

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

The Honorable James B. Jackson, Jr., Master-in-Equity

Case No. 2020-001254

Kacey Green and Charinrath Green,Appellants-Respondents,

v.

Mervin Lee Johnson,Respondent-Appellant.

**RESPONDENT-APPELLANT'S REPLY TO APPELLANTS-RESPONDENTS' RETURN
TO MOTION TO DISMISS**

In their Return to Respondent-Appellant's ("Johnson") Motion to Dismiss, Appellants-Respondents ("the Greens") argue that their Rule 59(e) motion did not stay the parties' deadline to appeal the Master's Amended Order. The Greens argue their motion only raised issues that were previously presented to the trial court and was filed "in an abundance of caution." Stated differently, the Greens ask this Court to ignore their Rule 59(e) motion as if it were never filed. Their motivations notwithstanding, the Greens undeniably raised new issues in their August 24, 2020 motion. They have failed to demonstrate that their motion did not raise new issues and cannot justify why the Court should ignore their motion to salvage their defective appeal.

ARGUMENT

The grounds for Johnson's Motion to Dismiss are simple and uncontroverted.

1. The Greens' timely Rule 59(e) motion, which raised for the first time the trial court's order reducing its previous damages award and denying property damages and which argued that loss of use and diminution of value were not released by the Greens' subrogation claim, stayed the appeal deadline.
2. The deadline to appeal was triggered by the trial court's March 8, 2021 Order denying the Greens' Rule 59(e) motion.
3. Therefore, any notice of appeal served and filed prior to March 8, 2021 is not within the jurisdiction of the appellate court.

No other procedural issue governs resolution of Johnson's Motion to Dismiss. The Greens cannot credibly argue that their Rule 59(e) motion did not raise new issues. The Master's Amended Order stated that "the Court's order dated June 5, 2019 award[ed] property damages, which the parties had previously settled." Motion to Dismiss, at Ex. A, pg. 9. In response, the Greens' Rule 59(e) motion argued that their "property damages were not released in full" and that "diminished value" and "loss of use of the vehicle constituted appropriate claims for property damage." *Id.*, at Ex. C, ¶ 14. The Greens were required to raise these issues in a motion to reconsider because they were not previously argued to the trial court. These jurisdictional defects were properly raised to the Clerk of the Court of Appeals in Johnson's notice of cross appeal filed on October 5, 2020.

The trial court's March 8, 2021 order denying the Greens' Rule 59(e) motion did not cure the jurisdictional deficiencies of their notice of appeal. This is true not only for technical reasons, but for practical ones. Suppose that on review, the trial court agreed with the Greens' arguments (raised for the first time in their timely Rule 59(e) motion) and set aside the Amended Order. In that scenario, the Greens' notice of appeal would be a nullity. As such, the Greens would be forced to ask the Court of Appeals to dismiss their appeal (and presumably Johnson's cross-appeal as well) because an order granting their motion would have obviated every issue they raised on appeal.

In their Return, the Greens argue that they “filed their 59(e) motion because the lower court considered Johnson’s 59(e) motion even though the matter was at that point ripe for appeal.” Return, at pg. 5. The Greens’ explanation is not convincing. Did they believe the trial court would rule on their Rule 59(e) motion? Did they file that motion whilst expecting that the motion was exempt from the appeal-staying power afforded by the Rules of Civil Procedure and Appellate Court Rules? Did they expect Johnson would also ignore the deadline-staying effect of such a motion – despite the Greens’ submission of a new affidavit attesting to new evidence in opposition of the trial court’s Amended Order?

The Greens should not be permitted to take a contrary position by now arguing their “Rule 59(e) motion was not necessary and superfluous to the issues already sufficiently vetted and considered by the lower court.” Return, at pgs. 5-6. If they believed their motion was unnecessary, they were obligated to withdraw the motion. “The signature of an attorney ... constitutes a certificate by him that he has read the ... motion ...; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay.” SCRC, Rule 11(a). Filing a frivolous motion lacking good ground to support it may be a sanctionable offense. See *Ex parte Gregory*, 378 S.C. 430, 663 S.E.2d 46 (2008).

Rule 11(a)’s injunction is particularly important where, as here, the frivolously entered motion triggers or stays jurisdictional deadlines. Because of Plaintiffs’ Rule 59(e) motion, Johnson did not serve his notice of appeal from the Master’s Amended Order within 30 days. Moreover, Johnson was obligated in briefing his cross-appeal¹ to argue the timeliness of the Greens’ notice

¹ The Greens’ untimely notice of appeal subjected Johnson to additional prejudice in that he has filed, and paid the \$400.00 filing fee, for two separate appeals. Johnson served and filed his notice of cross appeal after an email from the Master indicated that he believed no longer had jurisdiction to consider the Greens’ Rule 59(e) motion. Johnson timely served and filed his notice

of appeal and the Court of Appeal's lack of jurisdiction. Finally, preservation of Johnson's right to appeal the Master's order denying relief from default judgment and Amended Order on Damages required filing and briefing this Motion to Dismiss.

In their continuing effort to justify a Rule 59(e) motion they now argue was frivolous, the Greens misconstrue the effect of their motion to reconsider. In their Return, the Greens correctly cite *Coward Hund v. Ball Corp.* to discuss the effect of successive Rule 59(e) motions on a litigant's deadline to appeal. 336 S.C. 1, 3, 518 S.E.2d 56, 58 (Ct. App. 1999). However, they mischaracterize that decision in stating that this Court "found that subsequent Rule 59(e) motions did not stay the time to file an appeal." Return, at pg. 4. In *Coward Hund* this Court ultimately concluded that the plaintiff's second motion was "more appropriately treated as a motion under Rule 60, SCRCPP, [which] did not toll the time for the filing and service of its notice of appeal." 336 S.C. at 5, 518 S.E.2d at 59. The Greens have never argued (nor could they) that their motion for reconsideration was anything but a Rule 59(e) motion. Moreover, in *Coward Hund* the Court was analyzing the effect of successive Rule 59(e) motions *filed by the same party*. That Johnson's first and only Rule 59(e) motion preceded the Greens' first and only Rule 59(e) motion does not render their motion successive.

Contrary to the Greens' arguments, the essential conclusion from *Coward Hund* supports Johnson's motion to dismiss.

We agree ... that the prevailing rule in the federal courts is that a second motion for reconsideration is appropriate only if it challenges something that was altered from the original judgment as a result of the initial motion for reconsideration. In such a case, a new judgment has replaced the previous judgment and the party aggrieved by the alteration may move for reconsideration.

of appeal, and again paid the \$400.00 filing fee, when the Master ultimately denied the Greens' motion.

336 S.C. at 3, 518 S.E.2d at 58 (*citing* 12 James W. Moore et al., Moore's Federal Practice ¶ 59.37 at 59–123 (3d ed. 1999)). In this matter, the original order was the Master's Order on Damages dated June 5, 2019. Defendant's counsel appeared and moved to set aside default, which the Master denied. Thereafter, Johnson filed his timely Rule 59(e) motion. On August 14, 2020, the Master granted Johnson's motion in part, significantly reduced the Greens' monetary award, and struck the Greens' award for property damages. The Greens filed on August 24, 2020 their Rule 59(e) motion challenging new rulings that were "altered from the original judgment as a result of [Johnson's] initial motion for reconsideration [and] challeng[ing] this alteration from the original judgment." *Coward Hund*, 336 S.C. at 3, 518 S.E.2d at 58. Thus, the Greens' motion for reconsideration was entirely consistent with this Court's decision in *Coward Hund*. By filing that motion, the deadline to appeal was stayed. Therefore, this Court lacks jurisdiction over the Greens' appeal, which should be dismissed.

CONCLUSION

The Greens' August 24, 2020 Rule 59(e) motion stayed the deadline to appeal in this action. This Court is without jurisdiction over the Greens' untimely notice of appeal, which was served on September 14, 2020 before the Master ruled on their Rule 59(e) motion on March 8, 2021. Therefore, this Court should grant Johnson's motion and dismiss the Greens' notice of appeal as untimely.

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