one portion of the order. Those comments are contained in the attached letter pdf file. I am providing the letter to you and have copied Mr. Dunlaevy and Mr. Stephenson on this email.

Thank you again for the consideration.

Blessings,

Randy

**D. Randle Moody**
Attorney at Law
**Jackson Lewis P.C.**
15 South Main Street
Suite 700
Greenville, SC 29601
Direct: (864) 672-8037 |
Randy.Moody@Jacksonlewis.com | www.jacksonlewis.com
***Jackson Lewis P.C. is included in the AmLaw 100 and Global 100 law firm rankings.***

Exhibit 4

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2016CP2303431

| | | | |
|---|---|---|---|
| **Phyllis B Thomas** | | **Barbara R Merline**<br>**Keith G Meacham**<br>**Taxlaw Llc**<br>**Diane P Meacham** | **Merline & Meacham P**<br>**David A Merline Jr**<br>**MHAs Llc** |

**PLAINTIFF(S)** **DEFENDANT(S)**

**Submitted by: Clerk of Court**

**Attorney for:** ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

**DISPOSITION TYPE (CHECK ONE)**

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:** ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

**ORDER INFORMATION**

**Plaintiff's Motion for Reconsideration is hereby denied without a hearing.**

**This order** ☒ ends ☐ does not end the case.

Additional Information for the Clerk: _____

**INFORMATION FOR THE JUDGMENT INDEX**

**Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.**

| Judgment in Favor of (List name(s) below) | Judgment Against (List name(s) below) | Judgment Amount To be Enrolled (List amount(s) below) |
|---|---|---|
| | | |
| | | |
| | | |

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional

taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**
**E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.**

| | 2157 | |
|---|---|---|
| **Circuit Court Judge** | **Judge Code** | **Date** |

## For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

**D. Randle Moody II** 15 South Main Street Suite 700 Greenville, SC 29601

**Thomas L. Stephenson** 207 Whitsett St Greenville, SC 29601
**Jeffrey P. Dunlaevy** 207 Whitsett Street Greenville, SC 29601

**ATTORNEY(S) FOR THE PLAINTIFF(S)**

**ATTORNEY(S) FOR THE DEFENDANT(S)**

**Court Reporter**

**Paul B. Wickensimer Greenville County Clerk Of Court - Clerk of Court**

**Court Reporter:**

**E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.**

**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

Greenville Common Pleas

**Case Caption:** Phyllis B Thomas vs. Barbara R Merline , defendant, et al

**Case Number:** 2016CP2303431

**Type:** Order/Form 4

IT IS SO ORDERED

s/ The Honorable William H. Seals Jr. #2157

Exhibit 5

## Moody, D. Randle, II (Greenville)

**From:** Mansel, Sandra <SMansel@greenvillecounty.org>
**Sent:** Thursday, August 24, 2017 2:18 PM
**To:** Moody, D. Randle, II (Greenville)
**Attachments:** Rule 4 (4) Randle Moody II.docx

Hi Randle,
Please let me know if this is what you need and also if you prefer it to be in the form of an affidavit.

Thanks

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

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.

---

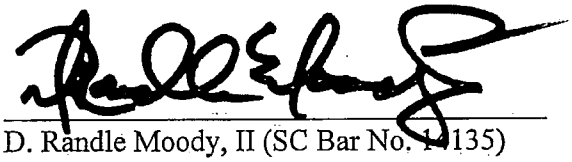
**PROOF OF SERVICE**

---

I certify that I have served a copy of Appellant's Motion For Extension Of Time by depositing a copy of it in the United States Mail, postage prepaid, on August 23, 2017, addressed to its attorney of record:

Thomas Stephenson, Esq.
Jeffrey P. Dunlaevy, Esq.
STEPHENSON & MURPHY, LLC
207 Whitsett Street
Greenville, SC 29601

Respectfully submitted,



D. Randle Moody, II (SC Bar No. 14135)
JACKSON LEWIS P.C.
15 South Main Street, Suite 700
Greenville, SC 29601

Phone: (864) 232-7000
Facsimile: (864) 235-1381
E-mail: randy.moody@jacksonlewis.com

**ATTORNEY FOR APPELLANT**
**PHYLLIS B. THOMAS**

August 28, 2017

4821-3527-4318, v. 1

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.

---

**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.

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[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

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[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,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

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Case No. 2016-CP-23-03431

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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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**PROOF OF SERVICE**

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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:

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