

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2019-000918
Horry County Case No. 2019-CP-26-00946

Lauren Egan, and Lauren K. Egan
2017 Irrevocable Trust,

.....Appellants

v.

Dockstreet at the Market Common, Inc.;
Dock Street Homes and Communities,
Inc.; Sands Building Group, Inc.;
Sterling Homes; Real Estate Modo Inc.;
Ocean Front Guru Real Estate
Sales & Development, Inc.; and
Brian Piercy, Defendants,

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SC Court of Appeals

Of which Ocean Front Guru Real Estate
Sales and Development, Inc., and Brian
Piercy,

.....Respondents

APPELLANTS' REPLY TO RETURN TO MOTION FOR LEAVE

I. Appellants' Motion was brought under both Rule 60 and Rule 59(e).

Respondents seize hold of a single mistyped character, and snatches it out of context to argue that Appellants "never filed a Rule 59(e) motion." It is true that, in one place, Appellants did cite subsection "b" of Rule 59 instead of subsection "e." And if one were to read that single sentence alone in isolation –without reading the caption, without reading the rest of the motion,

and with willful blindness to the history of the case – that one sentence standing in isolation might suggest a motion for new trial was intended. On the other hand, if one opens one’s eyes just the slightest bit, it is immediately obvious that Respondents’ argument is frivolous, and that it elevates form over substance to dizzying heights.

The scrivener’s error is in the last sentence of the first paragraph of the Motion – it says “Rules 59(b) and 60(a) and (b)” when it should have said “Rules 59(e) and 60(a) and (b).” That typing “b” instead of “e” was a mere typographical error is immediately obvious in several ways.

First, the caption itself says “Motion to Vacate, *Alter, or Amend.*” **Exhibit A** (emphasis added). Motions to alter or amend are brought pursuant to subsection “e”, not “b”, as Respondents’ counsel well knows.

Second, subsection “b” concerns new trials. No trial has occurred here, so it is obvious that Appellant could not be requesting a new trial. And indeed, nowhere in the Motion do the words “new trial” even appear.

Third, the entire body of the motion argues that the Order should be vacated, or *altered*, or *amended*. Subsection “e” of Rule 59 deals with motions to alter or amend, which, along with vacating under Rule 60, is the only relief sought.

Accordingly, it is obvious to even the most casual reader that the Motion is brought under Rule 59 subsection “e” to alter or amend, and not under subsection “b” for a new trial. This Court can and should correct this obvious scrivener’s error in order to avoid “apply[ing] the rules of error preservation so rigidly as to bar an otherwise properly presented issue.” Chastain v. Hiltabidle, 381 S.C. 508, 516, 673 S.E.2d 826, 830 (Ct. App. 2009) (correcting a similar scrivener’s error in a Rule 59 motion).

II. Appellants' May 7, 2019 Motion to Vacate, Alter, or Amend was timely.

Appellants had fifteen days from the date of e-filing of the challenged Order to file a Rule 59 motion, and a year or more to file a Rule 60 motion. Appellants complied with both deadlines by filing their Motion just twelve days after the challenged Order was e-filed.

The challenged Order was e-filed on April 25, 2019. Rule 59(e) provides ten days after April 25 to file a motion to alter or amend – this would put the deadline at May 5, 2019. However, Rule 4(e)(4) of the E-Filing Rules provides an *additional* five days. In re S.C. Elec. Filing Policies & Guidelines, 415 S.C. 1, 8, 780 S.E.2d 600, 604 (2015).

“Computation of the time for a response after service by NEF is governed by Rule 6, SCRCF. In accordance with Rule 6(e), SCRCF, service by electronic means via an NEF is treated the same as service by U.S. Mail for purposes of determining the time to respond; therefore, *five days shall be added* to the prescribed period to respond from the date set forth in the Official File Stamp on the NEF.” In re S.C. Elec. Filing Policies & Guidelines, 415 S.C. 1, 8, 780 S.E.2d 600, 603–04 (2015) (emphasis added). Use of the word “shall” indicates that adding five days is mandatory. Collins v. Doe, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002) (“Under the rules of statutory interpretation, use of words such as ‘shall’ or ‘must’ indicates the legislature’s intent to enact a mandatory requirement.”); Fairchild v. S.C. Dep’t of Transp., 398 S.C. 90, 107, 727 S.E.2d 407, 416 (2012) (“In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes.”).

Adding Rule 4(e)(4)’s mandatory five days to Rule 59’s ten days gives a total of fifteen days, thus putting the deadline to file a Rule 59 motion at May 10, 2019. Appellants filed three days earlier – on May 7. As a result, Appellants’ filing was timely.

To be clear, the authority cited by Respondents for the proposition that ten days is the

absolute deadline for filing a Rule 59 motion is inapplicable here, as those cases dealt with improper attempts *by the parties or the trial court* to extend the deadline pursuant to Rule 6(b). There is no dispute that Rule 6(b) specifically says that neither the parties nor the trial court can extend the Rule 59 deadline beyond what the Rules provide. However, that's not the situation here.

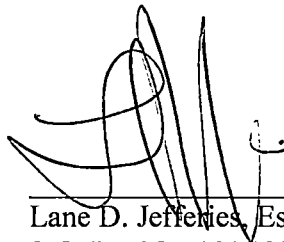
Here, the *Rules themselves* provide fifteen days – no improper extension by the parties or the trial court is at issue. Accordingly, Rule 6(b) has no application here. Appellants filed within the deadline provided by the Rules – no extension was needed or requested, let alone granted.

CONCLUSION

Through their Return to Appellants' Motion for Leave, Respondents persist in their circular argument that this appeal cannot go forward because Appellants' motion to the trial court has not been heard, and that Appellants' motion to the trial court cannot be heard because this appeal is pending. A simple solution to the procedural game that Respondents insist on playing is for this Court to grant Appellants' Motion for Leave so that the trial court may hear the Motion to Vacate, Alter, or Amend.

The trial court may very well rule in such a way as to moot this appeal. Or it may rule against Appellants, in which case this appeal will continue. Either way, granting Appellant's motion for leave will put an end to Respondents' gamesmanship, and permit the parties and the Court to get down to the serious work of addressing the substance of the issues at hand.

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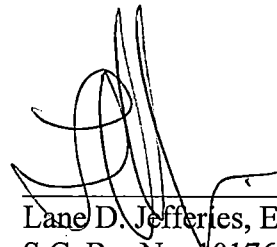
.....Respondents.

PROOF OF SERVICE

I certify that Appellants' Reply to Return to Motion for Leave was served on the South Carolina Court of Appeals and Respondents by U.S. Mail Postage Prepaid on January 21, 2020, addressed to Respondent's attorney of record, Joseph D. Thompson, III and Daniel R. Fuerst, 111 Coleman Boulevard, Suite 301 Mount Pleasant, South Carolina 29464.

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January 21, 2020

Via Regular U.S. Mail

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Clerk of Court
S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: *Lauren Egan v. Dock Street at the Market Common, et al.*
Appellate Case No. 2019-000918

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*OF COUNSEL

Dear Ms. Kitchings,

Enclosed for filing, please find the original and six (6) copies of Appellants' Reply to Return to Motion for Leave and Proof of Service in regard to the above-referenced matter. Should you have any questions, please do not hesitate to contact our office.

Sincerely,



Ivey B. Franklin, Esq.

Enclosures as stated.

cc: Joseph D. Thompson, III (By U.A. Mail and E-Mail)
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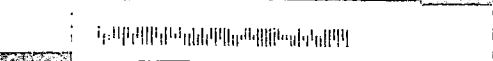
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