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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

The Honorable Kristi F. Curtis
Circuit Court Judge

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Case No.: 2014-CP-45-00132
(Court of Appeals Case No.: 2021-000835)

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South Carolina Farm Bureau Ins. Co. . . . . Plaintiff,

v.

Marion L. Driggers, Shiralee Driggers, Tammy D. Floyd, Arthur McKenzie, a/k/a Arther McKenzie, The Travelers Home and Marine Insurance Company, The United States of America acting by and through Its agency, The Internal Revenue Services and The South Carolina Tax Commission, . . . . . Defendants,

Of whom Marion L. Driggers is Appellant and The Travelers Home and Marine Insurance Company is the Respondent.

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**RESPONDENT THE TRAVELERS HOME AND MARINE INSURANCE COMPANY'S REPLY TO PLAINTIFF SOUTH CAROLINA FARM BUREAU INSURANCE COMPANY'S RETURN TO ITS MOTION TO DISMISS APPELLANT'S APPEAL**

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Respondent The Travelers Home and Marine Insurance Company replies to Plaintiff South Carolina Farm Bureau Insurance Company's ("Farm Bureau") Return to its Motion to Dismiss each Notice and Amended Notice of Appeal filed by Appellant Marion L. Driggers.

**Return Untimely**

Rule 240(e), SCACR states that "[a]ny party opposing a motion or petition shall have ten (10) days from the date of service thereof to file an original . . . of his return with the clerk and serve on all parties a copy of the return." According to the Rule, "[t]he court may in its discretion enlarge or limit the time for filing the return." *Id.* Respondent filed and served its Motion to Dismiss on October 26, 2021. Any party opposing its Motion had until November 5, 2021 to file and serve their Return.

Appellant, nor any other party, including Farm Bureau, filed and served a Return to Respondent's Motion to Dismiss by this Court's deadline, nor did Farm Bureau request for this Court to enlarge its deadline for filing a return. Farm Bureau's Return was emailed to undersigned counsel on November 8, 2021 with a Proof of Service dated November 8, 2021, past the deadline. Pursuant to the Rules, "[f]ailure of a party to timely file a return may be deemed a consent by that party to the relief sought in the motion or petition." *Id.* Every parties', including Farm Bureau's, failure to timely file and serve a Return by November 5, 2021 amounts to a consent to the relief sought in Respondent's Motion to Dismiss.

**Service and Appellate Jurisdiction**

In the event the Court considers the merits of Farm Bureau's untimely Return, it does not provide any evidence to support the jurisdiction of this Court. Farm Bureau provides a copy of an email from undersigned counsel to Appellant on August 2, 2021 as evidence of notice of the original Notice of Appeal. According to Farm Bureau, email correspondence with Appellant by counsel of record during the lower court action should

warrant complete disregard for this Court's well-established rules of procedure, which invoke the appellate jurisdiction of the Court for purposes of a proper appeal.[1]

At the lower court level, service of process does not require exact compliance but rather focuses on reasonable notice of an action and personal jurisdiction over the defendant. *See Mull v. Ridgeland Realty, LLC*, 387 S.C. 479, 485, 693 S.E.2d 27, 30 (Ct. App. 2010). As set forth in Respondent's Motion to Dismiss, the rules of filing and service, particularly in relation to a Notice of Appeal, have meaning and purpose far beyond the simple concept of notice. "Questions of compliance with rules, regulations, and statutes governing an appeal involve appellate jurisdiction." JEAN HOEFER TOAL ET AL., APPELLANT PRACTICE IN SOUTH CAROLINA 121 (3d ed. 2016). An "appellant should strictly adhere to service and filing requirements" to perfect the appeal. *Id.* at 289; *see also Conner v. City of Forest Acres*, 348 S.C. 454,461,560 S.E.2d 606, 609 (2002) ("Service of the notice of intent to appeal is a jurisdictional requirement, and the Court has no authority to extend or expand the time in which the notice of intent to appeal must be served."). "The notice of appeal in a case appealed from the South Carolina Court of Common Pleas must be served on all respondents within 30 days after receipt of written notice of entry of the order or judgment. S.C. App. Ct. R. 203(b)(1)." *Elam v. S.C. DOT*, 361 S.C. 9, 13, 602 S.E.2d 772, 774 (2004). Most importantly, "[t]he requirement of service of the 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." *Id.*

[1] While Farm Bureau suggests that "all parties have been dealing with Mr. Driggers by email," it also fails to elaborate on the numerous filings, motions and otherwise, that Appellant properly included certificates of service with copies provided by US Mail per the rules at the lower court level.

The procedural rules found in the South Carolina Appellate Court Rules governing the filing and service of a Notice of Appeal relate to the perfection and invocation of the appellate jurisdiction of this Court. This includes Rule 262 and the Covid Orders it references. Service is to be completed by hand delivery or mailing to a last known address, and the Covid Orders have not allowed for e-mail service by non-licensed attorneys or pro se parties.

As previously addressed more fully in Respondent's Motion to Dismiss, the rules for filing and service of the Notice of Appeal were clearly not complied with by Appellant. This Court does not have jurisdiction over this matter, notwithstanding the e-mail attached to Farm Bureau's Return and the alleged "notice" it argues for.

**Distinguishing Case Law**

Respondent wants to bring to this Court's attention that the case law cited by Farm Bureau makes clear that *pro se* leniency is not without limits, and none of the cases cited by Farm Bureau allows for *pro se* litigants to be granted additional time to properly serve a Notice of Appeal. Moreover, none of the cases allow for an e-mail, with complete lack of service per the Rules, to invoke the jurisdiction of this Court. Specifically, Farm Bureau cites *Beaudett v. City of Hampton* for the statement: "*Gordon* expressed the indisputable desire that those litigants with meritorious claims should not be tripped up in court on technical niceties." *See* 775 F.2d 1274, 1277-78 (4th Cir. 1985). Yet, the Court, in this federal district court action, continued:

> Principles requiring generous construction of *pro se* complaints are not, however, without limits. *Gordon* directs district courts to construe *pro se* complaints liberally. It does not require those courts to conjure up questions never squarely presented to them. District judges are not mind readers. Even in the case of *pro se* litigants, they cannot be expected to construct full

> blown claims from sentence fragments, which is essentially what Beaudett is seeking here.
>
> Nor should appellate courts permit those same fleeting references to preserve questions on appeal. In the light of hindsight, of course, and with the benefit of counsel on appeal, issues may be brought before this court that were never fairly presented below. We will not, however, require the district courts to anticipate all arguments that clever counsel may present in some appellate future. To do so would not only strain judicial resources by requiring those courts to explore exhaustively all potential claims of a *pro se* plaintiff, but would also transform the district court from its legitimate advisory role to the improper role of an advocate seeking out the strongest arguments and most successful strategies for a party.

*Id.* at 1278 (4th Cir. 1985) (internal citations omitted).[2] *Gordon v. Leeke* dealt with the "technical nicety" of "a meritorious claim" in a complaint by a *pro se* party, rather than the technical rules and deadlines for invoking jurisdiction in the Court of Appeals, where failure to do so results in the appealed order becoming law of the case. *See Citifinancial Mortg., Inc. v. Kennedy*, No. 2007-UP-062, 2007 S.C. App. Unpub. LEXIS 119, at *6 (Ct. App. Feb. 12, 2007) ("Once the time to file notice of appeal concerning the November 30, 2005 order had expired, that order, 'right or wrong,' became the law of the case and res judicata would preclude any further review on the issues decided therein.").[3]

Also, *Thomas v. Arn*, cited by Farm Bureau, does mention that "we give our ruling only prospective effect because rules of procedure should promote, not defeat the ends of justice. . . ." 474 U.S. 140, 145, 106 S. Ct. 466, 470 (1985) (quoting *United States v. Walters*, 638 F.2d 947, 949-50 (1981)). Yet, the entirety of the opinion, again in a federal district court, focused on the implication that "[i]t cannot be doubted that the courts of

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[2] "'The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.'" *State v. Dukes*, 404 S.C. 553, 558, 745 S.E.2d 137, 140 (Ct. App. 2013) (quoting *S.C. Dep't of Soc. Servs. v. Wilson*, 352 S.C. 445, 452, 574 S.E.2d 730, 734 (2002)).

[3] Farm Bureau also cited *Lehr v. Robertson*, 463 U.S. 248, 103 S. Ct. 2985 (1983), which affirmed a judgment holding that a putative father was not deprived of his right to notice and an opportunity to be heard. The statement cited to by Farm Bureau dealing with the right to be heard being a fundamental right in relation to due process was discussed in the dissent. *See id.* at 273, 103 S. Ct. at 2999.

appeals have supervisory powers that permit, at the least, the promulgation of procedural rules governing the management of litigation." *Id.* at 146, 106 S. Ct. at 470. In addressing waiver of an appeal if objections to a report and recommendation by a federal magistrate are not filed within ten (10) days, the Supreme Court of the United States set forth the following:

> The Sixth Circuit's rule, by precluding appellate review of any issue not contained in objections, prevents a litigant from "sandbagging" the district judge by failing to object and then appealing. Absent such a rule, any issue before the magistrate would be a proper subject for appellate review. This would either force the court of appeals to consider claims that were never reviewed by the district court, or force the district court to review every issue in every case, no matter how thorough the magistrate's analysis and even if both parties were satisfied with the magistrate's report. Either result would be an inefficient use of judicial resources. In short, "[the] same rationale that prevents a party from raising an issue before a circuit court of appeals that was not raised before the district court applies here."

*Id.* at 147-48, 106 S. Ct. at 471. Ultimately, the Court emphasized the importance of procedural rules, particularly in the context of appeals.

In this case, appellate jurisdiction of this Court revolves around compliance with the Rules for service of process and filing, particularly in the case of a Notice of Appeal. As Respondent made clear in its Motion to Dismiss, those rules were not followed, and this appeal is not perfected. The case law cited by Farm Bureau nor the email attached to its Return supports or corrects the procedural mistakes of Appellant.

**Abeyance Allegation**

Farm Bureau argues that it understands that the entire appeal has been held in abeyance, due to the Appellant's continuing inability to correct his original Notice of Appeal deficiencies. Due to this seemingly unlimited abeyance, Farm Bureau argues that Appellant's Amended Notice of Appeal, which contains an entirely new argument for

appeal filed and served an additional seventy-four (74) days beyond the time limits of this Court's Rules, should relate back to Appellant's original Notice of Appeal filed August 3, 2021, particularly since Appellant was "at the time, *pro se*."

In this Court's deficiency letters dated August 18, 2021, September 10, 2021, and October 8, 2021, the word "abeyance" is never utilized. Instead, an Order was entered by the Clerk of Court on September 10, 2021, which commanded the time for ordering the transcript be "held in abeyance pending correction of the remaining deficiencies in the notice of appeal . . . ." Nothing filed by the Clerk of Court or the Court itself warrants Farm Bureau's "understanding" that the entirety of this appeal, particularly the time for properly and timely invoking this Court's appellate jurisdiction, was to be held in abeyance indefinitely as Appellant, either on his own or with aid of counsel, corrected the deficiencies of his original August 3, 2021 Notice of Appeal. Farm Bureau's "understanding" advocates for a never ending ability for Appellant to add arguments to invoke the jurisdiction of this Court even today, months after his thirty (30) day deadline has long since past. In fact, the longer Appellant refuses to properly respond to this Court's deficiency letters, under Farm Bureau's "understanding," the better off he is, allowing for the addition of more arguments to this appeal. Deficiency letters as to the original Notice of Appeal and a specific Order holding the deadline for ordering a transcript in abeyance does not hold in abeyance the timeframe within which a party, *pro se* or represented by counsel, can properly invoke the appellate jurisdiction of this Court to hear an appeal on a matter decided at the lower level.

Furthermore, Appellant's *pro se* status in August does not provide him additional time to properly invoke this Court's jurisdiction, whether he eventually hires "very

competent counsel" at a later date or does not. All appellants are bound by the Rules of this Court for purposes of invoking jurisdiction.[4] Moreover, as I am sure this Court is aware, Appellant is not a novice to the world of appellate procedure, having handled another matter *pro se* before this Court several years ago. *See* Marion Driggers, Appellant, v. Daniel Shearouse, Honorable Jean Toal, Honorable Costa Pleicones, Honorable Donald Beatty, Honorable John Kittredge, Respondents, Appellate Case No. 2012-212819.

**Conclusion**

Appellant, through counsel, has not responded to Respondent's Motion to Dismiss as of this filing. Farm Bureau currently has its own appeal pending in relation to the lower court matter (Appellate Case No. 2021-000494), which is currently held in abeyance pending a Motion to Strike, although both Initial Briefs have been filed and are ready to be finalized. Notwithstanding its own current appeal, Farm Bureau now argues on behalf of Appellant against Respondent's Motion to Dismiss.

Nothing Farm Bureau has provided in its untimely Return establishes that this Court's appellate jurisdiction has been properly and timely invoked pursuant to the Rules. This Court does not have jurisdiction over these matters, and the appeal must be dismissed.

[4] *See Citifinancial Mortg., Inc. v. Kennedy*, No. 2007-UP-062, 2007 S.C. App. Unpub. LEXIS 119 (Ct. App. Feb. 12, 2007) (expounding procedural leniency with a *pro se* party and yet still holding her to the service and filing standards and timeframes setout in Rule 203, SCACR).

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November 10, 2021

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

The Honorable Kristi F. Curtis
Circuit Court Judge

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Case No.: 2014-CP-45-00132
(Court of Appeals Case No.: 2021-000835)

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South Carolina Farm Bureau Ins. Co. . . . . Plaintiff,

v.

Marion L. Driggers, Shiralee Driggers, Tammy D. Floyd, Arthur McKenzie, a/k/a Arther McKenzie, The Travelers Home and Marine Insurance Company, The United States of America acting by and through Its agency, The Internal Revenue Services and The South Carolina Tax Commission, . . . . . Defendants,

Of whom Marion L. Driggers is Appellant and The Travelers Home and Marine Insurance Company is the Respondent.

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**PROOF OF SERVICE**

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I, Mariel D. Norton, of Baker, Ravenel & Bender, LLC, Attorney for Respondent, hereby certify that, on this 10th day of November 2021, I have served the following with the foregoing Respondent The Travelers Home and Marine Insurance Company's Reply to Plaintiff South Carolina Farm Bureau Insurance Company's Return to Its Motion to Dismiss Appellant's Appeal via electronic mail of same to counsel of record at the e-mail addresses shown below:

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November 10, 2021

E-mail: ctappfilings@sccourts.org
The Honorable Jenny Abbott Kitchings
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RE: South Carolina Farm Bureau Mutual Ins. Co., Appellant v. Marion L. Driggers, et al.
Of Which The Travelers Home and Marine Insurance Company is the Respondent
Appellate Case No.: 2021-000835
Our File No.: 7746.1749

Dear Ms. Kitchings:

Attached for filing in the above-referenced matter please find Respondent The Travelers Home and Marine Insurance Company's Reply to Plaintiff South Carolina Farm Bureau Insurance Company's Return to Its Motion to Dismiss Appellant's Appeal with Proof of Service thereof via electronic mail.

By copy of this letter, the same is being served upon all counsel of record via electronic mail.

If you have any questions concerning this letter, please do not hesitate to contact me.

Sincerely yours,

Mariel D. Norton
MDN:sr
Enclosures
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