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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

James B. Jackson, Master-in-Equity

Case No. 2020-001254

Kacey Green and Charinrath Green,

Appellants-Respondents,
(The Greens)

v.

Mervin Lee Johnson,

Respondent-Appellant.
(Johnson)

**APPELLANTS-RESPONDENTS' MOTION TO DISMISS RESPONDENT-
APPELLANT'S NOTICE OF CROSS APPEAL AND NOTICE OF APPEAL**

Both the Notice of Cross Appeal and subsequent Notice of Appeal presented by Respondent-Appellant (Johnson) are untimely and thus, should be dismissed.

PROCEDURAL HISTORY OF LOWER COURT CASE

The Greens filed suit in the Orangeburg County Court of Common Pleas on January 11, 2019. Johnson was properly served, personally, but failed to timely answer. A default order was entered on March 8, 2019. The damages hearing was heard on May 22, 2019, and a damages order entered on June 5, 2019 (“Original Damages Order”).

On June 17, 2019, twelve days after the damages order, Johnson filed a motion titled “Motion to Dismiss, or in the Alternative, to Set Aside Entry of Default and Order of Damages and Allow Defendant to Responsively Plead” (“Rule 60 Motion”). Johnson did not appeal the Original Damages Order at that time. Johnson also did not file a 59(e) motion to reconsider, presumably because more than ten (10) days had passed since the Original Damages Order was

entered. A hearing on Johnson's Rule 60 Motion was held on October 21, 2019, and an order denying those motions entered on November 4, 2019 ("Rule 60 Order"). This order in effect upheld and reinforced the Original Damages Order both on the findings of default and damages.

Johnson did not appeal the Rule 60 Order nor the Original Damages Order at this time yet chose only to file a "Motion to Alter or Amend" the Rule 60 Order ("Johnson's Motion to Reconsider"). This motion was filed November 14, 2019 and heard July 13, 2020. On August 10, 2020, the lower court entered its order but did not serve it on the parties until August 14, 2020 ("Amended Damages Order"). This order affirmed Johnson was in default but granted reconsideration of the damages award, reducing the award from \$1,760,000.00 to \$250,000.00. The lower court's Amended Damages Order effectively changed its Original Damages Order, after two reviews of that order (first review was pursuant to Johnson's Rule 60 Motion and second review was pursuant to Johnson's November 14, 2019 motions). The Greens appealed arguing the lower court erred in changing its Rule 60 Order to a reduced damages amount. In the abundance of caution, the Greens filed a Rule 59(e) motion to reconsider the Amended Damages order.

PROCEDURAL HISTORY OF THE COURT OF APPEALS CASE

At the same time as their motion to reconsider, the Greens filed a Notice of Appeal on September 14, 2020, appealing the lower court's Amended Damages Order and bringing the matter before this court. The parties worked to receive the transcript, and each filed one motion for extension to file their initial briefs.

On December 9, 2020, Johnson moved to hold the appeal in abeyance to allow consideration of the Greens' Rule 59(e) motion. The Greens filed their initial brief on December 14, 2020. On December 18, 2020, the Greens filed their return to Johnson's motion to hold the appeal in abeyance. On January 8, 2021, Johnson filed another motion, asking this court's

permission to amend his Notice of Cross Appeal. The Greens also opposed that motion. This court has yet to rule on Johnson's motion to amend his cross appeal.

This court did rule on Johnson's Motion to Hold the Appeal in Abeyance, pending the lower court's consideration of the Rule 59(e) motion. The lower court issued a form 4 denying the motion on March 8, 2021, indicating a formal order would follow. Johnson then filed a notice of appeal on April 16, 2021.

ARGUMENT

Johnson's Notice of Cross Appeal was untimely and thus, should be dismissed. Pursuant to Rule 203(c), "[a] respondent may institute a cross-appeal by serving a notice of appeal on all adverse parties...within five (5) days after receipt of appellant's notice of appeal, or within the time prescribed by Rule 203(b), whichever period last expires. Rule 203(c), SCACR. Rule 203(b) permits filing a notice up appeal up to thirty (30) days after receiving notice of an order and that that thirty-day period is stayed until thirty (30) days after an order is entered on a timely Rule 59 motion. Rule 203(b), SCACR. The Greens filed their Notice of Appeal on or about September 14, 2020. Johnson did not file his Notice of Cross Appeal until October 5, 2020, which is more than five days after the Greens' Notice of Appeal. Thus, the analysis turns to whether the Greens' Rule 59 motion stayed the time for Johnson to file his Notice of Cross Appeal. The Greens submit it did not.

The Greens' Rule 59 motion was the second Rule 59 motion after the Rule 60 Order; it also did not challenge any new issues already considered twice by the lower court on Johnson's Rule 60 Motion and Johnson's Motion to Reconsider. Under *Coward Hund*,¹ this second 59(e)

¹ The Greens incorporate their arguments against Johnson's Motion to Dismiss the Greens' appeal as presented in the Greens' Return to Johnson's Motion to Dismiss filed with this court on or about May 17, 2021. Briefly stated, the Greens' 59(e) motion did not address any new matters not previously raised to the court twice before on Johnson's Rule 60 motion and subsequent (the first) Rule 59 motion.

does not stay the time for appeal. As such, Johnson's thirty-day period to appeal began on November 14, 2019, when the Rule 60 Order was entered. Thirty days from November 14, 2019, was on or about December 14, 2019. Johnson did not file his appeal by then. Thus, the only potential time Johnson could enter an appeal would be by a cross appeal filed within five days after Greens' Notice of Appeal or on or about September 19, 2020. Johnson filed his cross appeal on October 5, 2020, more than five days after the Greens' appeal. Thus, Johnson's Cross Appeal must be dismissed.

Likewise, Johnson's subsequent Notice of Appeal, filed on or about April 16, 2021, was too late. Although it was filed within thirty (30) days after the lower court's ruling on the Greens' Rule 59(e) motion, the Greens' 59(e) motion did not stay the time for appeal. Again, as argued in the Greens' Return to Johnson's Motion to Dismiss the Greens' Notice of Appeal, under *Coward Hund* the Greens' Rule 59(e) motion (second one filed after the rule 60 Order) did not raise any new issues that had not already been addressed by the court on Johnson's Rule 60 motion and Johnson's subsequent (first one filed after the Rule 60 Order) Rule 59 motion. Thus, the time for appeal was not stayed from starting on November 14, 2019, when the lower court's order was entered denying Johnson's Rule 60 motion. The time ran on December 14, 2019, which again, Johnson did not meet.

Finally, the Greens submit the time frame within which Johnson should have filed his appeal began when the lower court's Original Damages Order was entered on or about June 5, 2019. Pursuant to Rule 203(b)(1), "[a] notice of appeal shall be served on all respondents within thirty...days after receipt of written notice of entry of the order of judgment." Rule 203(b)(1), SCACR. The Original Damages Order was entered on or about June 5, 2019. Johnson first made an appearance and filed motion his Rule 60 Motions on or about June 17, 2019, and thus

presumably had notice of the damages order as of June 17, 2019. However, Johnson did not present any appeal until October 5, 2020.

The Greens anticipate Johnson will argue his Rule 60 Motions stayed the time for appeal, however that is contrary to South Carolina law. A Rule 60 motion “does not toll the time for the filing and service of [a] notice of appeal.” Coward Hund Constr. Co. v. Ball Corp., 336 S.C. 1, 5, 518 S.E.2d 56, 59 (Ct. App. 1999); *see also* Otten v. Otten, 287 S.C. 166, 337 S.E.2d 207 (1985) (dismissing an appeal where appellant filed a Rule 59(e) motion, Rule 60 motion, and notice appeal because a Rule 59(e) motion tolls the time for appeal but a Rule 60 motion does not); Mears v. Mears, 287 S.C. 168, 169, 337 S.E.2d 206, 207 (1985); and Baracco v. Beaufort Cty., No. 2014-000636, 2016 WL 6900856, at 1 (Ct. App. Nov. 23, 2016) (echoing *Coward Hund v. Ball Corp.*). Additionally, “a Notice of Appeal filed on the same day as post-trial motions does not deprive the trial court of jurisdiction to hear motions.” Hudson v. Hudson, 290 S.C. 215, 216, 349 S.E.2d 341 (referencing *Wicker v. Anderson County*, 347 S.E.2d 96 (S.C. 1986) and *Otten v. Otten*, 287 S.C. 166). The *Hudson* court held “that in the event timely post-trial motions are filed under Rule 59, simultaneously or subsequent to the filing of a Notice of Appeal...the appeal shall be dismissed without prejudice...[and]...[a]ny party can appeal within ten (10) days after the order disposing of the post-trial motions.” Hudson at 216, 349 S.E.2d at 342. In short, to stay the time for appeal, even when a Rule 60 motion is filed, a grieving party must also file a notice of appeal.

Johnson’s June 17, 2019, motion is titled “Defendants’ Notice of Motion and Motion to Dismiss, or, in the alternative, To Set Aside Entry of Default and Order of Damages and Allow Defendant to Responsively Plead.” Ex. A. (Motion, June 17, 2019). The body of this motion sets forth Rules 4, 6(b), 12(b)(4), 12(b)5, 12(h)(1), 55(c), 56, and 60 of the South Carolina Rules of Civil Procedure as the basis of the motion, proceeding to argue good cause under Rule 55(c) and

excusable neglect under 60(b)(1). *Id.* The motion does not reference rule 59(e) but rather Rule 60 and thus, pursuant to *Otten*, does not stay the time for appeal of the original damages order. Even if the substance of Johnson’s Rule 60 Motions could render it a Rule 59(e) motion, that would have been an untimely motion as it was more than ten (10) days after the Original Damages Order was entered.

Johnson’s Rule 60 motion led to the lower court’s November 14, 2019, order (“Rule 60 Order”) which confirmed Johnson was in default and upheld the damages awarded in the Original Damages Order. Johnson timely moved to reconsider the Rule 60 order but did not appeal it. On that motion, the lower court again confirmed default but reduced the damages with its “Amended Damages Order” entered on or about August 14, 2020. Ex. B (Order, Aug. 14, 2020). Because Johnson did not appeal the Original Damages Order or the Rule 60 Order, this Amended Damages Order limited Johnson’s sole remedy on appeal to whether the lower court abused its discretion in not reducing the damages more. However, as explained above, Johnson failed to timely appeal the Amended Damages Order. Thus, he has lost his ability to even question the damages awarded in the Amended Damages Order.

CONCLUSION

Johnson has missed all opportunity to address the matters decided by the lower court in the Original Damages Order and the Rule 60 Order. His Cross Notice of Appeal and Notice of Appeal were both untimely and thus must be dismissed, leaving only the Greens’ Appeal at issue before this Court.

[Signature page to follow]

Respectfully submitted,

June 4, 2021

s/ Virginia W. Williams

David R. Williams, 77899

Virginia W. Williams, 77898

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Attorneys for Appellants-Respondents

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF ORANGEBURG)	
Kacey Green and Charinrath Green,)	C/A No. 2019-CP-38-00053
)	
<i>Plaintiffs,</i>)	DEFENDANTS' NOTICE OF MOTION
)	AND MOTION TO DISMISS, OR, IN THE
versus)	ALERNATIVE, TO SET ASIDE ENTRY
)	OF DEFAULT AND ORDER OF
Mervin Lee Johnson,)	DAMAGES AND ALLOW DEFENDANT
)	TO RESPONSIVELY PLEAD
<i>Defendant.</i>)	

TO: VIRGINIA W. WILLIAMS AND DAVID R. WILLIAMS, ATTORNEYS FOR PLAINTIFFS:

Defendant Mervin Lee Johnson (“Defendant”), by and through his undersigned counsel, hereby moves pursuant to Rules 4, 6(b), 12(b)(4), 12(b)(5), 12(h)(1), 55(c), 56, and 60 of the South Carolina Rules of Civil Procedure (“SCRPC”), for an Order dismissing Plaintiffs’ Summons and Complaint for improper service of process, or, in the alternative, Defendant moves this Court to (a) set aside the Entry of Default (filed March 8, 2019) and Order of Damages (filed June 5, 2019) against him and/or (b) relieve Defendant from the June 5, 2019 Order of Damages. Defendant requests that he be allowed to responsively plead to Plaintiffs’ Complaint.

In support of this Motion, Defendant states as follows:

1. Defendant, a professional truck-driver, had no attorney in this matter prior to June 10, 2019.
2. Plaintiffs’ Summons and Complaint has not been properly served on Defendant in a manner prescribed by law and, as a result, this action has not been properly commenced under Rule 3, SCRPC. Defendant cannot be in default on an action not yet properly commenced.
3. Even if Plaintiffs’ Complaint were properly served, Defendant has acted with reasonable promptness to have the entry of default and damages order set aside, and because Defendant alleges meritorious defenses to the claims in Plaintiffs’ Complaint, including, but not limited to the defenses of improper service and the existence of a video recording which does not

support – or calls into question – Plaintiffs’ causation and damages allegations, Defendant has satisfied the requirements of good cause under Rule 55(c) of SCRCF.

4. No prejudice will result to Plaintiffs as a result of the Court setting aside the entry of default and damages order since doing so will not impede the ability of Plaintiffs to present their claims, and delay alone is insufficient to establish prejudice.

5. Even if Plaintiffs’ Complaint were properly served, Defendant’s failure to answer Plaintiffs’ Complaint in a timely manner was based on excusable neglect and was not the result of willful misconduct.

6. It is the policy of the South Carolina to encourage disposition of claims on their merits.

7. The Order of Damages filed June 5, 2019 is out of proportion to the actual damages suffered in this case. Plaintiffs alleged \$12,826.00 in medical expenses, and the award of \$1,760,000.00 in total damages, including \$1,000,000.00 in personal injury claims and \$750,000.00 in punitive damages, are unreasonable under the circumstances, especially given the fact that there is a video recording of this accident, which appears to show a relatively minor accident.

8. Defendant is unsure whether this video evidence was presented to the Court for its consideration at the May 22, 2019 damages hearing.

9. In support of this Motion, Defendants may rely upon one or more affidavits, a Memorandum of Law, documents on file with the Court, the arguments of counsel, and any other material the Court may receive.

10. The undersigned hereby certifies and affirms, in accordance with Rule 11, SCRCF, that consultation with opposing counsel was attempted in order to resolve the subjects within this Motion and no agreement has been reached.

Wherefore, Defendant respectfully requests that the Court grant this Motion to Dismiss Plaintiffs’ Summons and Complaint on the ground of improper service of process. In the

alternative, Defendant requests that the Court grant their Motion to Set Aside the Entry of Default and Order of Damages and allow Defendant to responsively plead to Plaintiffs' Complaint.

HOLCOMBE BOMAR, P.A.

s/ A. Walker Barnes

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June 17, 2019
Spartanburg, South Carolina

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PROOF OF SERVICE

I certify that I have served Appellants-Respondents' Motion to Dismiss Respondent-Appellant's Cross Appeal and Notice of Appeal on opposing counsel by email.

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[Signature page to follow]

June 4, 2021

s/ Virginia W. Williams _____

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