

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM FLORENCE COUNTY  
COURT OF COMMON PLEAS

William H. Seals, Jr., Circuit Court Judge

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Civil Action No. 2020-CP-21-00755  
SCWCC Claim No. 1222136

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**RECEIVED**

**Jun 18 2020**

**SC Court of Appeals**

Otis Nero, .....Respondent,

South Carolina Department of Transportation, Employer,  
and State Accident Fund, Carrier, ..... Appellants.

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**RESPONDENT'S REPLY TO APPELLANTS'  
RETURN TO MOTION TO DISMISS**

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The Respondent replies to the Appellants' Return to Motion to Dismiss Appeal as follows:

**I. THE APPEAL SHOULD BE DISMISSED AS UNTIMELY.**

The Appellants received written notice of the Judgment of the Circuit Court on March 13, 2020, when the same was served upon the South Carolina Attorney General pursuant to Rule 4(d)(5) of the South Carolina Rules of Civil Procedure. (See pp. 83-90 of Exhibit B to Respondent's Motion to Dismiss). Appellants' Rule 59(e) Motion, filed eleven (11) days later, on March 24, 2020, was therefore untimely. No appeal was filed within thirty (30) days of March 13, 2020, and, therefore, the appeal should be dismissed.

Appellants argue that "... when a party is represented by counsel, *counsel* must actually receive written notice of entry of judgment before the requirements of Rule 77(d) and Rule 59(e), S.C.R.C.P., are satisfied and the time to file a Motion under Rule 59(e) begins to run". (App. Return, p. 8 (emphasis in original)).

The Appellants cite no law in support of this, their central legal contention.

Rule 203(b)(1) of the South Carolina Appellate Court Rules provides that a notice of appeal shall be served on all parties "within thirty (30) days after receipt of written notice of the entry of the order or judgment." (emphasis added). The Rule does not require service of the entry of judgment upon the attorney of record, or at all. Rather, the time to appeal runs from "receipt of written notice of entry of the order or judgment."

Similarly, Rule 59(e) of the South Carolina Rules of Civil Procedure uses the same language to trigger the time to file a motion to alter or amend, "receipt of written notice of the entry of the order". Rule 59(e) S.C.R.C.P.

The Supreme Court construed this language in the recent case of Fargo v. Fallon Props., S.C., LLC, 422 S.C. 211 (2018). There the Court affirmed the dismissal of an appeal pursuant to

Rule 203(b)(4) where the appellant had received written notice of the entry of the judgment via email prior to being served with the judgment by certified mail. The Court noted:

Unlike the notice of appeal, there is no requirement that *the written notice of entry of an order or judgment* be served upon the parties. All that is required to trigger the time to appeal is that the parties *receive* such notice.

\* \* \*

Here, it is undisputed the email Petitioners received came from the master's administrative assistant and provided written notice of the entry of the order. Consequently, we find Petitioners' receipt of the email triggered the time to appeal. Although Petitioners also received written notice by mail three days after receiving the email, the time to serve the notice of appeal commenced at the time the parties *first* received written notice of entry of the order. Accordingly, we find the Court of appeals correctly determined the time to appeal was triggered on the day the parties received the email; therefore, the notice of appeal served thirty-one days therefore was untimely

Fargo v. Fallon, 422 S.C. 211, 215-217.(emphasis in original).

Here, as in Fargo, the Appellants are incorrectly focused upon the date upon which the attorney of record was served with the judgment. Here, as in Fargo, the time to appeal and the time to file a Rule 59(e) motion runs from "the time the parties first received written notice", not from service of the judgment on the attorney of record. Fargo, at 216-217. (emphasis in original).

The Appellants do not dispute they received written notice of the judgment when the same was served upon the Attorney General as agent for service of process for state agencies, pursuant to S.C.R.C.P. Rule 4(d)(5), on March 13, 2020. The time to file a Rule 59 (e) motion or to appeal ran from that receipt of written notice via service upon the Attorney General.

The Appellants' Rule 59(e) Motion and their Notice of Appeal were filed out of time; depriving this Court of jurisdiction and the appeal should be dismissed.

## II. THE APPEAL SHOULD BE DISMISSED ON RES JUDICATA GROUNDS.

The Appellants argue:

Nero attempts to argue that the Form 4 Judgement signed by Judge Seals on March 11, 2020, by which Nero **awarded himself** lump sum payment of benefits under S.C. Code §42-9-301, interest under S.C. Code §42-17-60, and penalties under S.C. Code §42-9-90, is not appealable, ostensibly due to the doctrine of *Res Judicata*. (App. Return, pp. 11-12, para. 50)(emphasis added).

The Appellants' Return goes on to argue that the matter is not res judicata because the Circuit Court judgment was the first adjudication of these issues. They argue that "... the Appellant was afforded no opportunity to be heard on these issues prior to Judgment and the Court lacked subject matter jurisdiction to address these issues..." (App. Petition, pp. 13-14).

To the contrary, the Respondent did not, and could not, "award himself" anything. The Judgment was entered by the Circuit Court pursuant to South Carolina Code §42-17-70 to enforce the Order of this Court dated June 26, 2019; which was, itself, the product of over five (5) years of litigation beginning with the Order of the Single Commissioner of August 5, 2014 and culminating with the Order of the Supreme Court denying certiorari on February 12, 2020.

The Appellants were afforded exhaustive due process during those five (5) years.

The Appellants failed to comply with this Court's Order of June 26, 2019; which reinstated the Order of the Single Commissioner and Ordered, inter alia, the payment of weekly temporary total disability benefits from June 20, 2012, the date of the Order of the Commission, and continuing until further Order of the Commission. (Exh. A, p. 54, Resp. Mot. Dismiss). The Respondent, therefore, had no alternative but to file the Order of the Court of Appeals with the Circuit Court, pursuant to §42-17-70, in order to obtain a judgment in order to enforce the June 26, 2019 Order of the Court of Appeals.

South Carolina Code §42-17-70 provides:

Any party in interest may file in the court of common pleas of the county in which the injury occurred ... an award of the commission affirmed upon appeal, whereupon such court shall render judgment in accordance therewith and notify the parties.

S.C. Code Ann. §42-17-70

Section 42-17-70 does not require service of the filing of the Commission Order with the Court of Common Pleas because the Order was already the product of due process.

The Circuit Court did not exercise any discretion in entering Judgment on the Court of Appeals' Order. To the contrary, the Circuit Court was performing a ministerial duty mandated by statute by entering Judgment on that Order and calculating the resulting benefits due; including back indemnity benefits, mandatory statutory pre-judgment interest, and the mandatory non-payment penalty pursuant to South Carolina Code §42-9-240 and §42-9-90.

The matter has been decided by this Court by Order of June 26, 2019. The Respondent seeks the enforcement of the Order of the Court of Appeals. The instant appeal should be dismissed as res judicata.

### CONCLUSION

Over the course of five (5) years, the parties litigated the Claimant's entitlement to workers' compensation benefits; culminating in this Court's Order on June 26, 2019, from which certiorari was denied.

The Appellants failed to comply with this Court's Order. Pursuant to South Carolina Code §42-17-70, the Respondent sought to enforce this Court's Order by filing that Order, and the Single Commission Order it reinstated, with the Circuit Court. As a ministerial task, the Court of Common Pleas entered Judgment on this Court's Order; calculating the past-due benefits, together with pre-

judgment interest and penalties and non-payment penalties mandated by statute, §§42-9-240, and 42-9-90.

The Appellants received written notice of the entry of this Judgment when it was served on the Attorney General as their agent for service of process pursuant to Rule 4(d)(5) of the South Carolina Rules of Civil Procedure.

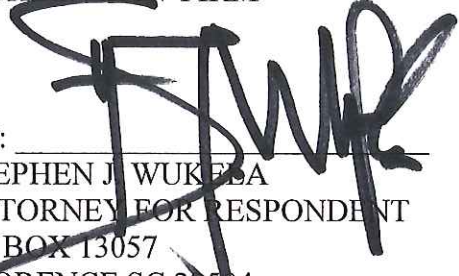
The Appellants failed to file a timely Rule 59(e) motion within ten (10) days of receipt of that written notice. Similarly, the Appellants failed to file a Notice of Appeal pursuant to Rule 203 of the South Carolina Appellate Court Rules within thirty (30) days of receipt of written notice of entry of the Judgment. Appellants' contention that Rule 59(e) and Rule 203 run from service upon the attorney of record is contrary to the Supreme Court's holding in Fargo v. Fallon, 422 S.C. 211 (2018).

Moreover, Appellants' appeal is based on their contention that, by entering Judgment pursuant to South Carolina Code §42-17-70 on the Court of Appeals Order of June 26, 2019, the Circuit Court newly adjudicated respondent's entitlement to benefits. The Circuit Court did not. The Circuit Court performed its ministerial duty pursuant to South Carolina Code §42-17-70 to calculate the benefits due including mandatory, statutory, pre-judgment interest and penalties.

The Appellants' appeal should be dismissed as untimely and res judicata such that the Respondent can continue in his efforts to enforce this Court's Order of June 26, 2019.

Respectfully submitted,

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June 18<sup>th</sup>, 2020

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**PROOF OF SERVICE**

I certify that I have served the Respondent's Reply to Appellants' Return to Motion to Dismiss on Appellants by email on June 18, 2020, via email to [kbarr@traskhowell.com](mailto:kbarr@traskhowell.com).

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