

ORIGINAL

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY

Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2012-CP-22-00971

In the Matter of the Estate of Willie Rogers Deas

Carolyn Deas

Respondent,

v.

Marvadine Giles a/k/a Marvdine Giles,
Willie Deas, Jr., Michelle Deas, Rodney
Branton, Moya Branton, Whitney Beaufort,

Of whom Marvadine Giles a/k/a Marvdine
Giles is the Appellant.

FINAL BRIEF OF APPELLANTS

Malcolm M. Crosland
Charles S. Goldberg
J. Kevin Holmes
The Steinberg Law Firm
61 Broad Street
Post Office Box 9
Charleston, SC 29402
(843) 720-2800
Attorneys for Appellant

RECEIVED

JUL 25 2013

SC Court of Appeals

TABLE OF CONTENTS

Table of Authorities	ii
Statement of the Issues on Appeal	1
Statement of the Case	2
Facts.....	3
Arguments	5
1. BECAUSE THE NOTICE OF APPEAL FROM THE PROBATE COURT TO THE CIRCUIT COURT WAS, IN FACT, TIMELY RECEIVED BY THE PROBATE COURT AND OPPOSING COUNSEL AND DELIVERED TO THE POST OFFICE BOX DESIGNATED BY THE CLERK OF THE CIRCUIT COURT, THE LOWER COURT ERRED IN GRANTING THE MOTION TO DISMISS THE APPEAL FOR LACK OF APPELLATE JURISDICTION REGARDLESS OF THE CLERK'S FAILURE TO PICK IT UP UNTIL THE FOLLOWING DAY AND STAMP IT AS RECEIVED TWO DAYS LATER.	
Conclusion.....	8

TABLE OF AUTHORITIES

Cases

<u>Archer v. Long</u> , 46 S.C. 292, 24 S.E. 83 (1896)	6
<u>Cretzmeyer v. Cretzmeyer</u> , 365 S.C. 12, 615 S.E.2d 116 (2005).....	7, 8
<u>Fox v. Union Buffalo Mills</u> , 226 S.C. 561, 86 S.E.2d 253 (S.C. App. 1955)	6, 7
<u>Gary v. State</u> , 347 S.C. 627, 557 S.E.2d 662 (2001).....	6
<u>King v. Atlantic Coast Line R. Co.</u> , 86 S.C. 510, 68 S.E.769 (1910)	6
<u>Sternberger v. McSween</u> , 14 S.C. 35 (1880)	6, 8
<u>Townsend v. Sparks</u> , 50 S.C. 380, 27 S.E.801 (1897).....	6
<u>United States v. Lombardo</u> , 241 U.S. 73, 36 S.Ct. 508, 60 L. Ed. 897 (1916)..	7

Statutes

§ 62-1-304, <u>S.C. Code Anno.</u> , 1976 as amended	6
§ 62-1-308(a), <u>S.C. Code Anno.</u> , 1976 as amended	6

Court Rules

Rule 6(a), S.C.R.C.P.	6
Rule 74, S.C.R.C.P.....	6

STATEMENT OF THE ISSUE ON APPEAL

- I. WHETHER THE LOWER COURT ERRED IN GRANTING A MOTION TO DISMISS APPELLANT'S APPEAL FROM THE PROBATE COURT TO THE CIRCUIT COURT FOR LACK OF APPELLATE JURISDICTION WHEN THE NOTICE OF APPEAL WAS TIMELY RECEIVED BY THE PROBATE COURT AND OPPOSING COUNSEL AND TIMELY DELIVERED TO THE POST OFFICE BOX DESIGNATED BY THE CLERK OF THE CIRCUIT COURT?

STATEMENT OF THE CASE

On August 28, 2012 The Honorable Waldo Maring, Probate Court Judge for Georgetown County, issued an Order ruling that the Respondent, Carolyn Deas, was the surviving spouse and had priority for appointment as Personal Representative of the Estate of Willie Rogers Deas. (Order of Judge Maring filed August 28, 2012) [R., pp. 1 – 11].

On September 6, 2012 Appellant's counsel placed a certified letter and Notice of Appeal in the United States mail, addressed to the Circuit Court, Probate Court, and opposing counsel. (Hearing Exhibits A, B, and C) [R., pp. 36 – 38]. The Notice of Intent to Appeal was received and signed for by the Probate Court on September 7, 2012 and by opposing counsel on September 10, 2012. (Hearing Exhibits D and E) (R., p. 42]. The certified letter was not delivered to the physical address of the Clerk's Office as requested but was diverted to a post office box designated by the Clerk of the Circuit Court at 9:45 a.m. on September 10, 2012. (Hearing Exhibit F) (R., p. 43]. The Clerk of Court did not pick up the certified letter and Notice of Intent to Appeal, however, until the next day on, September 11, 2012, and thereafter did not stamp the Notice of Appeal as having been received until three (3) days later on September 14, 2012. (Hearing Exhibit A) [R., p. 36].

On November 15, 2012 the Respondent's counsel filed a Motion to Dismiss on the grounds the Notice of Intent to Appeal had not been timely filed and, therefore, the Circuit Court lacked appellate jurisdiction of the appeal. (Motion to Dismiss dated 11/15/12) [R., pp. 28 – 33]. On February 26, 2013 the Honorable Benjamin H. Culbertson issued an Order granting the Motion to Dismiss. (Order of Judge Culbertson dated 2/26/13) [R., p. 22].

On March 13, 2013 Appellant filed Notice of Appeal to this Honorable Court and this appeal follows.

FACTS

The decedent, Willie Rogers Deas, died as a result of an automobile collision on January 6, 2012 in Georgetown, South Carolina. On January 30, 2012 the Appellant applied for Informal Appointment as the Personal Representative of the Estate of Willie Deas as his surviving spouse based on their marriage on September 21, 1972. The Appellant claimed she was separated from but not divorced from the decedent at the time of his subsequent marriage to the Respondent, Carolyn Deas, and his subsequent death.

On August 28, 2012 the Honorable Waldo Maring, Probate Court Judge for Georgetown County, issued an Order ruling that the Respondent, Carolyn Deas, was the surviving spouse and had priority for appointment as Personal Representative of the Estate of Willie Rogers Deas. (Order of Judge Maring filed August 28, 2012) [R., pp. 1 – 11].

The Appellate mailed a certified letter, return receipt requested, containing a Notice of Intent to Appeal to the Clerk of the Circuit Court, the Probate Court, and opposing counsel on September 6, 2012 by United States mail, return receipt requested. (Hearing Exhibits A, B, C) (R. pp. 36 - 38]. There is no dispute the letters were actually written or placed in the United States mail as evidenced by the copies of the letters and the Post Office receipt stamps produced by Appellant's counsel. There is no dispute the correspondence and Notice of Intent to Appeal were timely received by the Probate Court on September 7, 2012 and by opposing counsel on September 10, 2012 as evidenced by the signed return receipts produced by Appellant's counsel. (Hearing Exhibits D and E). (R. p. 42].

Today, thanks to computers, bar codes, laser scanners, and the internet, the delivery progress of a certified letter sent through the United States mail can be tracked on

USP.COM. The Appellant obtained the tracking information for the certified letter addressed to the Clerk of Court, Certified Letter No. 7010 1870 0000 0648 5476. (Hearing Exhibit F) (R. p. 43]. The tracking sheet states the certified letter and Notice of Intent to Appeal addressed to the Clerk of Court at 401 Cleland Street, Georgetown, South Carolina 29442 was “missent” on September 7, 2012.¹ (Hearing Exhibit F) (R. p. 43]. The tracking sheet further indicates the letter and Notice of Intent to Appeal was in the possession of the Georgetown Post Office the morning of September 10, 2012. Rather than delivering the letter to the physical address of the Clerk of Court as requested, however, the Post Office put a “Notice (No Authorized Recipient Available)” in the Clerk of Court’s post office box at 9:45 a.m. on September 10, 2012. (Hearing Exhibit F) [R. p. 43].

Unbeknownst to Appellant’s counsel, the Clerk of Court testified all mail is delivered to Post Office Drawer 479. [R., pp. 54 – 55]. The Clerk of Court testified they pick up the mail at 9:00 a.m. and 3:30 p.m. [R., pp. 55 – 56]. The Clerk of Court speculates the certified letter may have been placed in Georgetown County’s general post office box instead of the Clerk’s post office box and, therefore, was not picked up with the afternoon mail on September 10, 2012. (R., pp. 55 – 56]. The tracking sheet does not indicate another “missent” occurrence but simply states the certified letter was “delivered” on September 11, 2012. (Hearing Exhibit F) [R. p. 43]. The Clerk of Court testified, since the Notice of Intent to Appeal was one (1) day late on September 11, 2012, it was not clocked in by the Clerk’s Office until September 14, 2012. [R., p. 56].

¹ Appellant’s counsel was verbally advised by Post Office personnel that Postal Service Regulations do not allow them to respond to State Court subpoenas but that the “missent” referred to the letter being erroneously sent to the Clerk of Court in Walterboro, South Carolina. (Tr. Hearing, p. 10; Hearing Exhibit I).

ARGUMENT

- I. BECAUSE THE NOTICE OF APPEAL FROM THE PROBATE COURT TO THE CIRCUIT COURT WAS, IN FACT, TIMELY RECEIVED BY THE PROBATE COURT AND OPPOSING COUNSEL AND TIMELY DELIVERED TO THE POST OFFICE BOX DESIGNATED BY THE CLERK OF THE CIRCUIT COURT, THE LOWER COURT ERRED IN GRANTING THE MOTION TO DISMISS THE APPEAL FOR LACK OF APPELLATE JURISDICTION.

The procedure on appeal to the Circuit Court is governed by Rule 74, S.C.R.C.P. The time for filing notice of appeal is “the time provided by statute, or by this rule.” In this case, the time for filing Notice of Intent to Appeal from the Probate Court to the Circuit Court is governed by statute. Section 62-1-308(a), S.C. Code Anno., 1976 as amended, the Probate Code, provides a Notice of Intent to Appeal must be filed in the Circuit Court within ten (10) days of receipt of written notice of the Order being appealed. The Supreme Court has held “the statute is clear that the notice of appeal ‘must be filed’ in the circuit court within the ten-day period.” Cretzmeyer v. Cretzmeyer, 365 S.C. 12, 615 S.E.2d 116 (2005).

There is no dispute the Appellant received written notice of the Judge Maring’s Order on August 29, 2012, the day after the Order was filed and mailed by the Probate Court to Appellant’s counsel. The Probate Code adopts the Rules of Civil Procedure. *See*: § 62-1-304, S.C. Code Anno., 1976 as amended; *see also*: Cretzmeyer, *supra*. 615 S.E.2d at 116, fn. 2. Under Rule 6(a), S.C.R.C.P., since the tenth (10th) day after the Appellate received written notice of the Probate Court Order fell on a Saturday, the time for filing a Notice of Intent of Appeal was extended to the following Monday, September 10, 2012.

The words “file” and “filing” have long been defined under South Carolina case law to mean, “In the sense of a statute requiring the filing of a paper or document, it is filed when delivered to and received by the proper officer to be kept on file.” Sternberger v.

McSween, 14 S.C. 35 (1880); Archer v. Long, 46 S.C. 292, 24 S.E. 83 (1896); Townsend v. Sparks, 50 S.C. 380, 27 S.E.801 (1897); King v. Atlantic Coast Line R. Co., 86 S.C. 510, 68 S.E.769 (1910); Fox v. Union-Buffalo Mills, 226 S.C. 561, 86 S.E.2d 253 (S.C. App. 1955); Gary v. State, 347 S.C. 627, 557 S.E.2d 662 (2001). "It is clear that mailing does not constitute filing." Gary, *supra*. 557 S.E.2d at 663. The question presented in this case is what does "delivered" mean?

The Appellant does not ask this Court overrule precedent that mailing does not constitute filing. The Appellant seeks simply to modify the rule based on the facts of this case. The rule that regular mailing does not constitute filing dates back to the turn of the century and was based on the concern, "To so hold [that mailing constitutes filing] would create revolutions in the procedure of the law and the regulation of rights. In instances it might, indeed be convenient, in other, and most others, it would result in confusion and controversies; and we would have the clash of oral testimonies for the certain evidence of the paper in the files." Fox, *supra*. 86 S.E.2d at 255 *citing* United States v. Lombardo, 241 U.S. 73, 36 S.Ct. 508, 60 L. Ed. 897 (1916). Since *Lombardo* in 1916 and *Fox* in 1955, computers, bar codes, laser scanners, and the internet have revolutionized the postal service permitting the virtual real time tracking of mail from its point of origin to its destination. Such technology was not in existence when the rule was adopted. Instant tracking of certified letter greatly diminishes the continued need for the rule today.

Long after such technology did exist, however, this Court reaffirmed the rule that mailing does not constitute filing in the recent Certzmeier v. Cretzmeier, 365 S.C. 12, 615 S.E.2d 116 (2005). It is respectfully submitted that case is factually distinguishable. *Cretzmeier* involved the use of regular mail. This case involves the use of certified mail which was electronically tracked from the time it was placed in the United States mail until

it was delivered to the Clerk of Court. Unlike the facts in *Cretzmeyer*, the Appellant does not ask this Court to accept an attorney's affidavit the Notice of Intent to Appeal was dictated or the somewhat ambiguous affidavit of his legal secretary it was typed and mailed or to speculate why the letter in that case never arrived. Appellant's counsel has produced copies of the certified letter, the Notice of Intent to Appeal, and the certified mail and tracking number stamped received by the United States Post Office on September 6, 2012. Appellant's counsel has produced the USPS.COM tracking sheet showing the letter was first "missent," then timely delivered to the post office box designated by the Clerk of Court, on September 10, 2012 at 9:45 a.m. Unlike the facts in *Cretzmeyer*, the certified letter was picked up by the Clerk's Office the next day on September 11, 2012 and was thereafter stamped as filed three (3) days later on September 14, 2012.

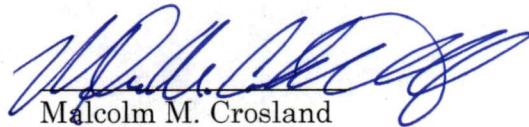
The sole issue presented under the facts of this case is whether the Notice of Intent to Appeal was timely filed on September 10, 2012 when notice of it was placed in the post office box designated by the Clerk of Court in ample time to have been picked up with the afternoon mail. Had the certified letter been delivered to the physical address of the Clerk's Office as requested, there would be no dispute in this case. It is manifestly unjust that the Appellant should forfeit her appellate right because the certified letter was diverted to a post office box designated by the Clerk of Court but not picked up until the following day. The evidence produced by the Appellant's counsel is contrary to the presumption the public officer did her duty. See: Sternberger, *supra*. 14 S.C. at 43.

The Appellant asks this Court to distinguish *Cretzmeyer* case based on the facts of this case and to rule, if an appellant produces an actual copy of the transmittal letter and Notice of Intent to Appeal, uses certified mail showing the letter was timely deposited in the United States mail, and produces a copy of the electronic tracking sheet showing the

certified letter was delivered to the post office box designated by the Clerk of Court within the statutory period, then the appeal is timely filed and the Circuit Court has appellate jurisdiction.

CONCLUSION

For the foregoing reasons, under the facts of this case, and in light of modern technology, the Appellant respectfully requests that the Order of the Honorable Benjamin H. Culbertson dated February 26, 2013 granting the Respondent's Motion to Dismiss be reversed and the case remanded for a hearing on the merits of the Appellant's appeal.



Malcolm M. Crosland
Charles S. Goldberg
J. Kevin Holmes
The Steinberg Law Firm
61 Broad Street
Post Office Box 9
Charleston, SC 29402
(843) 720-2800
Attorneys for Appellant

Charleston, South Carolina

24 day of July, 2013.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GEORGETOWN COUNTY

Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judges

Case No. 2012-CP-22-00971

Carolyn Deas..... Petitioner/Respondent,

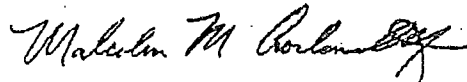
v.

Marvadine Giles a/k/a Marvdine Giles, Willie Deas, Jr.
Michelle Deas, Rodney Branton, Moya Branton,
Whitney Beaufort..... Respondents/Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Appellants complies with Rule 211(b) of the South Carolina Appellate Court Rules.

August 2, 2013.



Malcolm M. Crosland, Jr.
Charles S. Goldberg
J. Kevin Holmes
The Steinberg Law Firm
P. O. Box 9, 61 Broad Street
Charleston, SC 29402
(843) 720-2800
Attorney for Appellant