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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Robin B. Stilwell, Circuit Court Judge

Civil Action No. 2019-23-00269
Appellate Case No.: 2020-000438

Raymond A. Wedlake, as a Member of the Woodington Homeowners' Association, Inc.

Appellant,

v.

Christopher Edwards, Charles Koshis, Denis Esteve, Michael Keels and William Craigo in their capacity as Board of Directors of Woodington Homeowners' Association, Inc.,

Respondents.

FINAL BRIEF OF RESPONDENTS

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TABLE OF CONTENTS AND CASES

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

I. STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE CIRCUIT COURT'S FEBRUARY 20, 2020 ORDER PROPERLY DENIED APPELLANT'S DECEMBER 26, 2019 MOTION FOR RECONSIDERATION UNDER SOUTH CAROLINA RULE OF CIVIL PROCEDURE 59(E) AS UNTIMELY WHERE APPELLANT'S MOTION WAS FILED 31 DAYS AFTER ENTRY OF THE ORDER WHICH IT SOUGHT TO RECONSIDER.

2. WHETHER THE CIRCUIT COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S NOVEMBER 18, 2019 MOTION FOR NEW HEARING.

II. STATEMENT OF THE CASE

On January 17, 2019, Appellant commenced this action filing his Complaint in the Court of Common Pleas for the Thirteenth Judicial Circuit, County of Greenville (Civil Action No. 2019-23-00269). (R. pp. 13-23.) Appellant's Complaint sought a Declaratory Judgment permitting him to see "a list of those [Woodington Homeowners Association] Members who returned ballots (Documents or List) regarding a substantial increase in dues and a special assessment…" and "an affirmative Injunction '…to compel the production of corporate records…', specifically the List from November 9, 2018 balloting…" (R. pp. 14-15 ¶ 3 and p. 21 ¶ 37.) Appellant's claim was purportedly under the South Carolina Non-Profit Corporation Act. (R. pp. 14-15 ¶ 3.) Respondents answered, denying that Appellant was entitled to the requested List or any other form of relief under the SCNPCA. (R. pp. 39-53). Respondents later filed a counterclaim under the Frivolous Claims Act, but such counterclaim is not at issue on appeal.

On September 27, 2019, Respondents filed a Motion for Summary Judgment ("MSJ"), in relevant part seeking summary judgment in favor of Respondents on Appellant's claims. (R. pp. 54-56.) A hearing was held on the MSJ in front of The Honorable Robin B. Stilwell on October

28, 2019. (R. p. 181.) All parties were present at the hearing, and Appellant was accompanied by attorney Grant Gibson. (R. pp. 181-184.) At the hearing, Judge Stilwell indicated that he would rule in favor of Respondents and grant the MSJ on Plaintiff's claims, but no order was issued at that time. (R. p. 201, line 16-23.)

Events then proceeded as follows:

- On October 30, 2019, Appellant sent an unfiled email to Judge Stilwell requesting he deny the MSJ. (R. pp. 226-229.)
- On October 31, 2019, counsel for Respondent sent an unfiled email to Judge Stilwell clarifying an issue of fact from the hearing. (R. p. 230.)
- On November 18, 2019, Appellant filed a Motion for New Hearing ("MNH") regarding the MSJ, which covered the same issues and arguments already before the circuit court from the October 28th hearing and subsequent correspondence, as further evidenced by Appellant's quotations of prior submissions in the MNH. (R. pp. 97-101.)
- On November 25, 2019, Judge Stilwell issued an order granting Respondents' MSJ on Appellant's claims ("MSJ Order") and effectively denying Appellant's MNH. (R. pp. 5-8.)
- On December 2, 2019, Appellant filed a memorandum on an unrelated issue that acknowledged notice of the MSJ Order by at least that date. (R. p. 149 ¶ 3a.1.)
- On December 26, 2019, Appellant filed a Motion to Reconsider ("MTR") the MSJ Order. Nothing in Appellant's motion asserted why it should be considered timely filed. (R. pp. 157-166.)
- On February 20, 2020, the circuit court denied the MTR as untimely ("MTR Order"). The court also confirmed denial of the MNH. (R. pp. 9-10.)
- Appellant placed his notice of appeal in the mail on March 9, 2020 ("NOA"). The NOA purports to appeal the "'Order Form 4' (Exhibit 1) of the Honorable Robin B. Stilwell,

filed in the Public Index on February 20, 2020, which denied Appellant's request for a New Hearing," as well as "the Order of November 25, 2019 which granted Summary Judgment."[1] (R. p. 264.)

- On May 15, 2020, Respondents moved to dismiss Appellant's appeal as untimely. This Court issued an Order on September 21, 2020 denying the motion but clarifying that the denial was "because Appellant timely filed this appeal from the circuit court's *February 20, 2020 order*, which denied Appellant's motion to reconsider as untimely and separately denied Appellant's previous motion for a new hearing." (R. p. 12 (emphasis added).)

Thus, as this Court has itself acknowledged, the issues before this Court are those appealed from the February 20, 2020 order only, which are whether (1) Appellant's motion for reconsideration was properly denied as untimely and (2) whether the denial of Appellant's motion for a new hearing was within the circuit court's discretion.

As there are several motions and orders referenced in this appeal, below is a summary of the abbreviations used throughout Respondents' brief for consistency and ease of reading:

- "MSJ"—Respondents' Motion for Summary Judgment on Appellant's claims, filed on September 27, 2019
- "MSJ Hearing"—Hearing held in front of The Honorable Robin B. Stilwell on October 28, 2019
- "MNH"—Appellant's Motion for New Hearing, filed on November 18, 2019
- "MSJ Order"—Order issued by Judge Stilwell on November 25, 2019 granting Respondents' MSJ as to Appellant's claims
- "MTR"—Appellant's Motion to Reconsider the MSJ Order, filed on December 26, 2019
- "MTR Order"—Order issued by Judge Stilwell on February 20, 2020 denying Appellant's MTR and verifying denial of MNH
- "MTD"—Respondents' Motion to Dismiss Appellant's appeal as untimely, filed on May 18, 2020 before this Court
- "MTD Order"—Order issued by this Court on September 21, 2020 denying Respondents' MTD

[1] Respondents vehemently contest Appellant's assertions of what can be appealed and subsequent characterization of the issues before this Court. Respondents further note that Appellant's NOA says nothing about the circuit court's denial of MTR.

III. STANDARD OF REVIEW

This Court's appellate review of the MTR Order is pursuant to an "abuse of discretion" standard. "An abuse of discretion occurs when the conclusions of the circuit court are either controlled by an error of law or are based on unsupported factual conclusions." *Carson v. CSX Transp., Inc.,* 400 S.C. 221, 229, 734 S.E.2d 148, 152 (2012).

First, the timeliness of a Rule 59(e), SCRCP, motion is strictly a matter of law. *See* Rule 59 SCRCP; Rules 203, 263(b), SCACR. Thus, it is proper for this Court to apply an abuse of discretion standard. *See, e.g., Pollard v. Cnty. of Florence*, 314 S.C. 397, 402, 444 S.E.2d 534, 536 (Ct. App. 1994) (reviewing the circuit court's ruling on a Rule 59(e), SCRCP, motion pursuant to an abuse of discretion standard); *Stearns Bank Nat'l Ass'n v. Glenwood Falls, LP*, 373 S.C. 331, 336, 644 S.E.2d 793, 795 (Ct. App. 2007) ("An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support.") (citation and quotation marks omitted); *USAA Prop. & Cas. Ins. Co. v. Clegg,* 377 S.C. 643, 651, 661 S.E.2d 791, 795 (2008) (deferring to the circuit court's credibility determinations regarding the timeliness of a motion for reconsideration and declining to reverse the circuit court's decision).

Second, the determination of whether a rehearing is appropriate is soundly within the circuit court's discretion as there is no rule requiring such rehearings. Where legal discretion is required to be used by the circuit court, this Court must review for an abuse of that discretion. *See, e.g.*, *Plyler v. Burns,* 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2007) ("The grant or denial of a continuance is within the sound discretion of the trial judge and is reviewable on appeal only when an abuse of discretion appears from the record."); *Carson*, 400 S.C. at 229, 734 S.E.2d at 152.

This Court may uphold the circuit court's ruling on any single ground and is not required to review anything further once one basis is affirmed. *See Futch v. McAllister Towing of*

Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of another issue is dispositive of the appeal).

IV. ARGUMENT

A. The Circuit Court properly denied Appellant's December 26, 2019 Motion to Reconsider as untimely.

1. South Carolina Rules of Civil Procedure require motions to reconsider to be filed within 10 days of the judgment or order to be altered or amended.

Pursuant to Rule 59(e), SCRCP, "A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order." Rule 59(g), SCRCP, further requires, "A party filing a written motion under this rule shall provide a copy of the motion to the judge within ten (10) days after the filing of the motion."

2. Appellant did not file his MTR within 10 days after receipt of notice of entry of the MSJ Order.

It is undisputed that the MSJ Order was entered on November 25, 2019. (R. pp. 5-8.) Further, Appellant's December 2, 2019 memorandum on an unrelated issue shows that he had notice of the MSJ Order at least by that date. (R. p. 149 ¶ 3a.1.) It is further undisputed that Appellant's MTR was not filed until December 26, 2019—30 days after the MSJ Order was entered and at *least* 24 days after Appellant was on notice of the same. (MTR, R. p. 157, 166; MSJ Order, R. p. 8; App. Dec. 2 Memo., R. p. 149 ¶ 3a.1.) Thus, the record is clear that Appellant's MTR was filed outside the ten-day deadline, and the circuit court correctly held that Appellant's MTR was untimely. (R. pp. 9-10.)

3. Appellant has not provided the Circuit Court or this Court any evidence that his MTR was timely filed or timely served.

Nowhere in Appellant's MTR does he assert that his motion was in fact filed within 10 days of him receiving notice of the MSJ Order. (R. pp. 157-166). As this issue was not raised nor any evidence presented to the circuit court, Appellant cannot now assert for the first time on appeal that his MTR was in fact timely. *Malloy v. Thompson*, 409 S.C. 557, 561, 762 S.E.2d 690, 692 (2014) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have

been raised to and ruled upon by the trial judge to be preserved for appellate review.") (citation omitted). In fact, Appellant admits that his filing was not within the ten-day time frame. (App. Brief, pp. 1 & 2.)

Further, the circuit court found that Appellant's MTR was not properly served pursuant to Rule 59(g), SCRCP. (R. pp. 9-10.) The circuit court invited Appellant to provide evidence to the contrary, but no such evidence was presented. (*Id*.) Overall, nothing in the record challenges or show error in the finding that Appellant's MTR was untimely. Rather, the record confirms the MTR's untimeliness.

4. **South Carolina's Rules of Civil Procedure and case law make clear that an untimely filing cannot be remedied by the court.**

While Rule 6(b), SCRCP, allows for extension of some court deadlines, the Rule explicitly states, "The time for taking any action under rules 50(b), 52(b), 59, and 60(b) may not be extended except to the extent and under the conditions stated in them." *Id*. As the South Carolina Supreme Court has affirmed, "Rule 59(e) does not have any 'conditions stated' which would allow such an extension." *Overland, Inc. v. Nance*, 423 S.C. 253, 255–56, 815 S.E.2d 431, 432 (2018). Therefore, the Supreme Court has reiterated on multiple occasions that the ten-day deadline in Rule 59(e), SCRCP, is an absolute deadline. *Id*. (citing *Leviner v. Sonoco Products Co.*, 339 S.C. 492, 494, 530 S.E.2d 127, 128 (2000) and *Alston v. MCI Commc'ns Corp.*, 84 F.3d 705, 706 (4th Cir. 1996) ("It is clear ... that the district court was without power to enlarge the time period for filing a Rule 59(e) motion.")).

5. **The Circuit Court did not abuse its discretion in finding Appellant's filing untimely and, thus, dismissing his motion.**

Pursuant to South Carolina Rules of Civil Procedure 59(e), 59(g), and 6(b), the circuit court made no error of law in finding that Appellant's MTR, filed 30 days after the MSJ Order (and at least 24 days after notice of the same) and never served to the court, was untimely. Where there is no error of law, there can be no abuse of discretion. Thus, the MTR Order must be affirmed on

this ground.

Appellant asserts that the case of *Elam v. S.C. Dep't of Transp*., 361 S.C. 9, 602 S.E.2d 772 (2004) makes clear that a denial of an MTR as untimely is improper. (App. Brief, pp. 1 & 2). This is an incorrect reading and application of the law. *Elam* does state, "Our mandatory preservation requirements make it doubly important that litigants generally be freely allowed to file a first, written Rule 59(e) motion without concern a later appeal will be deemed untimely." 361 S.C. at 25, 602 S.E.2d at 780. However, the context of this statement makes clear that (1) a Rule 59(e), SCRCP, motion must still be timely and (2) only properly filed Rule 59(e), SCRCP, motions will toll the time for appeal. *Id*. at 15, 602 S.E.2d at 775 ("A *timely* post-trial motion, including a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP, stays the time for an appeal for all parties until receipt of written notice of entry of the order granting or denying such motion.) (emphasis added). Nothing in the Supreme Court's opinion in *Elam* condones, permits, or otherwise excuses untimely filing of a Rule 59(e), SCRCP, motion. Further, the more recent 2018 Supreme Court opinion in *Overland, Inc. v. Nance*, reaffirms that the ten-day deadline in Rule 59(e), SCRCP is an absolute deadline which the Court does not have discretion to extend. 423 S.C. 253, 255–56, 815 S.E.2d 431, 432.

B. The Circuit Court acted well within its discretion in denying Appellant's Motion for New Hearing.

1. Appellant's appeal of the denial of MNH is not timely.

The hearing on the MSJ was held on October 28, 2019. (R. p. 181.) On October 30, 2019, Appellant requested a new hearing via an email directly to Judge Stilwell. (R. pp. 226-229.) On November 18, 2019, Appellant filed his MNH. (R. pp. 97-101) The circuit court had the MNH before it and clearly opted not to grant a new hearing when it issued its November 25, 2019 MSJ Order. By ruling on the MSJ without a new hearing, Appellant's MNH was effectively denied by the MSJ Order. Respondents acknowledge that the MSJ Order does not explicitly address the

MNH; however, the timing of events makes clear that the circuit court denied MNH by issuing the MSJ Order without first scheduling a new hearing. Even the MTR Order only includes a note regarding the MNH for *clarity*, not because the court viewed the motion as previously undecided, stating, "Furthermore, to the extent that any party may contend that Plaintiff's Motion for a New Hearing filed November 18, 2019, is still pending, the same is denied." (R. p. 10.)

Therefore, because the MNH was effectively denied by the MSJ Order and no appeal or motion to reconsider was timely filed after such the MSJ Order, the denial of a new hearing was not timely appealed. The time for serving the notice of appeal under Rule 203, SCACR, cannot be extended by the appellate court. Rule 263(b), SCACR. A timely appeal is a clear prerequisite for appellate jurisdiction in South Carolina, and where the deadline is missed, "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." *Elam*, 361 S.C.at 15, 602 S.E.2d at 775. Therefore, the MNH was denied without timely appeal and cannot be considered by this Court.

2. **Even if the Circuit Court's denial of Appellant's MNH were properly before this Court, the Circuit Court did not abuse its discretion in denying the motion.**

a) Circuit courts are not required by the South Carolina Rules of Civil Procedure to permit rehearings.

Appellant's MNH was filed in relation to Respondents' MSJ, which is governed by Rule 56, SCRCP. (R. pp. 97-101.) Nothing in Rule 56, SCRCP, requires the court to rehear a motion for summary judgment. Further, while the South Carolina Rules of Civil Procedure contemplate new trials in certain circumstances, nothing in the rules contemplates new hearings on motions already briefed and argued before the court *except* though a properly filed Rule 59 motion.[2] And

[2] Appellant's MNH cannot be considered a Rule 59 motion. Even viewing this motion in the light most favorable to Appellant and assuming it was an attempted Rule 59(e) motion, it was untimely filed 20 days (rather than the required 10 days) after the October 28, 2019 hearing. Further, it cannot

even under Rule 59, SCRCP, a court does not have to allow a hearing but may in its sole discretion decide the matter on brief. See Rule 59(f), SCRCP. Therefore, because the circuit court is not required to rehear oral arguments on motions, motions for new hearings necessarily are decided at the discretion of the circuit court.

b) Circuit Court had ample information before it to make a decision without rehearing.

Under an abuse of discretion standard, the appellate court should give significant deference to the circuit court's decision as the circuit court is in a better position to know and evaluate all circumstances surrounding the issue in question. *See, e.g., USAA Prop. & Cas. Ins. Co.*, 377 S.C. at 651, 661 S.E.2d at 795 (deferring to the circuit court's credibility determinations regarding the timeliness of a motion for reconsideration and declining to reverse the circuit court's decision); *Reed v. Ozmint*, 374 S.C. 19, 24, 647 S.E.2d 209, 211 (2007) (noting the circuit court judge, who saw and heard the witnesses, is in a better position to evaluate their credibility and assign comparative weight to their testimony); *Carson*, 400 S.C. at 229, 734 S.E.2d at 152 (noting circuit court's discretion in governance of a case). Thus, to reverse the circuit court's denial of a new hearing, this Court must find the decision to deny such a hearing was based on an error of law or unsupported factual conclusions. *See, e.g., Carson*, 400 S.C. at 229, 734 S.E.2d at 152.

c) Circuit Court did not abuse its discretion in denying the motion for rehearing.

As explained in Section B.2.a. above, there is no law requiring a circuit court to grant a new hearing, and Appellant has not offered any authority to show otherwise. (*See* App. Brief.) Thus, there can be no clear error of law in the circuit court's denial of a new hearing.

Second, the circuit court's denial of new hearing is not dependent upon factual conclusions

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be considered a Rule 59(e) motion with respect to the Circuit Court's November 25, 2019 Order as such Order had not been filed yet. A Rule 59(e) motion cannot be filed preemptively or be said to preemptively toll the time to appeal even prior to an order being issued. Such procedure is fundamentally improper under the South Carolina Rules of Civil and Appellate Procedure

that could be found to be unsupported. This is not comparable to a bench trial or the like where the court has factual information it must assess; the court simply must decide if *it* needs a new hearing to rule on the pending motion.

Even extrapolating beyond the record, the only factual conclusion potentially involved in the circuit court's decision to deny a new hearing would be the circuit court's conclusion that it had all information before it necessary to make a decision on the MSJ without a new hearing. Such a decision would be clearly supported by the record which shows that the circuit court had all of the following before it prior to issuing its MSJ Order: (1) MSJ; (2) Respondents' Memorandum in Support of MSJ; (3) Appellant's Memorandums in Opposition to MSJ; (4) oral arguments presented at October 28, 2019 hearing; (5) Appellant's October 30, 2019 email to Judge Stilwell; (6) counsel for Respondents' October 31, 2019 email to Judge Stilwell; and (7) Appellant's MNH, with memorandum and exhibits incorporated. The circuit court had the opportunity to follow up with either party if it felt additional information was needed. Instead, the court determined that it had all necessary information to make a ruling and issued its MSJ Order on November 25, 2019.[3] Such a decision was soundly within the circuit court's discretion, and there is no basis upon which this Court can find an abuse of the circuit court's discretion in denying a second oral argument.

C. Appellant's presented issues on appeal cannot be considered by this Court as this Court does not have jurisdiction in this appeal over the MSJ Order granting Summary Judgment in favor of Respondents.

1. Appellant's notice of appeal was not filed within 30 days of notice of the MSJ Order and, thus, this Court does not have jurisdiction to review the MSJ Order.

The circuit court issued the MSJ Order on November 25, 2019. (R.pp. 5-8.) During the thirty days that followed, Appellant made no attempt to file a notice of appeal. Rule 203(b)(1) of the

[3] Again, this denial of a new hearing was reaffirmed in the MTR Order.

South Carolina Rules of Appellate Procedure requires notice of an appeal to be served "within thirty (30) days after receipt of written notice of entry of an order or judgment." A timely appeal is a clear prerequisite for appellate jurisdiction in South Carolina: "[t]he requirement [for a timely] notice of appeal is jurisdictional, i.e., if a party misses the deadline, 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." *Elam,* 361 S.C. at 15, 602 S.E.2d at 775. Here, Appellant disregarded the deadline for notice of appeal of the November 25, 2019 MSJ Order by over two months, mailing his NOA on March 9, 2020. (R. p. 264.) Thus, any attempt to consider Appellant's untimely appeal would turn a bright line jurisdictional inquiry into a merits inquiry. *Camp v. Camp*, 386 S.C. 571, 574, 689 S.E.2d 634, 636 (2010) ("[T]his Court has no authority to extend or expand the time in which the notice of intent to appeal must be served.") (citing *Mears v. Mears*, 287 S.C. 168, 169, 337, S.E.2d 206, 207 (1985)).

2. **Only a timely motion for reconsideration can toll the time for appeal.**

As stated above, Rule 203(b)(1), SCACR, requires that a notice of appeal be served "within thirty (30) days after receipt of written notice of entry of an order or judgment." The time to appeal an order can only be stayed by "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)". Rule 203(b)(1), SCACR.[4] All such listed motions are required to be filed within ten days of the entry of the order or judgment. If untimely, the motion has no effect on the deadline to file a notice of appeal because the original judgment is final. *See Ulmer v. Ulmer*, 369 S.C. 486, 490, 632 S.E.2d 858, 861 (2006) (noting a judgment that is not appealed, right or wrong, becomes the law of

[4] Note that a motion for a new hearing as to an order is not one of the motions specified to toll the time for serving a notice of appeal. Further, Appellant's MNH cannot be construed as one of these tolling motions particularly because it was filed *before* the MSJ Order was entered. It would be contrary to all procedural rules to allow preemptive tolling of an appeal deadline before an order giving rise to appeal has actually been issued. *See infra* FN 2.

the case).

3. **Appellant's motion for reconsideration was not timely, and thus, the time for appeal of the MSJ Order was not tolled.**

The MSJ Order was entered on November 25, 2019.[5] (R. pp. 5-8.) Appellant's MTR was not filed until December 26, 2019. (R. pp. 157-166.) Thus, Appellant's Rule 59(e) motion was properly held to be untimely (as explained in Section A., *infra*). No other motions pursuant to Rules 50 or 52 were filed at any time.

Because Appellant's MTR was not timely, the MTR was incapable of staying the deadline for Appellant to file his notice of appeal as to the MSJ Order. Thus, the 30-day deadline for filing his notice of appeal applies. SCACR 203(b)(1). Appellant's notice of appeal was not mailed until March 9, 2020 (R. p. 264.), which is well beyond the 30-day deadline to file a notice of appeal on the November 25, 2019 MSJ Order.

Therefore, as this Court already recognized in its MTD Order, this appeal is only timely as to, and this Court only has jurisdiction to consider, the MTR Order. (R. p. 4.) The MSJ Order is final and cannot be appealed. *See, e.g., Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) (an unappealed ruling is the law of the case and requires affirmance).

4. **Appellant cannot use the MTR Order as a back door for this Court to review the merits of the MSJ Order.**

Appellant has appealed because he disagrees with the circuit court's grant of summary judgment in favor of Respondents. (*See generally* App. Brief.) However, Appellant has not timely appealed the MSJ Order. Instead, Appellant attempts to use the MTR Order as a back door for this Court to review the merits of the MSJ Order. This Court is a court of limited jurisdiction and therefore only has jurisdiction over those matters properly presented before it. As this Court

[5] Appellant had notice of the MSJ Order no later than December 2, 2019. (R. p. 149 ¶ 3a.1.)

correctly recognized in its MTD Order, the circuit court's February 20, 2020 MTR Order is that one at issue on appeal. (R. p. 4.) The MTR Order (1) denied Appellant's motion to reconsider as untimely and (2) confirmed denial of Appellant's MNH. *Id.* Thus, this Court's jurisdiction is limited to determining whether these two rulings were correct. As set forth below, neither question before this Court regarding the MTR Order allows this Court to review the merits of the MSJ Order.

a) Even if Court finds in Appellant's favor on the issues in the MTR Order, the result is not an evaluation by this Court of the MSJ Order on its merits.

There is no circumstance under which this Court can evaluate the merits of the MSJ Order. As this Court acknowledged, the order that was timely appealed is the MTR Order issued February 20, 2020 (R. p. 4.), which is limited to at most two issues. If this Court determines that the MTR was improperly denied as untimely, then the MTR would be remanded to the circuit court to determine on the merits. Likewise, if this Court finds the circuit court abused its discretion in denying the MNH, then the remedy is to remand the case to the circuit court for a new hearing on the summary judgment arguments. This Court cannot make determinations regarding the merits of either the MTR or MNH prior to the circuit court having the opportunity to rule on all issues. *See, e.g., Malloy v. Thompson*, 409 S.C. 557, 561, 762 S.E.2d 690, 692 (2014) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.") (citation omitted). Thus, there is no remedy in which this Court reviews the substance of the MSJ Order.[6]

[6] If this Court determines that review of the merits of the November 25, 2019 SJ Order is proper, which Respondents vehemently contest, Respondents request the opportunity to fully brief these substantive issues prior to this Court's ruling on the same. At this point, based on this Court's Sept. 21, 2020 Order, Respondents understand that Appellant has only timely appealed the February 20, 2020 Order and thus the November 25, 2019 MSJ Order is not before this Court. In addition to the requested opportunity for supplemental briefing, Respondents would also direct this Court to other portions of the record, including Respondents' motion for summary judgment, memorandum in support, October 28, 2019 hearing transcript, and October 31, 2019 email to Judge Stilwell. (R. pp. 54-

5. **Appellant's stated issues on appeal only relate to the MSJ Order and thus cannot be decided by this Court.**

"[F]ormer Chief Judge Alex Sanders famously wrote, '[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.'" *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 331 fn 4, 730 S.E.2d 282, 286 (2012), *citing Langley v. Boyter,* 284 S.C. 162, 181, 325 S.E.2d 550, 561 (Ct. App.1984), *quashed on other grounds,* 286 S.C. 85, 332 S.E.2d 100 (1985). His point being that, in South Carolina, appeals must raise the issues to be decided. *Id*. In the absence of a presented and preserved exception, there is nothing properly before the court for it to decide. *See Evans v. Bruce,* , 245 S.C. 42, 44, 138 S.E.2d 643, 643 (1964). Therefore, the South Carolina Appellate Court Rules are specific in what is required in an appellant's initial brief to set forth the issues to be decided. Rule 208(b)(1)(B), SCACR, requires inclusion of a "concise and direct [statement] as to each issue" presented for the court's review. Rule 208(b)(1)(F), SCACR, also requires inclusion of "[a] short conclusion stating the precise relief requested."

"Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal." Rule 208(b)(1)(B), SCACR. If the issue is not included in the statement of issues on appeal, it is unpreserved for appellate review. *See, e.g.*, *Brown v. Odom*, 425 S.C. 420, 436, 823 S.E.2d 183, 191 (Ct. App. 2019) (citing Rule 208(b)(1)(B) in determining the appellant did not preserve an issue which he failed to include in the statement of issues on appeal); *Allen v. Pinnacle Healthcare Sys., LLC*, 394 S.C. 268, 277, 715 S.E.2d 362, 367 (Ct. App. 2011) (declining to address two of appellants' arguments on their merits where the issues were not included in the sole statement of the issue on appeal); *Burris v. Propst Lumber & Logging, Inc.*, 396 S.C. 85, 96, 719 S.E.2d 695, 701 (Ct. App. 2011) (finding an argument abandoned by appellant on two grounds where it was not listed in the statement of issues on appeal and had no supporting authority cited).

56, 83-91, 181-209, 230.)

Even read in conjunction with the rest of Appellant's brief, the stated issues on appeal cannot be construed to address any ruling other than the MSJ Order. (*See generally* App. Brief.) In fact, Appellant even explicitly states in his brief that "[s]uch appeal is based upon application of statutorily-wrong standards, where a granting of SJ against Appellant was not based upon merits of the case, but rather was based upon other technical-legalistic arguments." (App. Brief, p.4.) Further, Appellant's requested relief as set forth in his conclusion is also exclusively related to the MSJ Order. (*Id*. at pp.16-17.)

The appellate court is unable to decide issues which are not preserved and presented to it. *See, e.g., Brown*, 425 S.C. at 436, 823 S.E.2d at 191 (citing Rule 208(b)(1)(B), SCACR, in determining the appellant did not preserve an issue which he failed to include in the statement of issues on appeal). As the MSJ Order has not been timely appealed and there are no issues presented before this Court relating to anything other than the MSJ Order, there is nothing left for this Court to consider.

V. CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court AFFIRM the circuit court's February 20, 2020 MTR Order and deny review of any other orders not properly before this Court.

Respectfully submitted this 11th day of January, 2021.

CAMPBELL TEAGUE, LLC

/s/ Emily K. O'Brian
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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a copy of the Final Brief of Respondent has been served upon Appellant, at the below listed address, via electronic mail (as per Appellant's request):

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January 11, 2021
DATE

Emily O'Brian
CAMPBELL TEAGUE
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