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

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JAN 16 2020
SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Alex Kinlaw, Jr., Circuit Court Judge

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

Appellate Case No. 2019-002040

DAVID ROSEN,

Appellant,

v.

JOSEPHINE MIDDLETON,

Respondent.

Motion to Dismiss Appeal for Lack of Jurisdiction

Howard W. Anderson III (#100329)
LAW OFFICE OF HOWARD W.
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P.O. Box 661
Pendleton, SC 29670
howard@hwalawfirm.com
864-643-5790 (p)
Lead Counsel for Respondent

Comes now Respondent and respectfully moves this Court to dismiss the appeal for lack of jurisdiction. The reasons for this motion are set forth in the accompanying memorandum.

Dated this 14th day of January 2020.

JOSEPHINE MIDDLETON



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

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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
SC Bar No. 100329
Counsel for Respondent

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**THE STATE OF SOUTH CAROLINA
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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

Appellate Case No. 2019-002040

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

PROCEDURAL BACKGROUND¹

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, SCRCP, [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

¹ 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 14th 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
DEC 12 2019
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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ELECTRONICALLY FILED - 2019 Dec 04 10:12 AM - GREENVILLE - COMMON PLEAS - CASE#2018CP2300513

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).

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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DEC 12 2019

SC Court of Appeals

David Rosen.....Appellant,

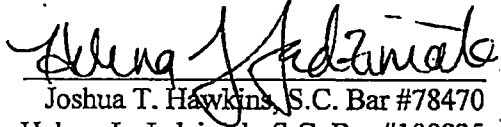
v.

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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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,

Josephine Middleton,

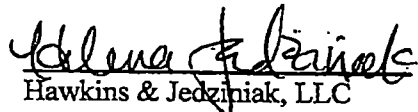
Respondent.

v.

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DEC 12 2019
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)	Defendant's Motion For Relief From Judgment
)	
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

S.C. Bar No.: 102097

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Attorneys for Plaintiff

ELECTRONICALLY FILED - 2019 Oct 02 1:56 PM - GREENVILLE - COMMON PLEAS - CASE#2018CP2300613

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

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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

Common Pleas Case No. 2018-CP-23-00513
Appellate Case No. 2019-002040

RECEIVED
FEB 24 2020
SC Court of Appeals

David Rosen,Appellant,

v.

Josephine Middleton,Respondent.

**APPELLANT'S RETURN TO RESPONDENT'S
MOTION TO DISMISS APPEAL**

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(864) 275-8142 (telephone)
(864) 752-0911 (facsimile)
Attorneys for Appellant

COMES NOW the appellant and files this response in opposition to the respondent's motion to dismiss.

FACTUAL BACKGROUND

The appellant and the respondent were involved in a romantic relationship and lived with one another at 407 Tanner Chase Way, Mauldin, South Carolina 29607. On or about September 18, 2017, the respondent ended her relationship with the appellant and instructed him to move out of the house located at 407 Tanner Chase Way. The respondent prevented the appellant from removing all of his possessions, including his car.

On October 18, 2017, the respondent filed an Application for Ejectment, stating that the appellant had moved out of her residence but had left items on the property. On November 3, 2017, the appellant, proceeding *pro se*, filed an action against the respondent in the Magistrate's Court under the civil action number 2017-CV-23-10202047. On December 13, 2017, Judge Dean Ford presided over a hearing on the respondent's Application for Ejectment and informed counsel for both parties that he would transfer the appellant's complaint to the Court of Common Pleas. Both the appellant and the respondent attended the hearing and heard Judge Ford's ruling.

On December 15, 2017, counsel for the appellant 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 respondent. Defense counsel did not file any responsive pleading. After learning that the case had been transferred to this court, the appellant served the amended complaint with the updated civil action number upon the attorney of record for the respondent on September 11, 2018. The appellant also served discovery requests,

including Requests for Admission, with the September 11, 2018, service of the amended complaint.

On November 23, 2018, the appellant moved for default judgment or, in the alternative, summary judgment. On December 18, 2018, the Court heard the appellant's motion and granted summary judgment in favor of the appellant. The appellant properly notified defense counsel of this hearing, but neither the respondent nor her counsel appeared. The Court scheduled a damages hearing for January 14, 2019. That hearing was rescheduled for January 17, 2019 and then for February 7, 2019. The appellant 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 for March 4, 2019. Neither the respondent nor her counsel appeared. On March 5, the Court issued a Form 4 order awarding the appellant \$61,233.00 in actual damages. The Court issued a formal order memorializing that award on March 25, 2019.

On September 16, 2019, the respondent filed a *pro se* motion to quash. In that motion, the respondent stated, "Michael Gambrell was not my attorney, I have not spoken to Michael Gambrell since Dec 13th, 2017, he came to court at Alex Pattera request. (Alex Pattera was my attorney at that time) I have emails to Michael Gambrell from March 12, 2018 telling him I did not want him to represent me since he never contacted me. I have had no representation on the above claim [...]" (Exhibit F). On September 24, 2019, current counsel for the respondent filed a motion for substitution of counsel and, on October 2, a motion for relief from judgment.

On October 22, 2019, the Court heard the respondent's motions for substitution of counsel and relief from judgment and granted those motions. On October 31, 2019, the appellant filed a motion to reconsider that order, which altered the December 21, 2018 order granting summary judgment, March 5, 2019 Form 4 order reflecting the findings at a damages hearing, and March

25, 2019 formal order reflecting the findings at a damages hearing. On December 4, 2019 the court entered a formal order granting the respondent's motions. The appellant filed a notice of appeal on December 9, 2019.

LEGAL STANDARD

"The determination of whether a party may immediately appeal an order issued before or during trial is governed primarily by S.C. Code Ann. § 14-3-330 (1976 & Supp. 2003)." *Hagood v. Sommerville*, 362 S.C. 191, 195, 607 S.E.2d 707 (2005). "An order generally must fall into one of several categories set forth in that statute in order to be immediately appealable." *Ibid.* citing *Baldwin Constr. Co. v. Graham*, 357 S.C. 227, 593 S.E.2d 146 (2004).

S.C. Code 14-3-330 provides:

the Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

- (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 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.

ARGUMENT

In moving to dismiss the appellant's appeal, the respondent relies upon *Posick v. Sea Coast Constr.*, 380 S.C. 584 (Ct. App. 2008). In this case, it is true that the Circuit Court granted the Rule

60(b) motion based on attorney abandonment – even though submitted documents unambiguously showed that Middleton fired her attorney and that her attorney did not abandon her. The ruling is appealable, though, because the Court entered an opinion that affected a substantial right.

The Court wholly adopted an order submitted by the respondent, who fired her attorney, refused to respond to filings or be present for Court dates, and then had summary judgment entered against her on December 21, 2018. After ten months – during which the appellant continued to incur costs related to the respondent’s tortious conduct – the court adopted the tortfeasor’s proposed order.

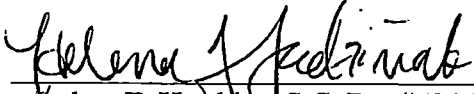
That order directly contradicted a document that the respondent personally filed with the court the previous month. In that document, the respondent clearly stated that she told her attorney in March 2018 that she no longer wanted him to represent her. Nevertheless, eighteen months after terminating her relationship with counsel, the respondent argued that her attorney abandoned her. In fact, summary judgment was entered against the respondent because she deliberately terminated her relationship with her prior counsel, failed to obtain new counsel, and failed to participate in her case despite having actual knowledge that the case was continuing to be prosecuted.

In attempting to bolster her straw-man argument, the respondent relies upon *Maples v. Thomas*, 565 U.S. 266. The facts of these two cases could not be more dissimilar. *Maples* addressed a case of attorney abandonment where a prisoner was at risk of execution due to the abandonment. The respondent, on the other hand, is not only not on death row, but is living freely in the very county where the summary judgment and damages hearings were held. The respondent alone chose to fire her attorney and to not hire another attorney, even with actual knowledge that litigation was ongoing. To reward her for that conduct violates not only the appellant’s substantial rights but also his constitutional rights.

The appellant followed procedure and incurred the costs associated with it. In addition to the damages he sustained as a result of the respondent's malicious conduct, he has incurred attorneys' fees, spent money on filing fees and court costs, and lost wages at work. After the appellant did all of that and obtained a judgment by following the South Carolina Rules of Civil Procedure, the respondent made a motion containing demonstrable falsehoods to the Court. If reversal of a legitimate judgment obtained through adherence to the Rules in this case does not violate a substantial right in this case, it is hard to image a case where a substantial right is violated.

CONCLUSION

For the foregoing reasons, the appellant respectfully requests that the court deny the respondent's Motion to Dismiss Appeal for Lack of Jurisdiction.


Joshua T. Hawkins, S.C. Bar #78470
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

FEB 24 2020

SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Alex Kinlaw, Circuit Court Judge

David Rosen.....Appellant,

v.

Josephine Middleton.....Respondent.

Appellate Case No. 2019-002040

PROOF OF SERVICE

I certify that I served the Appellant's Return to Respondents Motion to Dismiss Appeal on Josephine Middleton by depositing copies of it in the United States Mail, postage prepaid, on February 21, 2020, addressed to its attorneys of record, Devon Marc Pureifoy and Kimberly Truluck Thomason, at 3 Boyce Avenue, Greenville, South Carolina 29601.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

RECEIVED

Alex Kinlaw, Jr., Circuit Court Judge FEB 28 2020

Common Pleas Case No. 2018-CP-23-00515 **SC Court of Appeals**

Appellate Case No. 2019-002040

DAVID ROSEN,

Appellant,

... v.

JOSEPHINE MIDDLETON,

Respondent.

Reply to Return to Motion to Dismiss Appeal for Lack of Jurisdiction

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Lead Counsel for Respondent

COMES NOW Respondent and would respectfully show the Court as follows in Reply to Appellant's Return to Her Motion to Dismiss Appeal for Lack of Jurisdiction.

Appellant has failed to prove that jurisdiction lies here. Every appellant bears the burden of establishing subject-matter jurisdiction on appeal. *See, e.g., Harkins v. Greenville Cty.*, 340 S.C. 606, 616 (2000) ("The Adult Businesses, as the appellant in this issue, have the burden of presenting this Court with an adequate record. Without the necessary County ordinances, this Court cannot determine the time period between the initial permit application and a final appealable administrative decision."); *Yarborough & Co. v. Schoolfield Furniture Indus., Inc.*, 275 S.C. 151, 153 (1980) ("When jurisdiction is challenged, the plaintiff has the burden of presenting facts sufficient to establish jurisdiction."). And where, as here, the Record has not been filed, "the parties shall file affidavits and other documents in support of their positions." R. 240(c)(3), SCACR. Appellant's argument, however, is littered with factual assertions with no citation to evidentiary material. Because "[a] court cannot consider facts appearing only in argument of counsel," *Shinn v. Kreul*, 311 S.C. 94, 102 (Ct. App. 1993) (citation omitted), and because Appellant filed no affidavits or other documents with his Return, this Court can and should summarily dismiss the appeal. There is a complete lack of evidence establishing, as a matter of fact, any "substantial right" implicated in the order below.

Even if Appellant had proffered evidence for the Court's consideration, Appellant's claim would still fail as a matter of law. Appellant simply wants to avoid a trial. But "[a]voidance of trial is not a 'substantial right' entitling a party to immediate appeal of an interlocutory order." *Shields v. Martin Marietta Corp.*, 303 S.C. 469, 470 (1991) (citation omitted).¹

Dated this 26th day of February, 2020.

JOSEPHINE MIDDLETON



Howard W. Anderson III
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Lead Counsel for Respondent

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¹ Respondent obviously disagrees with Appellant's critique of Judge Kinlaw's ruling. Respondent will address that critique, if necessary, in the merits brief.

PROOF OF SERVICE

I, the undersigned, served a copy of the foregoing on the following counsel of record this 26th day of February, 2020, by U.S. Mail, First-Class Postage prepaid:

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Counsel for Respondent

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FEB 28 2020
SC Court of Appeals

The South Carolina Court of Appeals

David Rosen, Appellant,

v.

Josephine Middleton, Respondent.

Appellate Case No. 2019-002040

ORDER

Respondent's motion to dismiss this appeal is granted because the underlying order granting relief under Rule 60(b), SCRCP, is not immediately appealable pursuant to section 14-3-330 of the South Carolina Code (2017). See *Pocisk v. Sea Coast Const. of Beaufort*, 380 S.C. 584, 671 S.E.2d 98 (Ct. App. 2008) (holding the grant of a Rule 60(b) motion to set aside a consent judgment is not immediately appealable); *Pioneer Associates, Inc. v. Ticor Title Ins. Co.*, 300 S.C. 346, 387 S.E.2d 711 (Ct. App. 1989) (holding the grant of a Rule 60(b) motion to set aside a default judgment is not immediately appealable).


FOR THE COURT

Columbia, South Carolina

cc:

Helena LeeAnn Jedziniak, Esquire
Joshua Thomas Hawkins, Esquire
Devon Marc Puriefoy, Esquire
Howard Walton Anderson, III, Esquire

FILED

March 19, 2020

92544

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

MAR 30 2020

SC Court of Appeals

The Honorable Alex Kinlaw, Circuit Court Judge

David Rosen.....Appellant,

v.

Josephine Middleton.....Respondent.

Appellate Case No. 2019-002040

APPELLANT'S PETITION FOR REHEARING

COMES NOW the appellant, pursuant to Rule 221, SCACR, and other rules of Court, and petitions for rehearing as to the Court's dismissal of this appeal. The appellant, in an abundance of caution, files this petition in order to preserve his ability to file a petition for certiorari. The appellant respectfully submits that substantial rights will be affected.

This is not simply a case where the Circuit Court granted relief from a judgment that was 10 months old, which is rare in and of itself. This is a case where the respondent submitted documents at the hearing on her motion for relief from the judgment against her which undeniably show the respondent fired her attorney and then the Court granted her motion based on attorney abandonment. To snatch away the judgment the appellant worked so diligently to obtain where the respondent has voluntarily proven there is no basis for her motion affects the appellant's substantial rights, and this Court should hear the appeal and reverse the Circuit Court.

s/ Joshua T. Hawkins
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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

David Rosen.....Appellant,

v.

Josephine Middleton.....Respondent.

Appellate Case No. 2019-002040

PROOF OF SERVICE

I certify that I served the Appellant's Petition for Rehearing on Josephine Middleton by depositing copies of it in the United States Mail, postage prepaid, on March 25, 2020, addressed to its attorneys of record, Devon Marc Pureifoy and Kimberly Truluck Thomason, at 3 Boyce Avenue, Greenville, South Carolina 29601.

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The South Carolina Court of Appeals

David Rosen, Appellant,

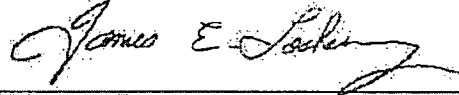
v.

Josephine Middleton, Respondent.


Appellate Case No. 2019-002040

ORDER

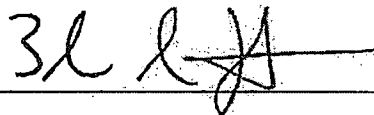
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



C.J.



J.



J.

Columbia, South Carolina

cc:

Helena LeeAnn Jedziniak, Esquire
Joshua Thomas Hawkins, Esquire
Devon Marc Puriefoy, Esquire
Howard Walton Anderson, III, Esquire

FILED
Apr 30 2020