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**RECEIVED**

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

JAN 12 2018

SC Court of Appeals

\_\_\_\_\_  
APPEAL FROM RICHLAND COUNTY  
COURT OF COMMON PLEAS

\_\_\_\_\_  
Robert E. Hood, Circuit Court Judge

\_\_\_\_\_  
Case No. 2017 CP 40 3084

Lance E. Woodley and  
Victoria Woodley

Respondents

v.

City of Columbia

Appellants

\_\_\_\_\_  
MOTION TO DISMISS APPEAL  
\_\_\_\_\_

Respondents hereby move for an Order dismissing the Appellant's appeal on the grounds that the Notice of Appeal was not timely served. This Motion is based on the following.

FACTS

This matter is an appeal from a decision of the City of Columbia's Design/Development Review Commission. Pursuant to statute, the appeal of this decision was to the Circuit Court.

A hearing on the original appeal was held before the Honorable Robert E. Hood, Circuit Judge, on July 28, 2017. On August 22, 2017, Judge Hood issued a written Order granting the Appeal of the Respondents. According to the Form 4 that accompanied this Order, service of this

Order was made by the Richland County Clerk by first class mail or by placing it in Appellant's counsel's box in the Clerk's Office on August 28, 2017. A copy of this Form 4 is attached. The undersigned counsel for Respondents received the Order by email from the Clerk's office on August 29, 2017.

Appellant's Notice of Appeal does not state the date that it received the Order as provided by Rule 203 (e) (1) (c) of the SCACR so the undersigned cannot determine the exact date of receipt by Appellant.

On September 12, 2017, Appellant City of Columbia served a Motion pursuant to Rule 59(e) of the SCRCRCP. The Certificate of Service filed by Counsel for Appellant indicates a copy of the Motion was served by mail only on counsel for Respondents. Appellant did not file any document indicating that a copy had been provided to Judge Hood.

On November 27, 2017, Judge Hood, on his own motion, issued an Order denying the City of Columbia's Motion because it failed to provide him a copy of the Motion as provided by Rule 59 (g) of the SCRCRCP.

Thereafter, the City of Columbia filed a second Motion under Rule 59 (e) of the SCRCRCP that offered an explanation. Judge Hood, again on his own motion, denied this by Order dated and filed on December 18, 2017.

The Notice of Appeal filed by Appellant indicates that it is appealing an Order dated September 6, 2017. This date is incorrect as the actual date of the Order is August 22, 2017. A copy of this Order accompanied the Appellant's Notice of Appeal.

## ARGUMENT

Appellant is appealing an Order that it received on or about August 28, 2017. SCACR Rule 203 (b) (1) specifies that an Appellant must serve a notice of appeal of an Order within 30 days of receipt of notice of filing.

However, Rule 59(c) of SCRCR provides in part

The time for appeal for all parties shall be stayed by a timely motion under this Rule and shall run from the receipt of written notice of entry of the order granting or denying such motions.

The key word in this rule is “timely.” There are two time limits for a motion filed under Rule 59 (e). The first is:

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.

The second time limit is in Rule 59 (g):

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.

While it appears that Appellant’s original Rule 59 (e) motion was not timely served, that issue was not ruled on by Judge Hood. He found only that Appellant did not comply with Rule 59(g) and dismissed the Motion because it failed to provide him a copy of the Motion.

In Smith v. Fedor (S.C App. 2017) (decided November 22, 2017), the Appellant failed to provide a copy of his Rule 59 (e) Motion to the Judge who heard the matter. The trial court dismissed the motion because of this failure and The Court of Appeals held:

The trial court properly denied Smith's motion for reconsideration because he failed to provide the motion to the trial judge within ten days of filing. Rule 59(g) would lack any purpose if trial courts committed error by denying the motion for failure to comply with the rule. Further, our language in *Gallagher v. Evert*, 353 S.C. 59, 63-64, 577 S.E.2d 217, 219 (Ct. App. 2002) implies a trial court may deny the motion solely on the basis of the rule. See 353 S.C. at 63, 577 S.E.2d at 219 ("Because the [trial] court found it appropriate to hear the matter, we find no error in the [trial] court's decision to decide the motion *despite* [the appellant's] failure to comply with Rule 59(g), SCRCP." (emphasis added)). Accordingly, the trial court properly denied Smith's motion for reconsideration because he did not timely provide a copy of the motion to the judge.

This case and the cases on which it is based stand for the proposition that failing to comply with Rule 59 (g) can be a fatal error that results in the dismissal of a Rule 59 (e) without consideration of its merits. Thus, if a party fails to follow the clear procedure set forth in Rule 59 (e) and/or Rule 59 (g), then the party's motion is "untimely" and does not stay the time for serving a notice of appeal.

In Camp v. Camp, 662 S. E. 2d 458, 378 S. C. 237 (S.C. App. 2008) the Court of Appeals found that the Appellant's Rule 59 (e) motion was timely filed but failed to comply with Rule 7( b) (1) SCRCP. The Court held that "...Father's motion satisfied neither the particularity nor relief-sought requirement of the South Carolina rule" and thus it was an insufficient motion under Rule 59 (e).

The Court of Appeals further held:

Our ruling that an insufficient motion under Rule 59(e), SCRCP, does not stay the time for appeal comports with federal law on point as well as with prior South Carolina decisions on a closely related issue. In *Elam*, our supreme court traced the history of judicial treatment of successive Rule 59(e) motions. 361 S.C. at 15, 602 S.E.2d at 775. *Elam* confirmed successive post-trial motions that raise no new

issues do not stay the time for appeal and noted this ruling reflected the "prevailing view among federal courts." *Id.* at 18, 602 S.E.2d at 777.

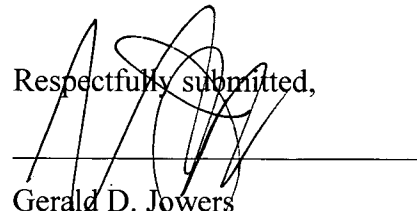
The reasoning of these cases is that in order to stay the time for service of notice of appeal, a party must make a sufficient Rule 59 (e) Motion. A sufficient motion must comply with all aspects of Rule 7 (b) (1) and the moving party must follow the clear time limits and requirements of Rule 59 (e) and (g).

In this matter, Appellant failed to make a sufficient and timely Rule 59 (e) motion. Consequently, the time for serving the notice of appeal was not stayed. Thus, the time for Appellant's service of the notice of appeal ended in late September or early October, 2017, depending on the date of receipt of the Order by Appellant's counsel. Appellant's notice of appeal served on December 27, 2017 was late and ineffective.

In Mears v. Mears, 287 S. C. 168, 337 S.E. 2d 206 (1985) the Court holds that "Service of the notice of intent to appeal is a jurisdictional requirement, and this Court has no authority to extend or expand the time in which the notice of intent to appeal must be served."

Accordingly, the Appellant's Appeal should be dismissed.

Respectfully submitted,



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Gerald D. Jowers  
Attorney for Respondents  
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South Carolina Bar No. 3236

January 12, 2018

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

JUDGMENT IN A CIVIL CASE

RECEIVED

CASE NUMBER: 2017CP4003084

Lance E Woodley

City Of Columbia South Carolina

JAN 12 2018

Victoria Alicia Woodley

Design Development Review Commission

PLAINTIFF(S)

DEFENDANT(S)

SC Court of Appeals

Submitted by: \_\_\_\_\_ Attorney for:  Plaintiff  Defendant or  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.
- ACTION DISMISSED (CHECK REASON):  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):  Rule 40(j), SCRPC;  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 \_\_\_\_\_

RECEIVED  
2017 AUG 28 PM 11:00  
RICHLAND COUNTY

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

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
		\$
		\$
		\$

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.

Circuit Court Judge \_\_\_\_\_ Judge Code 2164 Date \_\_\_\_\_

For Clerk of Court Office Use Only

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_ and a copy mailed first class or placed in the appropriate attorney's box on this 28 day of Aug, 2017 to attorneys of record or to parties (when appearing pro se) as follows:

Gerald D. Jowers

Jessica Mangum

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter \_\_\_\_\_

Clerk of Court Jeanette W. McBride

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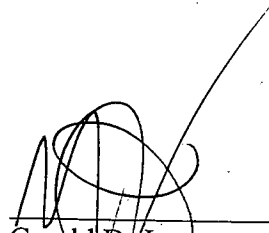
City of Columbia

Appellants

PROOF OF SERVICE

I, Gerald D. Jowers, hereby certify that I served the Motion to Dismiss Appeal on the attorney for the Appellant on January 12, 2018 by placing a copy in the United States Mail, with first class postage affixed, to the following address:

Jessica R. Mangum, Esq.  
Office of the City Attorney  
Post Office Box 667  
Columbia, South Carolina 29202

  
Gerald D. Jowers  
Attorney for the Respondents  
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Columbia, SC 29202