

STATE OF SOUTH CAROLINA )  
 COUNTY OF RICHLAND )  
 Jones G. Herring, )  
 Plaintiff, )  
 vs. )  
 Gilbert S. Bagnell and )  
 Bagnell and Eason, LLC, )  
 Defendant. )

IN THE COURT OF COMMON PLEAS  
 FIFTH JUDICIAL CIRCUIT

Docket No.: 2011-CP-40-1998

**ORDER DETERMINING DEFENDANTS' RULE 59(e) MOTION WAS TIMELY**

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 RICHLAND COUNTY

On October 23, 2012, the South Carolina Court of Appeals granted Plaintiff's Motion to Remand to Determine Timeliness of the Appeal. Specifically, the Court ordered the circuit court to conduct a hearing on the issue of the timeliness of the Defendants' Rule 59(e) motion.

A hearing was held before this court on January 17, 2013. Based on the testimony and evidence presented at the hearing, this court finds the Defendants' Motion to Reconsider was timely.

**FINDINGS OF FACT**

At the hearing, both attorneys presented testimony, and multiple items of evidence were introduced into the record. Considering all of the testimony and evidence in its entirety, this court finds the following as to the pertinent facts of this case:

The underlying case involved claims of legal malpractice against a former attorney, Gilbert S. Bagnell, and his law firm, Bagnell and Eason, LLC. In that case, Defendants defaulted. A damages hearing was held on October 31, 2011. A November 23, 2011 order awarded Plaintiff money damages in excess of \$500,000.00. The written order and Form 4 were filed and mailed on November 29, 2011. There is some dispute about the exact date Defendants received the court's order. However, both parties agree that December 15, 2011 was the latest

date for Defendants to have timely served a motion for relief pursuant to SCRCP 59(e), which requires a motion to alter or amend judgment be served within 10 days of receipt of written notice of entry of order. Rule 59, SCRCP.

### APPLICATION OF THE FACTS TO THE LAW

Plaintiff argues that because Defendants' motion was not time-stamped by the clerk of court until December 19, 2011 and was not received by the Plaintiff's attorney until on or about December 21, 2011, Defendants' Motion to Reconsider was untimely.

Defendants argue the motion was timely served on December 15, 2011. In support of their argument, Defendants submitted copies of their Motion to Reconsider, Motion and Order Information Form and Cover Sheet, certificate of service, and cover letter to the clerk of courts, which were all dated December 15, 2011. Additionally, Defendants submitted computer records indicating the documents in question were created on Gleissner Law Firm computers on the afternoon of December 15, 2011. Finally, Defendants' attorney, as an officer of the court, testified he placed the Motion to Reconsider, and all necessary accompaniments, in a mail box located at 4840 Trenholm Rd. in Forest Acres, South Carolina on December 15, 2011.


Under Rule 5(b)(1), "service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of court. . . . Service by mail is complete upon mailing of all pleadings and papers subsequent to service of the original summons and complaint." Rule 5, SCRCP. "Where **service by mail** is permitted, it is **complete when the document is deposited with the United States Postal Service**, properly addressed with sufficient postage." *Southbridge Prop., Inc. v. Jones*, 292 S.C. 198, 355 S.E.2d 535 (1987) (emphasis added).

"Any designated mail depository box, whether in a building or along a mail route, constitutes a

depository authorized for the receipt and delivery of mail.” *Rosen v. United States*, 245 U.S. 467 (1918).

Although the motion was postmarked four days after the ten-day deadline, the postmark date is not dispositive. *Green v. Green*, 320 S.C 347, 350, 465 S.E.2d 130, 132 (1995). “Such would assume the infallibility of the U.S. Postal Service, an illogical assumption given the volume of letters and packages constantly being processed and the number of human hands on any one envelope.” *Id.* Defendants’ motion was dated within the time requirements, the Defendants’ attorney testified he knew the importance of the deadline, and Defendants’ attorney placed the motion in a United States Postal Service mailbox on December 15, 2011. Service by mail is complete when the document is deposited in any designated mail depository box. *Southbridge Prop, Inc.*, at 198, 355 S.E.2d at 535. Therefore, the Defendants’ Motion to Reconsider was timely served on December 15, 2011.

**IT IS SO ORDERED.**

  
The Honorable DeAndrea Gist Benjamin  
Presiding Judge, Fifth Judicial Circuit

April 21, 2013  
Columbia, South Carolina