

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM LEXINGTON COUNTY  
Common Pleas

Alison Renee Lee, Circuit Court Judge

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**RECEIVED**  
APR 01 2019  
SC Court of Appeals

Case No. 2018-CP-32-01221  
Appellate Case No.: 2018-002134

Bryan Walling.....Respondent

v.

Judi Castro d/b/a A Mother's Prayer.....Appellant

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**BRIEF OF RESPONDENT**

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ATTORNEY FOR RESPONDENT

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**STATEMENT OF ISSUES ON APPEAL**

- I. Whether Appellant's appeal is barred due to the untimeliness of her Motions for Reconsideration and appeal;
- II. Whether Appellant's appeal fails on the merits due to her admission that she had not timely paid rent as agreed at the time of the eviction;
- III. Whether Appellant's appeal should be dismissed as moot due to her failure to comply with the Court's bond; and
- IV. Whether sanctions should be imposed against Appellant for filing a frivolous appeal.

**STATEMENT OF THE CASE**

This action was commenced on February 26, 2018, by an Application for Ejectment filed by Respondent in the Magistrate Court of Lexington County. [Application for Ejectment.] This application sought Appellant's eviction from property occupied pursuant to a commercial lease. [Application for Ejectment; Return of Civil Appeal.] A Rule to Vacate was issued on February 26, 2018. [Rule to Vacate.] A hearing was held on March 19, 2018, with Honorable Scott Dean Whittle presiding and Appellant appearing pro se. [Return of Civil Appeal.] The Magistrate Court ruled that Appellant was in arrears on rent for the property, by her own admission, and subsequently issued a Writ of Ejectment in favor of Respondent. [Writ of Ejectment; Return of Civil Appeal].

Appellant obtained counsel to appeal the eviction action decision. Appeal was timely filed, and at an April 19, 2018 bond hearing, the Magistrate Court ordered Appellant to pay a \$7,500 bond, as well as keep up with her \$2,500 per month rent payments. [Order Vacating Stay of Ejectment.] Appellant did not pay the court-ordered funds for rent. [Order Vacating Stay of Ejectment, p. 1, par. 3-4].

Appellant's appeal was denied by Honorable R. Knox McMahon on June 25, 2018. [Order Denying Appeal]. Appellant's counsel filed a Motion for Reconsideration on July 12, 2018, more than 10 days following written notice of the decision. [Notice of Motion and Motion for Reconsideration; Transcript of Proceedings on Motion for Reconsideration.] At the hearing on August 7, 2018, though Appellant claimed that he had attempted to file the documents on July 6, 2018, which still would have been

untimely, and Appellant failed to follow the electronic filing rules for failed electronic filings. [Transcript of Proceedings on Motion for Reconsideration.] Honorable Alison Renee Lee denied the motion due to the untimely filing of the Motion for Reconsideration. [1<sup>st</sup> Order Denying Motion for Reconsideration]. Appellant then filed a second Motion for Reconsideration on August 15, 2018, which also was denied. [2<sup>nd</sup> Order Denying Motion for Reconsideration.] In that motion, Appellant stated the there was an attempt to file the Motion for Reconsideration on July 6, 2018, but that the Clerk of Court's electronic filing system would not accept the document. [Notice of Motion and Motion to Reconsider.] This claim had not been not raised until the hearing on the Motion for Reconsideration. [1<sup>st</sup> Motion to Reconsider; Transcript of Proceedings on Motion for Reconsideration]. On October 30, 2018, Honorable Alison Renee Lee dismissed Appellant's second Motion for Reconsideration, finding that although Appellant allegedly attempted to file a Motion for Reconsideration on July 6, 2018, it was still outside of the ten-day filing deadline. [Order Denying Motion for Reconsideration].

On December 3, 2018, Appellant personally filed a Notice of Appeal in the South Carolina Court of Appeals to deny the decision of Honorable Alison Renee Lee. [Notice of Appeal]. On December 18, 2018, Counsel for Appellant filed a Motion to Be Relieved as Counsel for Appellant, which was not opposed by the undersigned. In support of his motion, Appellant's counsel averred stated that, "While I have aggressively represented Ms. Castro at every stage of this proceeding, I am of the opinion Ms. Castro's appeal has no merit." [Notice of Motion to Be Relieved as Counsel; Affidavit of Counsel in Support

of Motion to be Relieved, p. 3, par. 8]. On January 1, 2019, counsel was relieved by Honorable Frank R. Addy, Jr. [Order Relieving Counsel].

### STANDARD OF REVIEW

“When reviewing a circuit court’s adjudication of an appeal of an ejection action in magistrate’s court, this court reviews the order under a limited standard of review in which ‘(1) findings of fact are to be upheld if there is any supporting evidence, and (2) absent an error of law, the circuit court’s holding is to be affirmed.’” *Skydive v. Horry Cty.*, *Skydive v. Horry Cty.*, Op. No. 5573 (Ct. App. filed July 11, 2018)(citing *McNair v. United Energy Distribs.*, 390 S.C. 44, 49, 699 S.E.2d 723, 726 (Ct. App. 2010)).

### ARGUMENT

#### I. Appellant’s Appeal is Time-Barred.

The Supreme Court of South Carolina has declared that an appeal “is a matter of grace and is not an inherent or vested right.” *McCullough v. McCullough*, 242 S.C. 108, 110, 130 S.E.2d 77, 78 (1963). Accordingly, the “rules of court” and any applicable statutory law “must be followed in perfecting an appeal.” *Id.* The South Carolina Appellate Court Rules dictate that the clerk of court shall issue an order of dismissal when an appellant “has failed to comply with the requirements of these Rules” and that such order of dismissal will “have the same force and effect as an order of the appellate court.” Rule 260(a), SCACR.

The South Carolina Court of Appeals has made clear that failing to timely serve a notice of appeal “divests the court of subject matter jurisdiction and results in dismissal

of the appeal.” *Holroyd v. Requa*, 361 S.C. 43, 54, 603 S.E.2d 417, 423 (Ct. App. 2004) (quoting *Canal Ins. Co. v. Caldwell*, 338 S.C. 1, 5, 524 S.E.2d 416, 418 (Ct. App. 1999)). Thus, this Court should dismiss the present appeal for lack of subject matter jurisdiction on the grounds of an untimely appeal.

The South Carolina Appellate Court Rules require that a notice of appeal from the Court of Common Pleas shall be served within thirty (30) days after entry of the judgment. Rule 203(b)(1), SCACR. The Rule goes on to say that the time for appeal can be stayed pursuant to 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).” *Id.* A Motion for Reconsideration must be filed within ten (10) days after written notice of entry of the judgment by the court. Rule 59(e), SCRCP. The Appellant’s Motion for Reconsideration was not filed until July 12, 2018, though final judgment was entered dismissing the case on May 30, 2018, with written notice being served electronically on June 25, 2018 – more than the allotted ten (10) days prior to the filing of the Motion for Reconsideration. Even if the Court recognizes Appellant’s attempt to file a Motion for Reconsideration on July 6, 2018, the ten-day timeframe for the motion had already passed.

The South Carolina Court of Appeals has previously concluded that an untimely motion for reconsideration “did not stay the time for appeal.” *Canal Ins. Co. v. Caldwell*, 338 S.C. 1, 6, 524 S.E.2d 416, 418 (Ct. App., 1999). The Supreme Court of South Carolina has declared that if any party does not meet the deadline for filing a motion or notice of

appeal, “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.” *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 15, 602 S.E.2d 772, 775 (2004). Therefore, the untimely Motion for Reconsideration filed by Appellant’s counsel did not stay the deadline for appeal and Appellant’s appeal must be dismissed by the Court.

## II. The Appeal Fails On The Merits.

“When reviewing a circuit court’s adjudication of an appeal of an ejectment action in magistrate’s court, this court reviews the order under a limited standard of review in which ‘(1) findings of fact are to be upheld if there is any supporting evidence, and (2) absent an error of law, the circuit court’s holding is to be affirmed.’” *Skydive v. Horry Cty.*, *McNair v. United Energy Distribs.*, 390 S.C. 44, 49, 699 S.E.2d 723, 726 (Ct. App. 2010).

The Magistrate Court rightfully found that Appellant should be ejected from the subject property because she failed to pay rent as agreed, including tendering bad checks to Respondent. [Return of Civil Appeal.] At the hearing, there was no dispute that Appellant had not timely paid rent owed in the amount of \$2,600 per month. [Return of Civil Appeal, p. 2.] Thus, by her own admission, she breached the agreement and eviction was proper. Accordingly, *if* the Court hears the appeal, the lower court’s decision should be affirmed as a matter of law.

**III. The Appeal Is Moot Due To Appellant's Failure To Pay The Ordered Bond.**

The Magistrate Court ordered Appellant to pay an appeal by way of rent in the lesser amount of \$2,500 pending the appeal, which she agreed to do in the Bond to Stay Execution on Appeal. [See Bond to Stay Execution on Appeal.] She did not do so, as set forth in the Order Vacating Stay of Ejectment. [Order Vacating Stay of Ejectment.] Thus, the instant appeal should be denied due to her failure to pay rent as agreed during the appeal, thereby denying her the right to occupy the subject property, so her claim is moot. "An appellate court will not pass judgment on moot and academic questions; it will not adjudicate a matter when no actual controversy capable of specific relief exists." *Skydive v. Horry Cty.*, Op. No. 5573 (Ct. App. filed July 11, 2018)(citing *Sloan v. Greenville Cty.*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009)). Here, Appellant has not occupied the subject property in months due to her failure to pay the rent required by the bond. Thus, there is nothing for the Court to consider regarding these premises, and the appeal should be dismissed as moot.

**IV. The Court Should Impose Sanctions Upon Appellant For The Frivolous Appeal.**

Rule 269 of the South Carolina Appellate Court Rules provides that, upon a frivolous appeal or any appeal not that is not in compliance with the Rules, the appellate court may "impose upon offending attorneys or parties such sanctions as the circumstances of the case and discouragement of like conduct in the future may require." Rule 269, SCACR. Appellant filed this untimely, meritless appeal against the advice of

her counsel, against whom the undersigned does not seek sanctions. Appellant's appeal did not comply with the applicable South Carolina Rules of Civil Procedure and South Carolina Appellate Court Rules which clearly indicate that a Motion for Reconsideration must be filed within ten (10) days of written notice of a judgment, and the appeal must be filed within thirty (30) days. The Motion for Reconsideration was filed at minimum eleven (11) days after the Appellant received written notice of the judgment, and even after receiving that decision, she *still* filed no appeal but rather continued to file for reconsideration of a decision that was appropriate as a matter of law based upon the facts here: she simply would not pay her rent. Under these circumstances, Appellant's appeal was untimely, meritless, and violative of the stated Rules of this Court, resulting in attorney's fees to Respondent in the amount of \$250 per hour for the attorney and \$90 per hour for paralegals and law clerks, for which Appellant should be sanctioned.

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**CONCLUSION**

As detailed above, Appellant's appeal should be dismissed due to Appellant's counsel failing to timely file the Motion for Reconsideration. The appeal also fails on the merits, such that the decision of the lower courts should be affirmed, and is moot due to the fact that her lack of occupancy of the building and failure to comply with the bond rendered it moot. Further, Appellant should be sanctioned for a frivolous appeal that did not comply with the South Carolina Appellate Court Rules.

**SARVIS LAW, LLC**

By: \_\_\_\_\_

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April 1, 2019

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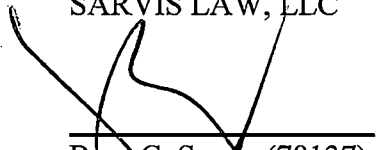
Appellant.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondent on Judi Castro d/b/a A Mother's Prayer by depositing a copy of it in the United States Mail, postage prepaid, on April 1, 2019, addressed to her attorney of record, Lawrence Keitt, Post Office Box 811, Orangeburg, South Carolina 29116.

April 1, 2019

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