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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM PICKENS COUNTY  
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

**RECEIVED**  
SEP 06 2018  
SC Court of Appeals

**Case No.: 2017-CP-39-0428**

John M. Burgess ..... Appellant,

v.

Katherine Hunter ..... Respondent.

**PETITION FOR REHEARING**

Stephen N. Garcia  
Garcia Law, LLC  
604 Pettigru Street  
Greenville, SC 29601  
(864) 271-7335  
Attorney for Appellant

David L. Moore, Jr.  
Turner | Padgett  
P.O. Box 1509  
Greenville, SC 29602  
Attorney for Respondent

Andrew F. Lindemann  
Lindemann, Davis & Hughes, P.A.  
P.O. Box 6923  
Columbia, SC 29260  
Attorney for Respondent

**COMES NOW PLAINTIFF**, by and through undersigned counsel, and files this, his Petition for Rehearing pursuant to Rule 221(a), SCACR, and as grounds would allege:

1. In support of his Petition for Rehearing, pursuant to Rule 221(a), SCACR, Plaintiff respectfully submits the following as having been overlooked and/or misapprehended by the Court:
  - a. That the Entry of Judgment entered by the Court of Common Pleas on July 2, 2018 was timely appealed by Plaintiff's Notice of Appeal dated July 31, 2018; and
  - b. That the Amended Motion for New Trial filed by Plaintiff was timely pursuant to *Gray v. Bryant*, 298 S.C. 285, 379 S.E.2d 894 (1989), and further, that the Order dated July 19, 2018 denying Plaintiff's Amended Motion for New Trial was timely appealed by Plaintiff's Notice of Appeal dated July 31, 2018.
2. This matter originates from the entry of an order of judgment at the Court of Common Pleas dated July 2, 2018.
3. The jury returned its verdict on June 29, 2018.
4. Immediately following the jury's verdict, Plaintiff made his oral Motion for a New Trial and said Motion was denied.
5. On or about July 3, 2018, Plaintiff's counsel received a signed affidavit from a juror that purportedly alleges potential bias and/or undue influence upon the jury.
6. On July 11, 2018, Plaintiff filed his Amended Motion for New Trial with attached affidavit citing newly discovered evidence as grounds.
7. Plaintiff's Amended Motion for New Trial was denied and the Order was filed July 19, 2018.

8. Plaintiff appealed both (1) the Order of the Trial Judge dated June 29, 2018 and **entered on July 2, 2018**, and (2) the Order of the Trial Judge dated July 19, 2018 both by Notice of Appeal dated July 31, 2018.
9. On August 24, 2018, the Court of Appeals entered its Order dismissing Plaintiff's Notice of Appeal as untimely pursuant to Rule 203(b)(1).
10. It is Plaintiff's position that the Appeal of the trial judge's denial of Plaintiff's Motion for New Trial entered on July 2, 2018 was timely pursuant to Rule 203(b)(1), SCACR, as the Notice of Appeal was filed on July 31, 2018, less than thirty days from the entry of judgement.
11. Further, it is Plaintiff's position that the appeal of the trial judge's denial of Plaintiff's Amended Motion for New Trial was timely as (1) the Amended Motion for New Trial was timely pursuant to *Gray v. Bryant*, 298 S.C. 285, 379 S.E.2d 894 (1989), and further, (2) that the subsequent Appeal of the Order denying Plaintiff's Amended Motion for New Trial was timely pursuant to Rule 203(b)(1), SCACR as the Order denying Plaintiff's Amended Motion for New Trial was entered July 19, 2018 and the Notice of Appeal from the Order was filed on July 31, 2018.

**WHEREFORE**, Plaintiff requests that the Appeal of the Orders originating from the Court of Common Pleas dated July 2, 2018 and July 19, 2018 be reinstated and for any further relief the Court deems just and proper.

Garcia Law, LLC

By:           /s / Stephen N. Garcia            
Stephen N. Garcia, SC Bar No. 76191  
604 Pettigru Street  
Greenville, SC 29601  
Dial: (864) 271-7335  
**For Appellant**

September 4, 2018  
Greenville, SC

## MEMORANDUM OF LAW

In support of his Petition for Rehearing, and pursuant to Rule 221(a), SCACR and Rule 240(c)(2), SCACR, Plaintiff respectfully submits the following as having been overlooked and/or misapprehended by the Court:

1. That the Entry of Judgment entered by the Court of Common Pleas on July 2, 2018 was timely appealed by Plaintiff's Notice of Appeal dated July 31, 2018 pursuant to Rule 203(b)(1), SCACR; and
2. That the Amended Motion for New Trial filed by Plaintiff was timely pursuant to *Gray v. Bryant*, 298 S.C. 285, 379 S.E.2d 894 (1989), and further, that the Order dated July 19, 2018 denying Plaintiff's Amended Motion for New Trial was timely appealed by Plaintiff's Notice of Appeal dated July 31, 2018.

### Timeliness of Appeal of the Entry of Judgment Dated July 2, 2018

On June 29, 2018, the jury returned its verdict. An oral motion for new trial was made immediately after the jury was dismissed. The motion was denied. The judgement was entered on July 2, 2018 and written notice of the entry of judgement was received on July 2, 2018 via email. Plaintiff timely filed his Notice of Appeal on July 31, 2018 in accordance with Rule 203(b)(1), SCACR.

Rule 203(b)(1), SCACR states that a notice of appeal from the Court of Common Pleas shall be served on all respondents within 30 days after receipt of written notice of the entry of the order of judgment. Plaintiff complied with this deadline. Plaintiff *does not* rely on the staying of the time for filing his notice of appeal based on a subsequently filed motion for new trial, so as to comply with Rule 203(b)(1), SCACR. Plaintiff has met the deadline for filing his appeal by

filing *before* the deadline prescribed by Rule 203(b)(1), SCACR. Therefore, it is respectfully submitted that Plaintiff's Appeal as to the Entry of Judgment dated July 2, 2018 should be reinstated.

**Timeliness of Amended Motion for New Trial and Timeliness of Subsequent Notice of Appeal of the Order Dated July 19, 2018**

On or about July 3, 2018, Plaintiff received notice of an Affidavit signed by a juror that, upon information and belief, related directly to the grounds stated for the prior oral motion for new trial made on June 29, 2018 following dismissal of the jury. In an abundance of caution, both in preserving the right to submit upon appeal as well as to allow the trial judge an opportunity to question the jurors, Plaintiff filed his Amended Motion for New Trial based on Newly Discovered Evidence. The Amended Motion for New Trial was filed on July 11, 2018 which was 12 days after the jury was dismissed, but only 8 days following notice of the existence of an Affidavit signed by a juror. Plaintiff's position is that the Amended Motion for New Trial was timely pursuant to *Gray v. Bryant*, 298 S.C. 285, 379 S.E.2d 894 (1989). It is also Plaintiff's position that the Notice of Appeal filed on July 31, 2018 for the purpose of appealing the Order dated July 19, 2018 denying Plaintiff's Amended Motion for New Trial was timely.

In *Gray v. Bryant*, 298 S.C. 285, 379 S.E.2d 894 (1989), the Supreme Court held that amendment of a motion for new trial based upon newly discovered evidence is permissible if made within a reasonable time following discovery of new evidence even if made *after* the 10-day period allowed in S.C. Rules of Civil Procedure, Rule 59. The *Gray* Court held that "Rule 59 and 60(b) must be read together." *Id* at 287. The *Gray* Court went on to cite *Smith v. Quattlebaum*, 223 S.C. 384, 76 S.E.2d 154 (1953):

“In *Smith*, defendant moved for a new trial because of an after-discovered relationship of juror to plaintiff. The court ruled that the trial court had jurisdiction to hear a motion for a new trial because of the after or newly-discovered evidence exception. The Court stated further:

‘It is the duty of the trial judge to ascertain the qualifications of the jurors, and when the discharge of this responsibility is thwarted by mischance, or otherwise, it is within the court’s inherent power to remedy the situation when brought to his attention, even after sine die adjournment of court, by the granting of a new trial, if in its discretion, necessary. *Smith*, 76 S.E. (2d) at 157.’”

*See Gray* at 287.

In the instant matter, Plaintiff’s Amended Motion for New Trial filed on July 11, 2018 was made within a reasonable time following notice of the newly discovered evidence. Because it is the duty of the trial judge to ascertain the qualification of jurors and when the discharge of this responsibility is thwarted by mischance, or otherwise, it is within the court’s inherent power to remedy the situation when brought to his attention. Irrespective of same, the trial judge dismissed the Amended Motion for New Trial by Order dated July 19, 2018. A Notice of Appeal was filed on July 31, 2018. Therefore, it is respectfully submitted that Plaintiff’s Notice of Appeal as to the Order dated July 19, 2018 should be reinstated.

### CONCLUSION

Plaintiff’s Notice of Appeal, filed July 31, 2018, as to the Entry of Judgment dated July 2, 2018, was timely pursuant to Rule 203(b)(1), SCACR. Plaintiff did not rely on the staying of the time for appeal based on the subsequent filing of an Amended Motion for New Trial. Further, Plaintiff’s Amended Motion for New Trial was timely pursuant *Gray v. Bryant*, 298 S.C. 285, 379 S.E.2d 894 (1989) and *Smith v. Quattlebaum*, 223 S.C. 384, 76 S.E.2d 154 (1953). Plaintiff’s Notice of Appeal, filed July 31, 2018, as to the Order dated July 19, 2018, was also timely pursuant to Rule 203(b)(1), SCACR.

It is respectfully submitted that Plaintiff's Appeal of the Entry of Judgment dated July 2, 2018 and Appeal of the Order dated July 19, 2018 should be reinstated.

Garcia Law, LLC

By:           /s / Stephen N. Garcia            
Stephen N. Garcia, SC Bar No. 76191  
604 Pettigru Street  
Greenville, SC 29601  
Dial: (864) 271-7335  
**For Appellant**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM PICKENS COUNTY  
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John M. Burgess ..... Appellant,

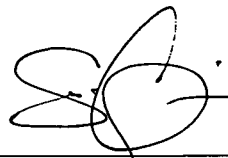
v.

Katherine Hunter ..... Respondent.

PROOF OF SERVICE

I certify that I have served the Petition for Rehearing on Katherine Hunter by depositing a copy of it in the United States Mail, postage prepaid, on September 4, 2018, addressed to her attorneys of record: **David L. Moore, Jr., Esq., P.O. Box 1509, Greenville, SC 29602** and **Andrew F. Lindemann, Esq., P.O. Box 6923, Columbia, SC 29260**.

September 4, 2018



Stephen N. Garcia  
Garcia Law, LLC  
604 Pettigru Street  
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Dial: (864) 271-7335  
Fax: (864) 271-7338  
Attorney for Appellant



September 4, 2018

**Via U.S. Mail and Facsimile**

The Honorable Jenny Abbott Kitchings  
Clerk for the South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, SC 29211  
Fax: (803) 734-1839

RECEIVED  
SEP 06 2018  
SC Court of Appeals

**Re: John M. Burgess v. Katherine Hunter, Case no. 2017-CP-39-0428**

Dear Ms. Kitchings:

Enclosed for filing are one (1) original and seven (7) copies of the Petition for Rehearing in the above case. Also enclosed are the following:

1. Proof of Service of the Notice of Appeal on the Respondent's attorneys;
2. A filing fee of \$25.00; and
3. A self-addressed, stamped envelope.

I would greatly appreciate if you would file the Petition and return a copy to our office in the self-addressed, stamped envelope provided.

Please feel free to contact my office with any questions or concerns.

Sincerely,  
GARCIA LAW LLC

Stephen N. Garcia  
Attorney for John M. Burgess, Appellant

SNG/cpg  
Encls.

CC: David L. Moore, Jr. and Andrew F. Lindemann, Attorneys for Katherine Hunter, Respondent

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GREENVILLE, SOUTH CAROLINA  
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The Honorable Jenny Abbott Kitchings  
Clerk for the South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, SC 29211

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SC Court of Appeals

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