STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2016-002367

Charles F. Burton,.....Appellant.

v.

Lexington County Solicitor,.....Respondent.

RETURN TO MOTION TO REINSTATE AND

MEMORANDUM IN SUPPORT[1]

The Lexington County Solicitor files this Return to Motion to Reinstate because the Appellant has failed to comply with the requirements for a notice of appeal, thus the appeal should remain dismissed.

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[1] Under Rule 240(c)(1)-(3), a motion shall include a certificate of service, a memorandum with citation of authorities, and, "where the Record on Appeal or Appendix has not been filed, or where the facts relied upon in support of the motion are not contained in the Record on Appeal or Appendix, the parties shall file affidavits and other documents in support of their positions." Although the Record on Appeal or Appendix has not been filed, the Respondent does not think affidavits or other documents are necessary, because the motion and memorandum reference documents that are part of the appellate record. If the Court disagrees, the Respondent will accordingly supplement the motion and memorandum.

BACKGROUND

On June 20, 2019, Judge McIntosh issued an Order (Original Order) granting summary judgment to Respondent. On June 27, 2019, Respondent filed a motion to alter or amend. On July 2, 2019, Judge McIntosh issued an Amended Order. On July 23, 2019, Appellant mailed a notice of appeal of the Original Order. Specifically, the Notice of Appeal states that Appellant is appealing the order "Signed by the Honorable R. Lawton McIntosh, on June 20, 2019," and Appellant attached a copy of the June 20, 2019 Order when he mailed the notice of appeal to the Court of Appeals.

ARGUMENT

I. The Appeal should remain dismissed because Appellant incorrectly appealed the Original Order, not the Amended Order.

An "[a]ppeal may be taken, as provided by law, from any final judgment, appealable order or decision." SCACR Rule 201.[2] On August 30, the Court of Appeals dismissed the instant appeal because Appellant failed to timely serve the notice of appeal on Respondent. On September 4, 2019, Appellant mailed a motion to reinstate arguing that he did serve the notice of appeal on the Respondent, but that "Appellant's Counsel in error attached the Original Order issued in this matter and did not attach the Amended Order issued by the lower court on July 2, 2019." This representation by Appellant's counsel is correct; and this error is legally dispositive. Appellant not only wrongly attached the Original Order from June 20, 2019, but specifically indicated in the notice of appeal that he intended to appeal the Original Order—making no mention of the Amended Order whatsoever. This was no accident. Simply stated, Appellant appealed the wrong order.

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[2] The jurisdiction of the Court of Appeals "is appellate only, and the court shall apply the same scope of review that the Supreme Court would apply in a similar case." S.C. Code Ann. § 14-8-200. This includes "[a] final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment. . . ." S.C. Code Ann. § 14-3-330.

After the issuance of the July 2, 2019 Amended Order, the June 20, 2019 Original Order was no longer the final appealable order in this case, and as such was not subject to appeal by itself. *See, e.g., Nelson v. Nelson*, No. 2017-000291, --- S.E.2d.---, 2019 WL 3938675, at *1 (S.C. Ct. App. Aug. 21, 2019) (appealing *both* "the family court's final order *and* final amended order." (emphasis added)). Rule 203(b)(3), SCACR (stating that appeals from a domestic relations action shall be filed in the same manner as appeals from the Court of Common Pleas under (b)(1)). That is to say, Appellant's attempt to appeal solely the Original Order, which lacks changes made by the Amended Order (which ultimately concluded the case), is improper. Appellant never filed or served a notice of appeal as to the July 2, 2019 Amended Order. Any attempt to do so now would be untimely.

Additionally, the South Carolina Appellate Court Rules recognize the importance of appealing the latest order to the Court of Appeals.

> 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.*

Rule 203, SCACR (emphasis added). *Gallagher v. Evert*, 353 S.C. 59, 63–64, 577 S.E.2d 217, 219 (Ct. App. 2002) ("[T]he time for filing the notice of appeal did not begin to run until after the circuit court denied the motion [to alter or amend]. After the circuit court denied the motion, only twenty days passed before [Appellant] filed his notice of appeal . . . , thus [Appellant] complied with Rule 203(b), SCACR."). Stated differently, the Appellate Rules provide the benefit of staying the time to file an appeal in order to permit the would-be appellant to seek

appeal from any amended final order.[3] If this was not so, and it mattered not which Order was appealed, then the entirety of the stay provision in Rule 203(b)(1) is superfluous. *See, e.g., State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010) (quotations omitted) (quoting *In re Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995)) ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.").

Lastly, permitting Appellant to appeal the Original Order, without reference to the Amended Order, in many ways perpetuates a legal fiction. To the extent the Court has amended or changed the Original Order, it no longer exists as such. Allowing an Appeal on a since-modified Order would be nothing more than entertaining a hypothetical or issuing and advisory opinion on what would be the case had the Court not issued the Amended Order. *Shasta Beverages (A Div. of Consol. Foods Corp.) v. S.C. Tax Comm'n*, 280 S.C. 48, 56, 310 S.E.2d 655, 659 (1983) ("It is not the role of this Court to . . . render an advisory opinion on a hypothetical situation."). The Court cannot permit such a result here.

II. The appeal should remain dismissed because if the Original Order was the final judgment, the notice of the appeal was untimely.

In the alternative, if this Court finds the Original Order is the final order subject to appeal, then the notice of appeal was still untimely. Respondent's motion to alter or amend asked the court to correct three scrivener's errors. The resulting Amended Order did not chance the substance of the order or go to the merits, it only corrected those three errors. As such, while styled, possibly incorrectly, as a Motion to Alter or Amend pursuant to SCRCP 59(e), it was in substance a SCRCP 60(a) motion to correct clerical mistakes in judgment, and not to reconsider the merits of the order. SCRCP 60(a) motions do no stay the time in which the appellant has to

[3] However, the Appellant here has received the benefit of staying the time to file his notice of appeal, but has not borne the burden of appealing the final, Amended Order.

serve the notice of appeal. *See Otten v. Otten*, 287 S.C. 166, 167, 337 S.E.2d 207, 208 (1985) ("Rule 60(a), allows the correction of clerical mistakes in judgments. A motion made under this provision does not toll the running of the time for appeal."). Treating the Motion to Alter or Amend as a Rule 60(a), because it only requested correction of three scrivener's errors, means that when the Appellant served the notice of appeal of the Original Order on June 23, 2019, it was beyond the allowable 30 days.

III. The appeal should remain dismissed because even if the notice of appeal was timely served, the notice of appeal has not been timely filed.

Should the court determine that Appellant timely served the notice of appeal, which Respondent disagrees with for the reasons discussed above, the appeal should nonetheless remain dismissed for failure to timely file the notice of appeal.

SCACR Rule 203(d)(1)(B) requires that "[t]he notice of appeal shall be filed with the clerk of the lower court and the clerk of the appellate court within the (10) days after the notice of appeal is served." SCACR Rule 203(d)(1)(B). On August 1, 2019, the Clerk of the South Carolina Court of Appeals sent the Appellant a deficiency letter alerting him that "[a] copy of the notice has not been filed with the trial court clerk, pursuant to Rule 203(d), SCACR." The August 1, 2019 deficiency letter additionally states that "any deficiency must be corrected within ten (10) days of the date of this letter or your appeal will be dismissed." As of the date of this return, the notice of appeal has still not been filed with the clerk of the lower court, according to the public index.

SCACR Rule 203(d)(3) further states, that "[i]f the notice of appeal is not timely filed or the filing fee is not paid in full, the appeal **shall be dismissed**, and shall not be reinstated except as provided by Rule 260." (emphasis added) SCACR Rule 203(d)(3). While Rule 263 allows for

appeals to be reinstated "by leave of the court, upon good cause shown" no good cause has been shown here. SCACR Rule 263. Appellant is not a *pro se* litigant, but rather he is represented by a licensed South Carolina Attorney. The Appellant was put on notice of this deficiency and already given an additional ten day extension to comply. The deficiency letter states that if the deficiency is not corrected within that ten day extension that the appeal will be dismissed. On August 30, 2019, this court dismissed the Appellant's appeal and the Appellant still did not correct this deficiency before moving to reinstate the appeal.

While SCACR Rule 263 gives the Court discretion to extend the time for filing the notice of appeal, there has been no showing from the Appellant was to why the time for filing the appeal should be extended again, this time necessarily in excess of fifty (50) days beyond the time initially set forth in the Appellate Rules.

Accordingly, for the reasons stated above, Appellant's appeal should remain dismissed and should not be reinstated.

[SIGNATURE BLOCK ON THE FOLLOWING PAGE.]

Respectfully Submitted,

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SEPTEMBER 13, 2019.
COLUMBIA, SOUTH CAROLINA.

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CERTIFICATE OF SERVICE

I certify that I served the Appellant with a copy of the Respondent's Return to Motion to Reinstate by depositing a copy of in the United States Mail, postage prepaid. The document was sent to his attorney at the following address:

Charles T. Brooks, III, Attorney at Law
Post Office Box 3512
Sumter, South Carolina 29151

[The signature block is on the next page.]

Respectfully submitted,

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September 13, 2019