THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2019-001609

Rachel Farley, as Trustee of the Louise Farley Revocable Trust Dated February 8, 2005; Drummond B. Farley; Rachel R. Farley; Carol E. Farley; and Nancy E. Farley, Appellants,

v.

Church of the Harvest of Columbia, Inc., Respondent.

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

1. Decisions

STATEMENT OF ISSUES ON APPEAL

I. Whether this Court has jurisdiction to hear this appeal.

II. Whether the issues on appeal should be limited.

III. Whether the court erred in granting Respondent's Motion for Summary Judgment on the claims of negligence, nuisance and trespass.[1]

STANDARD OF REVIEW

> 'The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.E. 440, 452, 548 S.E.2d 868, 874 (2001). "When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(e), SCRCP." *Turner v. Milliman*, 392 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011). Rule 56(e), SCRCP, provides a circuit court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.' 'On summary judgment motion, a court must view the facts in the light most favorable to the non-moving party.' ***212** *George*, 345 S.C. at 452, 548 S.E.2d at 874. When a circuit court grants summary judgment on a question of law, this Court will review the ruling de novo. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 109-10, 662 S.E.2d 40, 41 (2008).
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> Wright v. PRG Real Estate, 421S.C. 202, 826 S.E.2d 285 (2019).

[1] There were other claims made by the Plaintiffs in the lower court. Summary judgment was granted in favor of the Defendant on each of those claims. No appeal has been taken by any Plaintiff from the grant of summary judgment in favor of the Defendant on those claims.

STATEMENT OF THE CASE

Louise Farley (Ms. Farley) owned approximately nineteen (19) acres of land which fronted on Highway 378 in Lexington County. She agreed to sell 8.102 acres of that property to the Respondent ("The Church"). In 1994, The Church bought 2.864 acres. In 1988, The Church bought the remaining 5.208 acres. When the last sale closed, Ms. Farley's remaining acreage no longer had access to a public road. To avoid that property being landlocked, Ms. Farley, in the Deed conveying the 5.208 acres, reserved to herself and her heirs and assigns an easement for access, ingress and egress to and from Highway 378 over the westernmost 66 feet of the property conveyed to The Church ("the easement"). The easement was and is the only means of access to Ms. Farley's remaining land.

In February of 2005, Ms. Farley created the Louise Farley Revocable Trust ("the Trust"). She was named as the Trustee. She conveyed her remaining acreage and the easement to the Trust by Deed dated March 8, 2005 and recorded in Book 9960 at Page 286. She remained as the Trustee of her Trust until late March of 2012.

In 2006 The Church built a parking lot a portion of which encroached on the easement. In 2009 The Church built a structure (a building) a portion of which encroached on the easement. Both the parking lot and the building were open and obvious to everyone, including Ms. Farley in her capacity as Trustee of the Trust which owned the easement.

Upon the death of Ms. Farley on March 27, 2012, Rachel Farley became the Trustee of the Trust. This action was commenced on February 3, 2016, eleven years after the Trust was formed, ten years after the parking lot was built by The Church, seven years after the building was constructed by The Church, and almost four years after the death of Ms. Farley.

Initially, the case was brought by only Rachel Farley as Trustee of the Trust. By consent, Rachel R. Farley, Drummond B. Farley, Carol E. Farley and Nancy E. Farley (the children of Ms. Farley) were added as necessary Plaintiffs. Cross-motions for summary judgment were filed. Following a hearing on the motions, the lower court entered an Order granting the Defendant's Motion, denying the Plaintiffs' Motion, and dismissing the case with prejudice.

In the Order, the lower court made the following relevant findings and conclusions:

1. The Plaintiffs and the Defendant filed cross-motions for summary judgment. The Church submitted multiple briefs, Affidavits of Mr. Jumper ..., an Affidavit of Mr. Sturkie ... and exhibits in support of its Motion (Order at Page 2).

2. The Plaintiffs submitted multiple briefs and the deposition of Mr. Jumper in support of their Motion, but they did not submit any Affidavits either in support of their Motion or in opposition to the Defendant's Motion. Id.

3. Mr. Jumper's deposition testimony does not contradict the Defendant's Affidavits and exhibits. Therefore, the relevant facts underlying this Order are uncontroverted. Id.

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4. The Plaintiffs have ... alleged that The Church was grossly negligent, committed a trespass on the easement and reduced the value of the ten acre tract by (1) constructing a building and two parking lots which impermissibly encroach on and obstruct the use of the 66-foot easement for access to the ten acre tract and (2) by concentrating the discharge of ground water from the property of The Church onto the ten acre tract. The evidence in the record establishes that The Church, between 2006 and 2008, paved a portion of the 66-foot easement reserved by Ms. Farley, constructed an entrance into the easement from Highway 378 and marked off several parking areas on the paved portion of the easement. Jumper Aff. 7/20/18 ¶19. Each of those events occurred after the Trust acquired the ten acres and the 66-foot easement. Ms. Farley continued as the Trustee of the Trust until her death in 2012. See Plaintiffs' brief 8/21/18 p. 2. The evidence in the record also establishes that Ms. Farley was aware of the construction of the parking lots in 2005, and during that year, she raised with The Church concerns about damage to the ten acre tract cause by the runoff and other associated construction on the property of The Church. Jumper Aff. 8/17/18 and Exhibits attached thereto. The issues relating to the discharge of ground water were resolved in 2006 when the construction of the parking lots and

the driveway from Highway 378 into the 66-foot easement were completed. Id. Finally, the record before me also establishes that the building which encroaches on the easement was built in 2009, Jumper Aff. 7/20/18 ¶18.

The evidence in the record establishes (1) the location of the 66-foot easement, (2) the location of the parking lots on the easement, (3) the location of the driveway from Highway 378 into the easement, (4) the paving of a portion of the easement, (5) the marking of parking spaces in the paved portion of a parking lot on the easement (6) the location of the building on the easement and (7) the timing of the construction of each of those encroachments. The record also establishes the nature, existence and extent of each of the alleged encroachments (the driveway, the parking lots and the building). The existence of each of those encroachments was obvious after each was in place in 2008 (sic) and 2009 respectively. Ms. Farley, as Trustee, knew, or with the exercise of reasonable diligence should have known, those encroachments existed prior to her death in 2012. She knew of the ground water discharge issue in 2005. Thus, the existence of (1) any claim for damage to the ten acre tract due to concentrated discharge of ground water, (2) any claim for damage to the easement or the value of the ten acre tract due to the encroachments on and obstruction of the easement and (3) any claim for negligence and for trespass on the easement was known, or should have been known, to the Trust prior to Ms. Farley's death in 2012. Each of those claims is therefore barred by the three-year statute of limitations. See, §15-3-530(1) ("an action upon ...a liability, express or implied ....") and §15-3-530(3) ("an action for trespass upon or damage to real property"). Order, p. 7-8.

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5. As a predicate for their case, the Plaintiffs assert that Ms. Farley had, and that they now have, an express easement. This Court agrees, ... Order, p. 9.

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6. The Plaintiffs also argue that The Church cannot establish a right to obstruct the easement under the doctrine of adverse possession because Ms. Farley gave The Church permission to build the driveway, the parking lots and the building on the easement. Id. The Court need not address this argument. The Church has not asserted such a right, and there is nothing in the record to establish the assertion that Ms. Farley ever gave The Church permission to encroach on the easement. Order, p. 10.

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7. Finally, the Plaintiffs assert that the ten-year statute of limitations set out in §15-3-340 is applicable here. That limitation applies to "an action for the recovery of real property ...." The Plaintiffs do not seek in this action "to remove [a] cloud on [their] title." See, Unpublished Op. No. 2008-UP-153. The gravamen of the Plaintiffs' claims in this action is the recovery of (1) damage for the diminution in value of the ten (10) acres (sic), (2) damage for breach of contract (with and without a fraudulent act). (3) damage for fraud, (4) damage for trespass, (5) damage for negligence, and (6) damage for the encroachments on the easement. Those claims bring this action squarely within the scope of the three-year statute set out in §15-3-530(1) ("an action upon a contract, obligation, or liability, express or implied ...") and §15-3-530(3) ("an action for trespass upon or damage to real property; ...)." There are no issues of title in this case. The Plaintiffs do not contest the fee ownership by The Church of its land, and The Church does not contest the validity, existence or the Plaintiffs' ownership of the easement. This is an action for breach of contract, fraud, trespass and negligence. It is not an action to remove a cloud on the Plaintiffs' property or an "action to recover real property." Under these circumstances, the limitation set out in §15-3-340 is not applicable. Order, p. 11.

The lower court then denied the Plaintiffs' Motion for Summary Judgment, granted the Defendant's Motion for Summary Judgment and dismissed the case with prejudice. Order, p. 12.

To summarize, the lower court found and held: The Plaintiffs do not contest the fee ownership by The Church of its land; The Church does not contest the validity, existence or the Plaintiffs' ownership of the easement; and The Church encroached on the easement by constructing a building and a parking lot on the easement. The lower court then held as a matter of law that Plaintiffs' claims were barred by the three-year statute of limitations, and the ten-year statute of limitations in Section 15-3-340 was not applicable because there were no issues of title raised in the case and neither party sought to recover land.

The Order was entered on May 9, 2019. A copy of the May 9th Order was served by mail on all Plaintiffs on May 10, 2019. The time to file a Notice of Intent to Appeal from the May 9th Order expired on June 14, 2019 unless the time to appeal was extended by the timely filing of a proper post-trial motion. Pursuant to Rule 203(b)(1), the timely filing of a post-trial motion stays

the time to appeal for all parties "and [the time to appeal] shall run from the receipt of written notice of the entry of the Order granting or denying such Order." Rule 203(b)(1), SCACR.

Rachel Farley timely filed a Rule 59(e) Motion. The Motion sought an "order altering or amending the Court's judgment [of May 9th] so as to recognize the validity of the Plaintiffs' Trust's easement, that the easement has been obstructed by the Defendant and that the Defendant must remove the obstructions to the easement."

The Church filed a response to her motion and pointed out that the issues raised by Rachel Farley's 59(e) Motion had been raised to and ruled upon by the Court in the May 9th Order. The Church also filed a motion pursuant to Rule 60(a), SCRCP, to correct three clerical errors in the May 9th Order: To Wit:

1. Changing the last word in Footnote 2 from "Defendants" to "Parties."

2. Changing the reference in Footnote 7 from "See n.8, infra." to See n.10, infra."

3. Changing the reference in Footnote 14 from "See n.13, infra." to "See n.15, infra."

None of the clerical changes if made would have had any effect on the rulings on the merits made by the Court in the May 9th Order. No one opposed the Rule 60(a) Motion.

On June 19th the Court issued an Order denying Rachel Farley's Rule 59(e) Motion in which it said:

> After careful consideration of the record in this case and the arguments raised by Plaintiffs this Court is unable to discover any new material fact or any principle of law that was overlooked or warrants reconsideration of the Order.
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> • • •
>
> Plaintiffs' motion to alter/amend is hereby DENIED.

In that Order the Court also said: "This Court has reviewed the [May 9th] Order and amended several clerical errors as noted by the Defendant in its motion. A revised Order reflecting those

amendments has been (sic) filed pursuant to Rule 60(a)" (emphasis added).[1] That Order was served electronically on June 19th and was filed on June 20th.

Despite the language in the June 19th Order indicating the contemporaneous filing of a revised order "reflecting those amendments . . . pursuant to Rule 60(a)," the Revised Order was not filed until July 23rd. It is important to note that the only amendment to the May 9th Order made by the July 23rd Order was the correction of the three (3) clerical errors. The July 23rd Order made no other change in or to the language of the May 9th Order. The July 23rd Order did not change the findings and ruling of the Court on the merits in the May 9th Order regarding either (1) the existence, validity or ownership of the Plaintiffs' easement, (2) the obstruction thereof by The Church or (3) the holding by the Court in the May 9th Order that the relevant claims of the Plaintiffs arising from the obstructions were time barred. The time to appeal from the July 23rd Order expired on August 22nd.

On August 2nd Rachel Farley filed a "Motion for Reconsideration" of the "Order of July 23rd."[2] In that Motion, she sought to have the July 23rd Order modified by the inclusion of an "order that the easement location be cleared of the Defendant's building and parking lot."

The Motion for Reconsideration did not address either the May 9th Order or any of the three clerical corrections contained in the July 23rd Order. Instead, that motion raised the same issue that had been raised in her earlier 59(e) Motion. In her 59(e) Motion, Rachel Farley asked the Court to hold "the Defendant must remove the obstructions to the easement." In her Motion for Reconsideration, Rachel Farley asked the Court to "order that the easement location be cleared

[1] If Rachel Farley's 59(e) Motion was necessary and proper and tolled the time for appeal from the May 9th Order, under the authorities cited herein, infra, the time to appeal from the May 9th Order then began to run on June 19th and expired on July 19th. No Plaintiff filed a Notice of Appeal on or before July 19th.

[2] This motion is tantamount to a Rule 59(e) motion. Elam v. South Carolina Dept. of Transp., 381 S.C. 9, 15, 602 S.E. 2d 772 (2004).

of the Defendants' building and parking lot." Although the wording is not identical, the relief she sought in both motions is identical: The removal of obstructions from a valid easement owned by the Plaintiffs.

On September 12th the Court entered its Order denying the Motion for Reconsideration, saying:

> This matter is before the Court on Plaintiff's Motion for Reconsideration filed on August 2, 2019 by Plaintiff. Defendant filed a response to the motion and Plaintiff sent letters providing additional information. The letters will be filed for the record. This Court has reviewed the documents filed as well as the Revised Order filed July 23, 2019. Based upon the information presented, the claims raised by the Plaintiff, including easement, trespass, and nuisance, were fully addressed in the Order. See pages 8-10 and various footnotes. This Court is unable to discover any new material fact or principle of law that was overlooked or warrants further reconsideration. The Motion for Reconsideration is DENIED. In the Court's discretion, oral argument is not necessary. Rule 59(f), SCRCP.

That Order was filed on September 12th. On September 23rd "Rachel Farley, et al.," filed a Notice of Appeal of "the order of the Honorable Allision Renee Lee dated September 12, 2019." The Notice of Appeal did not address either the May 9th Order, the June 19th Order or the July 23rd Order. This Court accepted the appeal and designated all of the Plaintiffs as Appellants. The Appellants filed their Initial Brief on February 18, 2020.

ARGUMENT

This Court lacks jurisdiction to hear this appeal because the Notice of Intent to Appeal filed on September 23, 2019 was untimely. If the appeal is allowed to go forward, the issue should be limited to addressing only the three clerical corrections made in the July 23rd Order. If the appeal is allowed to go forward on all issues, the Order of the lower court should be affirmed.

I.

For the reasons set forth below this Court does not have jurisdiction to hear this appeal. The appeal should therefore be dismissed.

A. The requirement of the timely filing of a Notice of Appeal is jurisdictional. Elam v. South Carolina Dept. of Transp., 381 S.C. 9, 602 S.E. 2d 772 (2004). If a party misses the deadline for filing a 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 for service of the notice. Id. at 15, 775. If a party does not timely file a Notice of Appeal, this Court lacks jurisdiction, and an untimely appeal must be dismissed under the holding in Elam, supra. As shown below, the appeal was untimely, this Court lacks jurisdiction to hear this appeal, and the appeal should be dismissed.

B. The Rule 60(a) motion did not toll the time to appeal. In the case of Otten v. Otten, 287 S.C. 166, 167, 337 S.E.2d 207, 208 (1985), the Supreme Court distinguished a motion under Rule 59(e) from a motion under Rule 60(a). The former, if proper and timely, tolls the time for appeal. The latter does not. Therefore, the Rule 60(a) motion filed by the Church had no effect on the time to appeal from any final Order in this case.

C. No timely appeal was taken from any final Order. Rule 203(b)(1), SCACR, is as follows:

> **(1) Appeals from the Court of Common Pleas.** A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment. 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. When a form or other short order or judgment indicates that a more full and complete order or judgment is to follow, a party need not appeal until receipt of written notice of entry of the more complete order or judgment.

Neither the May 9th Order nor the July 19th Order denying Rachel Farley's first post-trial motion indicated that a relevant "more full and complete order or judgment" on the merits would follow. Therefore, each of those Orders was final when issued and each was immediately appealable. The May 9th Order was served on May 10th, and the June 19th Order was served on June 19th. The portion of the June 19th Order granting the Rule 60(a) Motion and amending the May 9th Order only in that regard did indicate that a "more full and complete order" memorializing those amendments would follow. But the Revised Order of July 23rd was limited to the three clerical changes. The Revised Order was filed and served on July 23rd. As shown below, no timely appeal was taken by any Appellant from either of those final Orders.

D. To the extent the Notice of Appeal filed on September 23rd applies to the May 9th Order (which on its face it does not), it should be dismissed as untimely. The time to appeal expired on either June 14th or July 19th.

1. The time to appeal from the May 9th Order expired on June 14th. Rachel Farley's first Rule 59(e) Motion was not necessary or proper. Therefore, it did not toll the time for appeal, and the time to appeal expired on June 14th. The Supreme Court in Elam, supra, said:

> If a party is unsure whether he properly raised all issues and obtained a ruling, he must file a Rule 59(e) motion or an appellate court may later determine the issue or argument is not preserved for review. But in filing the motion, he may unwittingly forfeit the right to an appeal if an appellate court later determines the Rule 59(e) motion was unnecessary because he had already raised the issue and obtained a ruling.

Elam at 25, 781 (emphasis added). The Supreme Court went on to say: "We strive to avoid an interpretation of procedural rules which routinely would place a party between the proverbial rock and a hard place." Id. However, in the footnote related to that sentence, the Court said: "An aggrieved party who is confident his issues and arguments were sufficiently raised to and ruled on by the trial court may wish to serve a timely Notice of Appeal." Id. at n. 5.

In the case at bar, if this Court determines that Rachel Farley's first Rule 59(e) motion was unnecessary because the issues raised by her in the 59(e) motion had been "raised to and ruled upon by the trial court," the time to appeal from the May 9th Order was not tolled by the motion and expired on June 14th. That is the case here.

The Plaintiffs claimed an easement over lands of the Church. The Court found the Plaintiffs held such an easement. The Plaintiffs claimed the Church obstructed their easement with a building and two (2) parking lots. The Court found that to be true. The Plaintiffs claimed the Church must remove the obstructions. The Court discussed the relevant claims of the Plaintiffs in that regard and the law applicable to those claims. Then, based

on the uncontroverted facts in the record, the Court ruled that all of the Plaintiffs' causes of action relating to the abstructions were time barred. Rachel Farley's 59(e) Motion sought "an order altering or amending the court's judgment [of May 9th] so as to recognize the validity of the Plaintiff Trust's easement, that the easement has been obstructed by the Defendant and that the Defendant must remove the obstructions from the easement." Rachel Farley's first Rule 59(e) motion was not necessary or proper since it raised only issues which had been raised to and ruled upon by the Court in the May 9th Order. Therefore, the time to appeal from the May 9th Order was not extended by her 59(e) Motion, and the time within which to appeal from the May 9th Order expired on June 14th. No Plaintiff timely filed a Notice of Appeal. Under those circumstances, to the extent the Notice of Appeal filed on September 23rd appeal applies to the May 9th Order, this Court lacks jurisdiction to consider this appeal, and this Appeal should be dismissed.

2. The time for appeal from the May 9th Order expired at the latest on July 19th. If Rachel Farley's 59(e) Motion was necessary and proper and tolled the time to appeal from the May 9th Order (which is denied), the time for appeal from the May 9th Order expired on July 19th.

It is the law in South Carolina that (1) the timely filing of a proper Rule 59(e) motion stays the time for appeal, (2) the denial of such a motion restores the finality of the Order to which it was addressed and (3) pursuant

to Rule 203(b)(1) the time for appeal begins to run from the day written notice of the Order denying the motion is received.

This Court first addressed the issue of the effect of the denial of a proper post-trial motion in Coward Hund Construction v. Ball Corp., 336 S.C. 1, 518 S.E. 2d 56 (Ct. App. 1999) (Rehearing Denied September 11, 1999). There, final orders granting summary judgment to the defendants were served on April 22, 1997. Coward Hund filed a motion for reconsideration on April 30, 1997. On June 20, 1997 the Circuit Court issued an Order denying the motion. Coward Hund received that Order on July 10, 1997. The finality of the April 22nd Order was restored on July 10, 1997; the time for Coward Hund to appeal began to run on July 10, 1997; and the time for Coward Hund to file an appeal expired on August 9th.

Coward Hund then filed a second motion for reconsideration in which it sought clarification of issues raised with regard to claims of indemnity against the Defendant. On July 28, 1997 the Circuit Court issued a supplemental Order saying:

> The court granted summary judgment to Defendants Carolina Glass and Ball Corp. without the court referencing any prejudice regarding Coward Hund's indemnity claims, if any.

Id. Coward Hund received this Order on August 4th or 5th and filed its Notice of Appeal on September 2, 1997. Following the prevailing rule in Federal Courts, in the absence of controlling case law in South Carolina, this Court of Appeals held:

> In the case before us the trial court denied Coward Hund's first motion for reconsideration. The finality of the summary judgment orders, then, was restored, and Coward Hund's time for filing its notice of appeal began to run upon its receipt of the Order denying the motion.

Because Coward Hund did not file a Notice of Appeal within thirty (30) days of July 10, 1997 (the date on which the finality of the earlier orders was restored), Coward Hund's appeal was dismissed as untimely. Id. at 3-4, 58.

Under the holding of Coward Hund, the finality of the May 9th Order was restored on June 19th by the Order denying Rachel Farley's 59(e) Motion. The language of the Order of June 19th denying her motion was complete on its face. It was an absolute and final denial of her Motion. It did not contemplate the entry of a "more full and complete order or judgment" relating to either the merits of the case or the denial of that Motion. See, Rule 203(b)(1), SCACR, supra. Therefore, the time to file a notice of appeal from the "restored" May 9th Order "began to run upon receipt of the order denying the motion." Coward Hund, supra. The Plaintiffs received the Order denying her 59(e) Motion on June 19th. Their time to appeal from the "restored" May 9th Order began to run on June 19th and expired on July 19th. No Plaintiff filed a Notice of Appeal on or before July 19th, and the Notice of Appeal filed on September 23rd, to the extent it is directed to the May 9th Order or the July 23rd Order, should be dismissed.

E. Rachel Farley's second, written, post-trial motion did not further extend her time to appeal from the May 9th Order, and the Notice of Appeal filed on September 23rd should be dismissed as untimely.

It is also the law in South Carolina that the time for filing an appeal from a "restored" final Order is not tolled by the filing of a second, written post-trial motion (1) filed under a different caption, (2) raising the same issues that were raised in the earlier, written post-trial motion which was ruled on and denied and (3) failing to address the changes made in the Order denying the first post-trial motion.

The cases addressing the issue of the effect of (1) the denial of a proper post-trial motion and (2) the effect of the filing and denial of successive post-trial motions began with the Court of Appeals' decision in Coward Hund, supra. The issue was next discussed in the case of Quality Trailer Products, Inc., v. CSL Equipment Company, Inc., 349 S.C. 216, 562 S.E. 2d 615 (2002) (Rehearing denied May 16, 2002). The issue in Quality Trailer was "whether the time for serving a notice of appeal is tolled by the subsequent filing of the same motion under a different caption." Id. at n. 3.

In Quality Trailer, following a jury verdict, I Corp., made timely motions for JNOV and for new trial. Those motions were denied by Order dated December 20, 1999 and filed on December 21, 1999. On December 31, 1999, I Corp. filed a motion to "Alter, Amend or Reconsider Judgment and Findings Denying Defendant's Motion for Judgment Notwithstanding the Verdict and Motion for New Trial." The second motion was made pursuant to Rules 52, 59 and 60 and was almost a duplicate of the first motion. Recognizing the second motion was, in substance, identical to the first motion, the Court denied the second motion by Order dated February 16, 2000 and filed on February 21, 2000. I Corp. filed its Notice of Appeal on March 17, 2000.

In its Opinion dismissing the appeal as untimely, the Supreme Court noted that:

> In its Order denying the second motion, the trial court remarked that 'the [second] motion is an exact compilation of the motion for judgment notwithstanding the verdict and motion for a new trial with a few procedural alterations. In sum, the motion seeks reversal of the Order, but provides no additional assertion of fact or argument of law.' We agree with the trial court's interpretation of the second motion.

Id. at 220, 617. Based on the procedural history of the case and the nature of the second motion, the Supreme Court held:

> We agree with the rationale of Coward Hund and hold that successive motions for JNOV do not toll the time for serving notice of appeal. The time for filing appeal is not extended by submitting the same motion under a different caption.

Id. at 220, 617. The Court, went on to say:

> We find that I Corp's second motion literally recites the arguments previously raised and previously ruled upon by the trial court in I Corp's first motion. The second motion was not, despite its caption, an appropriate Rule 59(e) motion. It was simply a successive motion for JNOV and a new trial, and thus did not toll the time for serving the Notice of Appeal. I Corp. did not serve its Notice of Appeal within the time prescribed in Rule 203, SCACR. We therefore dismiss the Appeal as untimely.

Id. at 221, 618.

Later in 2002, this Court again addressed the issue in Collins Music Company v. IGT, 353 S.C. 559, 579 S.E. 2d 524 (Ct. App. 2002), and dismissed the appeal as untimely. There, IGT timely filed motions pursuant to Rule 50(b) and 59 asking for either a new trial or new trial remittitur on twenty-eight grounds. The trial court "after carefully reviewing the matter" issued an Order denying the motion. A copy of that order was served on IGT on September 5, 2006. On September 12, 2006 IGT served a Rule 59(e) motion to alter or amend the judgment in which IGT simply restated the arguments made in its first post-trial motion. On October 29, 2001 the trial

court issued an Order denying the Rule 59(e) motion specifically saying IGT had failed to raise any issue not already raised and considered. IGT received the order denying the Rule 59(e) Motion on November 5, 2001 and served its Notice of Appeal on November 21, 2001.

Citing Coward Hund and Quality Trailer as clearly standing "for the proposition that although a successive post-trial motion for relief is permissible, the subsequent motion must seek relief on issues coming to light as the result of the order following the initial post-trial motion that alters or amends the judgment," this Court in Collins Music held:

> The successive motion cannot be a motion to alter or amend that merely recites arguments in a previous Rule 59(e) motion, as was the case in Coward Hund, or the recaptioning of previous Rule 50 or Rule 52 motions as a Rule 59(e) motion, as was done in Quality Trailer.

Id. at 564, 526. This Court went on to say:

> The circuit judge denied IGT's motions for JNOV, new trial and new trial nisi remittitur in his first post-trial order. Accordingly, the underlying issues giving rise to these motions were preserved and ripe for appellate review.
>
> We rule IGT's Rule 59(e) motion was nothing but a recapitulation of the arguments raised and previously ruled upon by the circuit court and did not toll the time for serving the notice of appeal. We therefore dismiss the appeal as untimely.

Id. at 566, 527.

Thereafter, in Matthews v. Richland County School Dist. One, 357 S.C. 594, 594 S.E. 2d 177 (Ct. App. 2004), and in an unpublished Order in Elam v. South Carolina Dept. of Transp., S.C. Ct. App. Order dated July 25, 2002, this Court dismissed as untimely appeals filed following the denial of a Rule 59(e) motion which had been filed following the denial of ORAL motions for a new trial. In Elam v. South Carolina Dept. of Transp., 381 S.C. 9, 602 S.E. 2d 772 (2004), the Supreme Court reversed Matthews and the unpublished Order and reaffirmed the principles expressed in Coward Hund, Quality Trailer and Collins Music.

In reaffirming those decisions, the Supreme Court drew a bright line distinction between the timeliness of the filing of a notice of appeal following (1) the denial of a written post-trial motion filed after the denial of an earlier ORAL post-trial motion and (2) the denial of a written post-trial motion filed after the denial of an earlier WRITTEN post-trial motion. In the first situation the appeal is timely. In the second situation – which is the case at bar – the appeal is untimely.

In this case, the Order dismissing the case with prejudice was entered on May 9th. Rachel Farley's Rule 59(e) motion was denied by Order dated, signed and served on June 19th and filed on June 20, 2019. That Order immediately restored the finality of the May 9th Order. The time for filing a Notice of Appeal began to run on June 19th, the day the Plaintiffs received the Order denying the motion, and the time to appeal from the "Restored" May 9th Order expired on July 19th. Coward Hund, supra.

No Plaintiff filed a Notice of Appeal of the May 9th Order on or before July 19th. On August 2nd, two weeks after that deadline passed, Rachel Farley filed a Motion to Reconsider the July 23rd Order. That motion is treated as a motion under Rule 59(e), Elam, supra.

Her second motion did not address the May 9th Order which had become final on July 19th. Her second motion was filed under a different caption but sought the same relief she had asked for in her first 59(e) Motion. Her second motion, in essence, sought reversal of the July 23rd Order, but she provided no additional assertion of fact or argument of law. Quality Trailer, supra. Her second motion did not address any of the three (3) clerical corrections that were made to the May 9th Order by the July 23rd Order. Collins Music, supra. Therefore, her second motion did not extend the time to appeal from the May 9th Order which became final on July 19th at the latest, and

the Notice of Appeal filed on September 23, 2019 addressing only the Order of September 12th should be dismissed as untimely.

F. The July 23rd Order did not affect the finality of the May 9th Order on the merits.

Rule 203(b)(1), SCACR, contains the following provision:

> When a form or other short order or judgment indicates that a more full and complete order or judgment is to follow, a party need not appeal until receipt of written notice of entry of the more complete order or judgment.

Rule 203(b)(1), SCACR.

The Order of June 19th granted the Rule 60(a) motion requesting the correction of three clerical errors in the May 9th Order. The Rule 60(a) motion did not extend the time to appeal. Otten, supra. The June 19th Order contained language indicating that "a more full and complete order" reflecting those amendments would follow.

Consistent with that indication, the Court entered an Order on July 23, 2019 reflecting those amendments. The July 23rd Order did not amend or change the May 9th Order other than to correct those three clerical errors. It did not change or amend in any way the findings and rulings made in the May 9th Order relating to the merits of the case. The only change made to the May 9th Order by the July 23rd Order was the correction of clerical errors in three footnotes. None of those corrections had any impact or effect upon the Court's rulings on the merits in the May 9th Order.

The July 23rd Order was not a "more full and complete" order on the merits of the case. Therefore, the July 23rd Order had no effect on the time to appeal from the "restored" May 9th Order which became final at the latest on July 19, 2019. The Motion to Reconsider did not address any of the amendments to the May 9th Order making the clerical corrections. Instead, that motion raised the same issues which had been raised in the earlier Rule 59(e) motion. Those issues related to only the merits of the case, and those issues had been considered and ruled upon in the Order

denying the first 59(e) motion. The "full and complete" Order relating only to the clerical corrections had no effect on the restored May 9th Order which became final at the latest on July 19, 2019. Therefore, to the extent the Notice of Appeal filed on September 23rd relates to either the May 9th Order, the restored May 9th Order or the July 23rd Order, it is untimely and should be dismissed.

G. The Motion for Reconsideration of the July 23rd Order did not toll the time to appeal from that Order. The Motion to Reconsider the July 23rd Order raised only issues which had been "raised to and ruled upon" by the Court in the July 23rd Order. Thus, under Elam, supra, the Motion to Reconsider the July 23rd Order was not proper or necessary, and it did not extend the time for appeal from the July 23rd Order. Therefore, the time to appeal from that Order expired on August 22, 2019. No Plaintiff timely filed an appeal. The appeal was filed on September 23rd. To the extent the Notice of Appeal is directed to the July 23rd Order, it should be dismissed.

H. The Notice of Appeal does not address the May 9th Order. The June 19th Order or the July 23, 2019 Order and should be dismissed. In the case of Bogart v. Chapell, 396 F.3d 548 (4th Cir. 2002), the Fourth Circuit entertained an appeal from the denial of a Rule 59(e) motion where the appeal was timely and addressed both the Order denying the motion and the underlying final Order. For good reason, no case has been found in which a court entertained an appeal from only the Order denying a second post-trial motion as is the case here. If such an appeal is allowed after the underlying Order becomes final, a party could extend indefinitely the time for appeal by simply filing successive post-trial motions raising the same issue and then, at a whim, decide to appeal the Order denying the last motion. To avoid that absurd result, the Notice of Appeal must be timely filed after the underlying Order becomes final, and the Notice of Appeal must address either the underlying Order or both the underlying Order and the Order denying the post-trial

motion. In this case, since a Notice of Appeal from the May 9th Order, the June 19th Order or the July 23rd Order was not timely filed, the Notice of Appeal filed on September 23rd addressing only the September 12th Order, should be dismissed.

II.

Under these circumstances, the appeal, if it is allowed to proceed, should be limited to issues arising from the three clerical changes made to the May 9th Order by the July 23rd Order. The only change made to the May 9th Order by the July 23rd Order was the correction of three clerical errors. The correction of those clerical errors had absolutely no bearing or impact on the substantive content of the May 9th Order. The relevant findings and rulings on the merits made by the Court in the May 9th Order remained the same.

Beyond that, Rachel Farley's second motion did not address any of the clerical changes made to the May 9th Order by the July 23rd Order. Therefore, neither the Rule 60(a) motion, the Order granting that motion and amending the May 9th Order nor the Order reflecting those amendments had any effect on the deadline for filing an appeal from the "restored" May 9th Order which became ripe for appeal at the latest on June 19, 2019. No Plaintiff filed a timely appeal from the May 9th Order.

The Notice of Appeal addresses only the September 12, 2019 Order which denied the Motion for Reconsideration. The only new language in the "restored" May 9th Order relates to the correction of the three clerical errors. Therefore, if this Court allows this appeal to proceed at all, the issues to be addressed by the appeal should be limited to that portion of the Revised May 9th Order pertaining to only the correction of the three clerical errors, all of which were properly corrected.

Based on the foregoing facts and the applicable law either (a) the Appellants' Notice of Appeal filed on September 23, 2019 should be dismissed as untimely or (b) if the appeal is allowed to proceed, the issues on appeal should be limited to those issues arising from the correction of the three clerical errors by the Revised May 9th Order.

III.

The lower court correctly granted the Defendant's Motion for Summary Judgment and dismissed the case with prejudice.

A. The relevant claims of Plaintiffs are barred by the three-year statute of limitations set out in S.C. Code Ann. 15-3-530. That Section requires the following actions to be brought within three years: (1) an action upon a contract; (2) an action for trespass upon or damage to real property; (3) an action for . . . any injury to the person or rights of another. . . . The three year statute begins to run "when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party may exist." See, e.g. Peterson v. Richland County, 335 S.C. 135, 515 S.E.2d 553 (Ct. App. 1999); Anon. Taxpayer v. S.C. Dept. Rev., 377 S.C. 425, 661 S.E.2d. 73 (2008).

The three-year statute of limitations applies to an action for negligence, and the statute begins to run when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against another party may exist. Jumper v. Milliman, 381 S.C. 101, 671 S.E.2d 636 (Ct. App. 2009) (rev'd. on other grounds); Harper v. Ebenezer Senior Services, 377 S.C. 217, 659 S.E.2d 213 (Ct. App. 2008).

The application of the three-year statute of limitations to an action for trespass depends upon the nature of the trespass. If the trespass is permanent so that the entire damage occurs in the first instance, the three-year statute applies. If the trespass is "continuing," meaning it is

"intermittent or periodical," the expiration of the three-year statute does not completely bar the claim, but the Plaintiff is limited to damage which occurred within the statutory period. Melton, ex rel. Dutton v. Carolina Power and Light Co., 283 R.F.D. 280 D.S.C. (2012), citing Hedgepath v. AT&T, 348 S.C. 340, 357, 529 S.E.2d 327, 337 (Ct. App. 2001).

The discovery rule applies to actions for trespass upon or damage to real property. See, e.g., Barn v. City of Rock Hill, 330 S.C. 640, 500 S.E.2d 157 (Ct. App. 1998). The discovery rule also applies to action for injury to the person or the rights of another. S.C. Code Ann. §15-3-535.

The Court below found that the parking lot was built in 2006 and that the building was constructed in 2009. The Appellants do not contest this finding. They state this as a fact ub their Statement of the Case. The Court below also found that the parking lot and the building which encroached on the easement were permanent in nature. The Appellants do not contest that finding. The lower court also held:

> The existence of each of those encroachments was obvious after each was in place in 2008 (sic) and 2009 respectively. Ms. Farley as Trustee knew, or with the exercise of reasonable diligence should have known, those encroachments existed prior to her death in 2012.

Order, page 8. The Appellants do not contest this holding. Therefore, each of the relevant claims of the Appellants are barred by the three-year statute of limitations.

The Plaintiffs claim The Church has encroached upon, obstructed or otherwise blocked the Plaintiffs' easement for access to their property. The encroachments and obstructions identified are (1) a permanent building which was constructed in 2009 and (2) permanent, paved parking areas which were built 2006. Both of those structures are permanent, and the statute of limitations began to run at the time the encroachment or obstruction first arose. The applicable statute of limitation expired as to those claims respectively in 2011 and 2012. Therefore, these claims are barred. To the extent those obstructions devalue the Plaintiffs' property or the

easement, any claim in that regard is also barred by the three-year statute, and the Order of the lower court should be affirmed.

The Supreme Court in Sutton v. Catawba Power Co., 104 SC 405 89 S.E. 353 (1916) quoted 21 E. N. Enc. of Law 724:

> ...But where the injury is of such a nature, that all the damages resulting therefrom, whether past or prospective, are recoverable in one action, the statute of limitations begins to run, from the time of the completed erection of the nuisance ....

Id. at 406, 354.

In this case, the obstruction of the easement and any resulting damage to either the easement or the property of the Trust was immediate when the building was completed and when the parking lot was completed. The two encroachments were open and obvious from the time they were built in 2006 and 2009 respectively. Therefore, the statute of limitations began to run from the time each encroachment was constructed. Under these circumstances, the Plaintiffs' claims arising from the encroachments are time barred.

This position is supported by the following cases. In Re: Hemmel, 399 B.R. 867 (S.D. Iowa 2009) (a dam and pond were held to be permanent structures and the statute began to run upon completion); Papanikolas Brothers v. Wendy's, 580 Utah App. 211, 163 P.3d 728 (2007) (construction of a driveway on Plaintiff's property was a single act and was considered a permanent structure); Rankin v. De Bare (205 Cal. 639, 271 P. 1050) (1928) (construction of a building which encroached on Plaintiff's property was considered a permanent structure); Bertram v. Orlando, 102 Cal. App. 2d 506, 27 P.2d 894 (1951) (an encroaching building was considered to be a permanent structure); Tracy v. Ferrera, 144 Cal. App. 2d 827, 301 P.2d 905 (1956) (the construction of walls, foundations, pipes and vents upon Plaintiff's property were considered permanent structures); Mattos v. Mattos, 162 Cal. App. 2d 41, 328 P.2d 269 (1958)

(construction of a building partly upon the land of another is a permanent encroachment thereon and the entire cause of action for past as well as prospective damages accrues when the trespass occurs); Troger v. Fink, 166 Cal. App. 2d 22, 332 P.2d 779 (1958) (construction of a stucco building encroaching upon Plaintiff's land was a permanent structure); Bourg v. Morningstar Benev. Ass'n, 804 So.2d 666 (La. Ct. App. 1st Cir. 2001) (debris dumped on Plaintiff's property was a permanent trespass rather than a continuing or intermittent trespass).

The Plaintiffs claim that The Church was grossly negligent in (1) obstructing the easement by erecting buildings on the easement and (2) by failing to remove the obstructions. All of those actions took place in or prior to 2009. Therefore, all of the claims based on those actions are also barred by the three-year statute of limitations, and the Order of the lower court should be affirmed.

Finally, the Plaintiffs claim that The Church has trespassed on the easement by encroaching on the easement. The only encroachments identified are (1) a permanent building or buildings and (2) the construction of permanent parking areas. Both of those actions took place no later than 2009. Both obstructions are permanent in nature, and the damage, if any, occurred at the time of construction. The encroachments are not intermittent or periodic, therefore, the three-year statute of limitations applies, the claims based on those actions are barred and the Order of the lower court should be affirmed.

B. All of the acts of the Defendant complained of by the Plaintiffs were open and obvious. The building and the parking area were obvious and apparent when they were constructed in 2006 and 2009 respectively. No one can seriously argue that the discovery rule prevented the applicable statutes of limitation from expiring prior to Ms. Farley's death in March of 2012 and prior to February 3, 2013. Therefore, the three-year statute of limitations expired as to all of the

Plaintiffs' claims well before the commencement of this action, and the Order of the lower court should be affirmed.

C. The lower court correctly held that the ten-year statute of limitations contained in Section 15-3-340 is not applicable to the claims asserted by the Plaintiffs. That Section provides:

> No action for the recovery of real property or the recovery of the possession of real property may be maintained unless it appears that the Plaintiff ...was seized or possessed of the premises in question within ten years before the commencement of the action.

In this case, the Plaintiffs are not trying to "recover real property" or to recover "possession of real property." The court below correctly found there was no question of the validity and existence of the easement or the ownership of the easement by the Plaintiffs. The Plaintiffs own the easement, and they have always been in possession of the easement. They are not seeking to recover real property or the possession thereof.

The character of this action is determined by the Plaintiffs' Complaint. Walsh v. Evans, 112 S.C. 131, 39 S.E. 546 (1916); Hall v. Boatwright, 58 S.C. 544, 36 S.E. 1001 (1900); Southern Cotton Oil Co. v. Shelton, 220 F. 297 (1914); Elmore v. Davis, 49 S.C. 1, 26 S.C. 898 (1897). In this case, the court below correctly held:

> The gravamen of the Plaintiffs' claims in this action is the recovery of (1) damage for the diminution in value of the ten (10) acres (2) damage for breach of contract (with and without a fraudulent act), (3) trespass to land, (4) damage for trespass, (5) damage or negligence and (6) damage for the encroachments on the easement.

Order, Page 11.

Each of those claims fall squarely within the terms of the three-year statute of limitations set out in Section 15-3-530(1) and (3). Subsection 530(1) applies to "an action upon a contract, obligation or liability ...." Subsection 530(3) applies to "an action for trespass or damage to real property." All of the Plaintiffs claims set out in the Complaint are consistent with the holding of

the lower court as to the nature of the claims. The three-year statute of limitations is applicable to each of the Plaintiffs' claims and the lower court correctly granted summary judgment in favor of the Defendant on each of those claims on the ground that each was barred by the applicable three-year statute of limitations.

The lower court was also correct in holding that the ten-year statute was not applicable. There is no issue of title in this case. The validity, existence and ownership of the easement by the Plaintiffs is not contested by The Church. The Plaintiffs do not contest the ownership by The Church of the land which is subject to the sixty-six (66) foot easement. The Plaintiffs do not seek to recover real property or the possession thereof. They own the easement, and they are and have always been in possession of the easement. The issue on appeal is whether their claim that The Church should remove the encroachments on the easement and their claim for damage resulting therefrom is time barred by the three-year statute. The Court below correctly held that the relevant claims of the Plaintiffs are barred by Section 15-3-530(1) and (3).

D. The Appellants appear to argue that The Church seeks to establish a prescriptive right to encroach on the easement. Appellants' Brief, page 3-4. The Church does not claim such a right. It is the position of The Church that the causes of action related to the encroachments are time-barred by the three-year statute contained in Section 15-3-530.

The Appellants' Brief contains a conclusory statement that the encroachments are a "continuing violation of the easement" and "reset the statute of limitations each day the encroachment remains." Appellants' Brief, page 3. However, the Appellants do not discuss or cite any authority to establish that permanent structures such as a building or a parking lot are a "continuing violation" of the easement or intermittent and periodical encroachments on the easement. On the other hand, the authorities cited above in this Brief establish that a building and

a parking lot are permanent, non-abateable, encroachments and do not reset the statute of limitations every day they encroach upon the easement.

IV.

Based on the foregoing, either the appeal should be dismissed as untimely or the issues on appeal should be limited. If the appeal is allowed to go forward on all issues, the Order of the lower court should be confirmed.

RESPECTFULLY SUBMITTED,

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March 17th, 2010
Chapin, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2019-001609

Rachel Farley, as Trustee of the Louise Farley Revocable Trust Dated February 8, 2005; Drummond B. Farley; Rachel R. Farley; Carol E. Farley; and Nancy E. Farley, Appellants,

v.

Church of the Harvest of Columbia, Inc., Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that on March 17, 2020 he caused the ***Initial Brief of Respondent***, ***Counterdesignation of Matter to be Included in the Record on Appeal***, and ***Motion to Exclude Matter from the Record on Appeal*** to be sent via United States Postal Service, first class mail, with adequate postage prepaid, to the parties listed below:

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March 17, 2020

VIA HAND DELIVERY

Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Rachel Farley, as Trustee of the Louise Farley Revocable Trust Dated February 8, 2005; Drummond B. Farley; Carol E. Farley; and Nancy E. Farley v. Church of the Harvest of Columbia, Inc.
Appellate Case No. 2019-001609
Our File No. 3303.28245

Dear Madam Clerk:

Attached for filing please find the original and one copy of the ***Initial Brief of Respondent***, the original and one copy of the ***Counterdesignation of Matter to be Included in the Record on Appeal***, the original and six copies of the ***Motion to Exclude Matter from the Record on Appeal*** and the original and one copy of the ***Proof of Service*** in the above-referenced matter. By copy of this letter and aforementioned pleadings, we are serving same upon all parties of record.

Yours very truly,

Robert W. Dibble, Jr.

RWDJR:rdb
Attachments
cc: William H. Edwards, Esquire
Mr. Drummond B. Farley
Ms. Carol E. Farley
Ms. Nancy E. Farley