

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY MAGISTRATES COURT -- NORTH
The Honorable Maite Murphy, Circuit Court Judge
The Honorable Roger M. Young, Circuit Court Judge
The Honorable James A. Turner, Magistrate Judge

Appellate Case No. 2019-0001878
Common Pleas Case No. 2018-CP-10-3315
Small Claims Case No. 2017CV1011500354

Alan Nix, Appellant,

v.

Churchill Park Homeowners' Association, Inc., Churchill Park at Parkwest, Inc., Churchill Park,
David Brown, and Catherine Brown, Respondents

And the Honorable Roger Young and Lyndsay Luthringer, Interveners.

**INITIAL BRIEF OF RESPONDENT CHURCHILL PARK, IMPROPERLY NAMED AS
CHURCHILL PARK HOMEOWNERS ASSOCIATION, INC. AND IMPROPERLY
NAMED AS CHURCHILL PARK AT PARKWEST, INC.**

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ASSOCIATION, INC. AND IMPROPERLY
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PARKWEST, INC.***

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STATEMENT OF ISSUES ON APPEAL

- I. Whether Appellant timely filed a Notice of Appeal from the magistrates court when the Notice was filed approximately 440 days after entry of order dismissing the case.
- II. Whether Appellant's Issues on Appeal are preserved for appellate review when the arguments were not raised and ruled on by the magistrate judge.

STATEMENT OF THE CASE

This case was commenced on February 24, 2017 in the magistrates court (North) for Charleston County. The general allegations in the underlying Complaint relate to a fence dispute at 1401 Densmore Circle, Mount Pleasant, South Carolina 29466. On May 23, 2017, Respondents timely filed an Answer denying adverse claims and a dispositive pre-trial motion. On April 18, 2017 Judge James Turner held a pre-trial conference in chambers and issued a form order the same day dismissing Appellant's Complaint with prejudice as to all Respondents except David Brown, individually. The case was dismissed without prejudice as to David Brown, individually, and Judge Turner allowed Appellant to amend the Complaint with specific allegations against Brown within 14 days. An amended Complaint was never filed.

Instead, approximately one year later, on April 18, 2018, Appellant filed a Rule 60, SCRCF, motion to clarify Judge Turner's April 18, 2017 order dismissing the case. On April 30, 2018, a hearing was held on Appellant's motion to clarify, and on May 9, 2018, Judge Turner denied Appellant's motion. On May 21, 2018, Appellant filed a motion for reconsideration which was likewise denied by order dated May 31, 2018. On or about June 18, 2018, Appellant filed another post trial motion styled "Plaintiff's Motion to Compel Clarification of Orders dated May 9, 2018 & May 31, 2018." Judge Turner denied the motion on June 20, 2018. On June 28, 2018, Appellant filed a Notice of Appeal with the magistrates court. On or about July 9, 2018 Judge Turner entered a Return to Appellant's Notice of Appeal.

After jurisdiction was assumed by the circuit court (in its appellate capacity), Appellant filed numerous motions seeking reconsideration of a consent order substituting counsel, a motion

for a change of venue, a motion for judicial recusal, and likewise issued numerous subpoenas to members of the judiciary as well as various current and former attorneys of record.

On August 28, 2019, the circuit court held a merits hearing on Appellant's Notice of Appeal as to the underlying Magistrate order dismissing the case. By orders entered September 27, 2019, Judge Murphy denied Appellant's appeal, quashed numerous subpoenas issued by Appellant, and enjoined Appellant "from filing additional Complaints or other Pleadings related to the matters set forth in Civil Action No. 2018-CP-10-3315, until such time that Plaintiff has retained legal counsel, licensed to practice in the State of South Carolina."

Still acting *pro se*, Appellant filed a Notice of Appeal with this court on November 8, 2019.

STANDARD OF REVIEW

On appeal from the magistrates court, the Court of Appeals looks to whether the circuit court order is controlled by an error of law or unsupported by the facts. *Parks v. Characters Night Club*, 345 S.C. 484, 490, 548 S.E.2d 605, 608 (Ct. App. 2001).

ARGUMENT

I. Appellant did not timely file a Notice of Appeal from the magistrates court's final order dismissing the case; therefore, this court is without appellate jurisdiction to consider the appeal.

"Within thirty (30) days after delivery of written notice of judgment to the parties or their attorneys, a party wishing to appeal shall serve on the respondent and file a notice of appeal containing a statement of the grounds for appeal with the magistrate rendering the judgment and with the Circuit Court of the County where the judgment was rendered." Rule 18(a), *SCRMC*. Without a timely notice of appeal, the reviewing court has no jurisdiction. *Burnett v. S.C. State Highway Dep't*, 252 S.C. 568, 571, 167 S.E.2d 571, 572 (1969). An appeal may be barred due to

untimely service of the notice of appeal when a party—instead of serving a notice of appeal—files a successive Rule 59(e) motion, where the trial judge's ruling on the first Rule 59(e) motion does not result in a substantial alteration of the original judgment. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 20, 602 S.E.2d 772, 778 (2004). Likewise, **a motion made under Rule 60, SCRCP, does not toll the running of the time for appeal.** *Otten v. Otten*, 287 S.C. 166, 167, 337 S.E.2d 207, 208 (1985) (emphasis added).

Here, the record plainly reflects that Appellant did not timely file and serve his Notice of Appeal as provided by applicable rules of procedure. On April 18, 2017, Judge Turner issued a form order dismissing Appellant's Complaint with prejudice as to all Defendants except David Brown, individually. Order 4/18/2017. The case was only dismissed without prejudice as to Defendant David Brown, and Judge Turner allowed Appellant to amend the Complaint with specific allegations within 14 days. Order 4/18/2017. **Appellant did not amend his Complaint or file appropriate post trial motions to toll the time limit to appeal from the magistrate court.** Instead, Appellant filed a Rule 60, SCRCP, approximately one year later on April 18, 2018. Motion 4/18/2018. The Rule 60 motion was denied by the court, and Appellant thereafter filed numerous motions styled as motions for reconsideration which were likewise denied. Order 5/9/2018; Order 5/31/2018; Order 6/20/2018. On July 2, 2018, approximately 440 days after Judge Turner's April 18, 2017 order dismissing the case with prejudice as to certain Respondents, Appellant filed his Notice of Appeal. Notice 7/2/2018. The record reflects that Appellant's appeal from the magistrate court is untimely and not in accord with magistrate court rules of procedure. Any reference to the municipal rules of procedure by Judge Murphy in her September 27, 2019 order dismissing the appeal does not affect Appellant's substantial rights, is not prejudicial, and amounts to harmless error. Order 9/27/2019.

In light of the procedural facts outlined and the case law authority above, this court should dismiss Appellant's appeal.

II. Appellant's various issues raised on appeal are not preserved for review and have no merit.

Parties to an appeal from the magistrates court are restricted to the arguments raised in the magistrates court. *Indigo Assocs. v. Ryan Inv. Co.*, 314 S.C. 519, 523, 431 S.E.2d 271, 273 (Ct. App. 1993). Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779–80 (2004). “Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review.” *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct.App.2006). At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). It is “axiomatic that an issue cannot be raised for the first time on appeal.” *Id.* Imposing such a requirement on the appellant “is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.” *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000); *see also Roche v. South Carolina Alcoholic Beverage Control Comm'n*, 263 S.C. 451, 211 S.E.2d 243 (1975) (purpose of an appeal is to determine whether the trial judge erroneously acted or failed to act and when appellant's contentions are not presented or passed on by the trial judge, such contentions will not be considered on appeal). “The requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him

another opportunity to prove his case.” *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

In this case, the record reflects Appellant never properly raised and the magistrate court never ruled on any issue addressed in Appellant’s Statement of Issues on Appeal/Questions Presented. Appellant’s arguments are not preserved for review, without merit, and should be dismissed by this court.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this court dismiss Appellant’s appeal with prejudice as to Respondent Churchill Park. Respondent likewise joins in and further states any and all arguments by all other Respondents to this action, pursuant to Rule 208(b)(6), *SCACR*.

Respectfully submitted,

s/ Kevin W. Mims

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Charleston, SC
January 4, 2021

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The Honorable Maite Murphy, Circuit Court Judge
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v.

Churchill Park Homeowners' Association, Inc., Churchill Park at Parkwest, Inc., Churchill Park,
David Brown, and Catherine Brown, Respondents

And the Honorable Roger Young and Lyndsay Luthringer, Interveners.

PROOF OF SERVICE

The undersigned certifies that a copy of Respondent Churchill Park improperly named as Churchill Park Homeowners Association, Inc. and improperly named as Churchill Park at Parkwest, Inc.'s Initial Brief and Designation of Matter have been served upon the following counsel of record by mailing a copy of the same by United States Mail, addressed as shown below this 4th day of January 2021.

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January 4, 2021



VIA EMAIL AND U.S. MAIL

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
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SC Court of Appeals

Re: Alan Nix v. Churchill Park HOA, et al.
Appellate Case Number: 2019-001878
LM File Number: 114-20177015

Dear Ms. Kitchings:

Enclosed please find the original and one copy of Respondent Churchill Park's Initial Brief and Designation of Matter in connection with the above-referenced matter. Please return a filed copy to me in the enclosed stamped envelope. Please let me know should you have any questions or need additional information.

With kindest regards, I am

Sincerely,

LUZURIAGA MIMS, LLP

s/ Kevin W. Mims

Kevin W. Mims

KWM/mlw
Enclosures

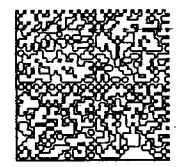
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