

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Alex Kinlaw, Jr., Circuit Court Judge

Common Pleas Case No. 2018-CP-23-00513

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Appellate Case No. 2019-002040

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DAVID ROSEN,

*Appellant,*

v.

JOSEPHINE MIDDLETON,

*Respondent.*

**Memorandum in Support of  
Motion to Dismiss Appeal for Lack of Jurisdiction**

Howard W. Anderson III (#100329)  
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*Lead Counsel for Respondent*

**TABLE OF CONTENTS TO MEMORANDUM**

Procedural Background.....2  
Argument.....2  
Conclusion .....3  
Proof of Service .....5

**TABLE OF CONTENTS TO APPENDIX**

*Orders:*

Order of December 4, 2019 .....1  
Order of March 25, 2019 .....4

*Pleadings:*

Notice of Appeal .....7  
Motion for Relief from Judgment.....9

Comes now Respondent and would respectfully show the Court as follows in support of her Motion to Dismiss Appeal for Lack of Jurisdiction.

### **PROCEDURAL BACKGROUND<sup>1</sup>**

Appellant David Rosen has filed a notice of appeal from the Court of Common Pleas, in a civil action he filed against Respondent Josephine Middleton. [App. 7.]. The order under appeal is “the Order of the Honorable Alex Kinlaw, dated December 4, 2019.” [App. 7]. In that order, Judge Kinlaw granted Respondent Josephine Middleton’s motion for relief under Rule 60, SCRCF, [App. 9-13], from a previous grant of summary judgment that had been entered without her participation, [App. 4-6].

### **ARGUMENT**

By statute the General Assembly has created appellate jurisdiction with respect to only four categories of appeals:

(1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;

(2) An order affecting a substantial right made in an action when such

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<sup>1</sup> The relevant documents are included in the Appendix to this Memorandum.

order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;

(3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment; and

(4) An interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction or granting, continuing, modifying, or refusing the appointment of a receiver.

S.C. Code § 14-3-330.

Although Appellant here seeks to review an order granting Respondent relief under Rule 60, SCRCP, this Court has held that orders granting are neither final orders nor intermediate orders subject to immediate appellate review. *Posick v. Sea Coast Constr.*, 380 S.C. 584, 589 (Ct. App. 2008) (“We find the order granting the Pocisks’ motion for relief from judgment neither affects a substantial right nor grants a new trial. As the order does not meet the requirements of section 14-3-330(2) and does not fall within any of the other categories set forth in section 14-3-330, the order is not immediately appealable.”). Accordingly, appellate review of the order is premature before an adjudication of the action below on the merits. *See id.*

#### CONCLUSION

Because this Court does not yet possess any jurisdiction in this matter, the appeal

should be dismissed.

Dated this 14<sup>th</sup> day of January 2020.

JOSEPHINE MIDDLETON



---

Howard W. Anderson III  
SC Bar No. 100329  
*Lead Counsel for Respondent*

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# **APPENDIX**

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF GREENVILLE )  
 )  
David Rosen )  
 )  
Plaintiff, )  
 )  
VS. )  
 )  
Josephine Middleton )  
 )  
Defendant. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
FOR THE THIRTEENTH JUDICIAL CIRCUIT  
CASE NO.: 2018-CP-23-00513

ORDER  
**RECEIVED**  
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SC Court of Appeals

This matter came before the Court on Defendant’s Motion to Substitute counsel, Motion to Quash and Motion for Relief from Judgement pursuant to Rule 60 of the South Carolina Rules of Civil Procedure. Defendant’s motion was filed in response to this Court’s December 10, 2018 order attached hereto as Exhibit “A.” Present at the hearing was Plaintiffs’ counsel, Joshua T. Hawkins, of the Greenville County Bar, and Defendant’s counsel, Devon Puriefoy, of the Greenville County Bar.

**FINDING OF FACTS AND CONCLUSIONS OF LAW**

At the commencement of the hearing, counsel for Defendant recommended the Court heard the Motion to Substitution of Counsel motion. All parties consented to this motion. The Court agreed.

Counsel for Defendant then recommended the Court hear the Rule 60 Motion for Relief from Judgment prior to the Motion to Quash, as a grant of Defendant’s Rule 60 motion would render moot his Motion to Quash. The Court agreed.

Based on the arguments presented at the hearing, the court finds as follows:

1. The Court releases Michael Gambrell as counsel for Defendant Josephine Middleton and

substitute Kimberly T. Thomason and Devon M. Puriefoy,

2. The Court finds further, that although Plaintiffs have argued the Rule 60 relief from judgment should be denied as our Court's have routinely held that attorney negligence does not entitle a party subject to a judgment to relief, this Court finds that, pursuant to the United States Supreme Court case of Maples v. Thomas, attorney abandonment has been established. In accordance with the findings of our nation's Supreme Court, the action, or inaction, of Defendant's former counsel went beyond traditional notions of attorney negligence and constitute attorney abandonment. Maples v. Thomas, 565 U.S. 266, 273, 132 S. Ct. 912, 918, 181 L. Ed. 2d 807 (2012).
3. Finally, I find that as a result of this Court's grant of Defendant's Rule 60 Motion for Relief from Judgment, the Court need not consider Defendant's Motion to Quash as doing so would be premature.

**NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED** as follows:

**IT IS SO ORDERED!**

---

Alex Kinlaw, presiding Judge  
Thirteenth Judicial Circuit

\_\_\_\_\_, SC  
this \_\_\_\_ day of \_\_\_\_\_, 2019



Greenville Common Pleas

**Case Caption:** David Rosen vs. Josephine Middleton  
**Case Number:** 2018CP2300513  
**Type:** Order/Vacate Judgment

So Ordered

s/Alex Kinlaw, Jr., #2763

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STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF GREENVILLE )  
 )  
David Rosen, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
Josephine Middleton, )  
 )  
Defendant. )  
 )

COURT OF COMMON PLEAS  
CASE NO. 2018-CP-23-00513

**ORDER**

**BACKGROUND**

On November 3, 2017, the plaintiff, proceeding *pro se*, filed an action against the defendant in the Magistrate’s Court under the civil action number 2017-CV-23-10202047. On December 15, 2017, counsel for the plaintiff filed an amended complaint in the Greenville County Magistrate’s Court alleging several causes of action, including trespass to chattels, conversion, and abuse of process. Service of the amended complaint was made on January 12, 2018, on Michael Gambrell, the attorney of record for the defendant. Defense counsel did not file any responsive pleading. After learning that the case had been transferred to this court, the plaintiff served the amended complaint with the updated civil action number upon the attorney of record for the defendant on September 11, 2018. The plaintiff also served discovery requests, including Requests for Admission, with the September 11, 2018, service of the amended complaint.

On November 23, 2018, the plaintiff moved for default judgment or, in the alternative, summary judgment. On December 18, 2018, the Honorable Judge Robin Stillwell heard the plaintiff’s motion and granted summary judgment in favor of the plaintiff. The plaintiff properly notified defense counsel of this hearing, but neither the defendant nor her counsel appeared. The Court scheduled a damages hearing for January 14, 2019. That hearing was rescheduled to January 17, 2019 and then to February 7, 2019. The plaintiff provided notice to defense counsel of all three of those scheduled hearings. On February 7, 2019, defense counsel requested a continuance for the hearing. The Court rescheduled the hearing to March 4, 2019. The plaintiff provided notice to defense counsel of that hearing on February 11, 2019. Neither the defendant nor her counsel appeared.

### FINDINGS

During the March 4, 2019 damages hearing, the Court heard testimony from the plaintiff regarding his damages. The plaintiff also introduced an affidavit of his monetary damages into evidence as Plaintiff's Exhibit One. The Court finds that, as a result of the defendant's actions, the plaintiff sustained actual damages in the amount of Sixty-One Thousand Two Hundred Thirty-Three Dollars and 00/100 (\$61, 233.00) comprised of the following: Nine Thousand Seven Hundred Twenty-Seven Dollars and 00/100 (\$9,727.00) in repairs and improvements to the house and property located at 407 Tanner Chase Way, Mauldin, South Carolina 29607; Ten Thousand Dollars and 00/100 (\$10,000.00) in increased value of the house and property located at 407 Tanner Chase Way, Mauldin, South Carolina 29607; Thirty Eight Thousand Four Hundred Twenty-Four Dollars (\$38,424.00) in personal property retained or destroyed by the defendant; and Three Thousand Eighty-Two Dollars and 00/100 (\$3,082.00) in moving expenses. The Court does not find that the defendant be ordered to pay any punitive damages or damages for pain and suffering.

It is therefore ordered that the defendant pay the plaintiff actual damages in the amount of Sixty-One Thousand Two Hundred Thirty-Three Dollars and 00/100 (\$61, 233.00).

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The Honorable Alex Kinlaw

Greenville, South Carolina  
March \_\_\_\_, 2018



Greenville Common Pleas

**Case Caption:** David Rosen vs. Josephine Middleton

**Case Number:** 2018CP2300513

**Type:** Order/Damages

So Ordered

s/Alex Kinlaw, Jr., #2763

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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

The Honorable Alex Kinlaw, Circuit Court Judge

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SC Court of Appeals

David Rosen.....Appellant,

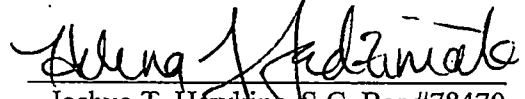
v.

Josephine Middleton.....Respondent.

Case No. 2018-CP-23-00513

**NOTICE OF APPEAL**

David Rosen appeals the Order of the Honorable Alex Kinlaw, dated December 4, 2019.  
The appellant received written notice of the entry of Judge Kinlaw's Order on December 4, 2019.

  
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**Attorneys for Appellant**

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**Attorney for Respondent Josephine Middleton**

FORM 7  
PROOF OF SERVICE OF A NOTICE OF APPEAL

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

The Honorable Alex Kinlaw, Circuit Court Judge

Case No. 2018-CP-24-00157

David Rosen,

Appellant,

v.

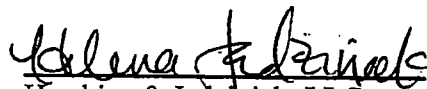
Josephine Middleton,

Respondent.

RECEIVED  
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SC Court of Appeals

PROOF OF SERVICE

I certify that I served the Notice of Appeal on Josephine Middleton by depositing a copy of it in the United States Mail, postage prepaid, on December 09, 2019, addressed to her attorneys of record, Devon Marc Pureifoy and Kimberly Truluck Thomason, Trulock Thomason, LLC, 3 Boyce Avenue, Greenville, South Carolina 29601.



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Attorneys for Appellant

December 09, 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE	)	CASE NO.: 2018-CP-23-00513
	)	
David Rosen	)	<b>Defendant's Motion For Relief From Judgment</b>
	)	
Plaintiff,	)	
	)	
VS.	)	
	)	
Josephine Middleton	)	
	)	
Defendant.	)	
_____	)	

Defendant, Josephine Middleton, by and through her undersigned counsel, files this Motion to Vacate Judgment pursuant to Rule 60 of the South Carolina Rules of Civil Procedure ("SCRCP").

**LEGAL STANDARD AND ARGUMENT**

Rule 60(b) authorizes a district court, on motion and upon such terms as are just, to relieve a party from a final judgment, order, or proceeding for any "reason justifying relief from the operation of the judgment." *Aikens v. Ingram*, 652 F.3d 496, 500-01 (4th Cir. 2011). Pursuant to Rule 60(b), SCRCP, a court may relieve a party of a final judgment for mistake, inadvertence, surprise, or excusable neglect so long as the relief sought is filed no more than one (1) year from the date of judgment. "This rule is an appropriate remedy for good faith mistakes of fact if all other applicable factors are met." *Hillman v. Pinion*, 347 S.C. 253, 256, 554 S.E.2d 427, 429 (Ct. App. 2001). In determining whether to grant relief under Rule 60(b)(1), the court must consider the following factors: "(1) the promptness with which relief is sought; (2) the reasons for the failure to act promptly; (3) the existence of a meritorious defense; and (4) the prejudice to the other party." *Micronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 510-11,

548 S.E.2d 223, 226 (Ct. App. 2001). *Rouvet v. Rouvet*, 388 S.C. 301, 309, 696 S.E.2d 204, 208 (Ct. App. 2010). Although generally the neglect of an attorney is viewed as the neglect of the client, and no mistake, inadvertence, or neglect attributable to the attorney can be successfully used as a ground for relief from judgment, the United States Supreme Court addressed the issue of attorney abandonment and whether such a finding satisfies the “good cause” or “cause” inquiry of a motion to be relieved from judgment. Rules Civ.Proc., Rule 60(b); *Id.* at 301; *Maples v. Thomas*, 565 U.S. 266, 273, 132 S. Ct. 912, 918, 181 L. Ed. 2d 807 (2012).

In Maples the court was tasked with determining whether the facts surrounding Appellant’s failure to timely submit all exhaustive state court appeals was “cause” to be relieved from judgment. *Maples v. Thomas*, 565 U.S. 266, 270, 132 S. Ct. 912, 916, 181 L. Ed. 2d 807 (2012). There, two New York-based attorneys volunteered to assist Appellant in his post-conviction relief efforts due to claimed ineffective assistance of counsel at the trial and sentencing phases of his criminal proceedings. In 2002, while Appellant’s post-conviction petitions were pending, the two New York-based attorneys left their respective positions at the New York-based firm and sought alternative employment opportunities. *Id.* Neither attorney informed Appellant of their departures. Following their respective departures, the Alabama trial court denied Appellant’s petition for post-conviction relief, which started the appeals clock. *Id.* Under the Alabama Rules of Criminal Procedure, Appellant had forty-two (42) days to timely file an appeal, however, no such appeal was filed. *Id.* Appellant then sought a habeas petition in federal court which was ultimately denied due to the Court’s finding that Appellant failed to timely file his appeal at the state court level.

There, the United States Supreme Court held that although the negligence of an attorney is imputed on the client and therefore not a viable ground to be relieved from judgment, the facts surrounding Appellant's default warranted a finding of attorney abandonment. *Id.* More specifically, the court held that "a client cannot be charged with the acts or omissions of an attorney who has abandoned him. Nor can a client be faulted for failing to act on his own behalf when he lacks reason to believe his attorneys of record, in fact, are not representing him." *Id.* at 924.

In the present matter Plaintiff filed a *pro se* Summons and Complaint with the Greenville County Magistrate's Court on November 3, 2017, and served a copy of the same on Defendant. On or about December 13, 2017, Defendant's counsel filed an Answer and Counterclaims and served a copy of the same on Plaintiff. On or about December 15, 2017, Plaintiff's counsel filed his Amended Summons and Complaint with the Greenville County Magistrate's Court and served a copy of the same on Defendant's counsel on or about January 12, 2018, which went unanswered by Defendant. On September 11, 2018, following the removal of the matter to the Greenville County Court of Common Pleas, Plaintiff served an updated copy of the Summons and Complaint on Defendant's counsel, reflecting the new civil case number. This pleading also went unanswered by Defendant's counsel. In fact, following the filing of Defendant's Answer and Counterclaims on December 13, 2017, Defendant's counsel made no additional appearances on Defendant's behalf, and never sought leave of court to be relieved as counsel.

Over the course of the coming months, Defendant frequently reached out to her attorney in an attempt to get an update regarding the case in hopes that some good news would ease her anxiety, each time to no avail. Although Defendant's counsel was unresponsive, Defendant had

no reason to suspect her counsel was not zealously advocating on her behalf. Unbeknownst to Defendant, however, her counsel had missed each court/rule mandated deadline including the answer deadline on the Amended Summons and Complaint, twice. Additionally, counsel failed to respond to or attend the hearing on Plaintiff's Motion for Default Judgment; failed to attend the damages hearing relating to the same, despite the clerk's electronic notifications; and failed to file any appeals. As a direct result of counsel's abandonment, Plaintiff was awarded \$61,233.00 via judgment of this Court on or about March 22, 2019. Even following the default judgment award, which counsel received electronic notification of, Defendant's counsel remained unresponsive to Defendant's communications. In fact, Defendant was not made aware of her counsel's utter abandonment until she received a notice from her banking institution that a subpoena for her personal bank records had been issued by Plaintiff, at which time Defendant immediately sought assistance of counsel.

Counsel for Defendant in the present matter made but a single appearance on her behalf, eerily similar to the facts in the Maples matter, where Appellant's New York-based counsel filed but a single post-conviction relief petition. Also like Maples, Defendant's counsel failed to seek the necessary leave of court to terminate the attorney-client relationship.

#### CONCLUSION

For the foregoing reasons, Defendant Middleton respectfully requests that this Court grant his Motion to Vacate or in the alternative Alter and Amend this Court's judgment.

Respectfully submitted  
this 2nd day of October, 2019

**TRULUCK THOMASON, LLC**

s/ Kimberly Thomason

Kimberly Thomason

S.C. Bar No.: 79179

s/Devon Puriefoy

Devon Puriefoy

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*Attorneys for Plaintiff*

**PROOF OF SERVICE**

I, the undersigned, served a copy of the foregoing on the following counsel of record this 14th day of January, 2020, by U.S. Mail, First-Class Postage prepaid:

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Kimberly Thomason  
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Howard W. Anderson III  
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*Counsel for Respondent*

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Law Office of Howard W. Anderson III, LLC  
P.O. Box 661  
Pendleton, SC 29670



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