

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

SC Court of Appeals

Michael S. Holt, Circuit Court Judge, PROBATE JUDGE
CASE NO.: 2015-CP16-00622

CASE NO.: 2022-000261

Harold Wilson,.....Appellant.

Vs.

Cynthia Barnett, Louise Sweet, and Hubert Wilson,.....Respondents.

INITIAL BRIEF OF RESPONDENT

RESPECTFULLY SUBMITTED,



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February 13, 2023

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Cases

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State V. Colden, 372 S.C. 428, 641 S.E.2d 912, (S.C. App. 2007) 3
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(Other Jurisdictions)

None

(Statutes and other authorities)

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Rule 40, SCRCF 3

STATEMENT OF ISSUES ON APPEAL

1. Did the Circuit Court err in failing to grant the Appellant's Motion for Continuance?
2. Did the Circuit Court err in dismissing Appellant's Appeal for lack of prosecution?

STATEMENT OF THE CASE

On January 27, 2010 the Respondent, Cynthia Barnett filed a Summons and Petition for Formal Testacy and Appointment in the Darlington County Probate Court. All interested parties were properly served. The Appellant, Harold Wilson, filed a Pro Se Answer with the Court on September 17, 2012. Several hearings were continued because the day of the hearing Appellant Wilson or someone on his behalf called requesting a continuance as result of illness. A hearing on the pleadings was held September 17, 2012 in the Darlington County Probate Court. The Appellant, Harold Wilson, failed to attend hearing. As a result of that hearing, the Respondent, Cynthia Barnett, was appointed as Personal Representative of the Estate of Dorothy W. Hatcher on September 26, 2012. On September 24, 2013, Harold Wilson filed a Petition to Vacate or Modify Previous Order with the Darlington County Probate Court. A hearing was held on the Petition on January 14, 2014. After reviewing the file, pleadings and the evidence presented at the hearing the Court denied the Petition for Modification or Vacation. The Appellant filed a Notice of Appeal directly to the Court of Appeals. The Appellant required six extensions of time before filing his initial brief. The Respondents filed a Motion to Dismiss appeal for failing to timely file the Notice of Appeal in the Circuit Court. The Court of Appeals denied that motion and by letter dated July 2, 2015, the South Carolina Court of Appeals remitted the case to the Darlington County Court of Common Pleas. Nothing further action was taken in this matter until the Respondent, Cynthia Barnett, filed a Motion to Dismiss for lack of prosecution on October

12, 2021. That Motion was served on the Appellant by mail on October 13, 2021. A hearing on the Motion was scheduled for January 9, 2022. On December 28, 2022, the Appellant Harold Wilson asked for a six month continuance of the Motion, again due to Covid and a potential surgery in February of 2022. The matter was not continued, and the hearing was on January 4, 2022. The Court did however, give the Appellant Wilson as additional thirty (30) minutes to arrive or to otherwise contact the Court. When the Appellant Wilson did not appear or contact the Court, the Respondent Barnett's Motion to Dismiss for Failure to Prosecute was granted by Order dated January 24, 2022. The Appellant filed a Notice of Intent to Appeal this Order on March 2, 2022.

ARGUMENT

1. The Circuit Court did not err in denying to grant Appellant's Motion for Continuance.

Appellant Wilson argues that the Court erred by going forward with the hearing without him being present. On December 28, 2022, the Appellant filed a Motion for Continuance on the grounds he had Covid and he had "another medical issue going on..." which might require surgery in February. After receiving the Respondent, Cynthia Barnett's Motion to Dismiss for Lack of Prosecution, Appellant Harold Wilson filed a Motion to Oppose Motion to Dismiss for Lack of Prosecution which was filed on November 15, 2021. In that Motion he had also claimed to have Covid at that time as well. The matter was not continued, and the hearing was held as scheduled on January 4, 2022. Appellant argues that by going forward without him present the Court denied him due process of law and cited several criminal cases in support of his argument. A fundamental requirement of due process is to afford interested parties of the action and to

give them an opportunity to present their objections. *Mullane V. Central Hanover Bank Trust Co.*, 339 U.S. 306, 70 S. Ct. 652 (1950) Appellant Wilson was given more than adequate notice of the date and time of the hearing. His failure to appear is not a denial by the Court of Due Process.

Rule 40(i)(1), SCRPC provides that a Court has the power to grant a continuance for “good and sufficient cause”. The purpose of this power is to allow Courts to manage their affairs in a way that allows for expeditious disposition of cases. *Anders V. The Settings of Mackey Point, LLC* No. 2015-UP-434 (S.C. App 2015) Granting or denying a motion for continuance is within the sound discretion of the Court and will not be disturbed absent a clear showing of abuse. *State V. Colden*, 372 S.C. 428, 435, 641, S.E.2d 912, 916 (SC App 2007). The grant or denial of the motion for a continuance is only reviewable on appeal when an abuse of discretion appears from the record. *In the Matter of the Care and Treatment of James Carl Miller*, 393 S.C. 248, 713 S.E. 2d 253 (S.C. 2011) A review of the record shows a long history of proceeding in a dilatory fashion by the Appellant. The Appellant did not provide the Court with any information on his alleged “medical issue” or his Covid diagnosis. In addition, there was nothing in his motion that gave the Court any reason for continuing this matter for an additional six months.

This Court should uphold the lower Court’s denial of the Motion for a Continuance.

2. The Circuit Court did not err in dismissing Appellant’s Appeal for lack of prosecution.

By Motion filed October 12, 2021, the Respondent, Cynthia Barnett filed a Motion to Dismiss the Appeal of the Appellant Wilson for failure to prosecute the action. At the time the motion was made, the case had been pending in the Circuit Court for more than seven (7) years. In that time no action had been taken by the Appellant on his appeal. This matter involved an estate which was originally opened in the Darlington County Probate Court in 2012. The Notice of Appeal from an Order of that court was originally filed in the South Carolina Court of Appeals. The matter was later remitted to the Darlington County Circuit Court by Order of the Honorable Joseph W. Cureton filed June 16, 2015. Since the Appeal was remitted the Appellant has failed to make any effort to finalize his Appeal or request that it be heard. The Circuit Court's file does not contain a transcript or any correspondence from the Appellant requesting the transcript as requested by Rule 207 of the Appellate Court Rules. The Appellant is responsible for furnishing copies of the transcript to the Appellant Court as well as all correspondence with the court reporter. The record does not contain the Appellant's initial Designation of Matter to be included in the record. However, not all items contain enough specificity to be identifiable. For instance, some of the items proposed to be included were items such as "a letter from attorney 2009", a "Last Will and Testament" and "a Living Will."

In addition, Appellant Wilson's response to the Motion to Dismiss was to request a six (6) month extension. The Motion for Continuance was not granted and the hearing was scheduled at 10:00 a.m. At the scheduled time, the Appellant was not present. Although the Court waiting until 10:30 a.m. to call the case, the Appellant was still not present, nor did he call or attempt to contact the Court about the hearing.

Appellant has the burden of prosecuting his action. If he fails to do so, the Court may dismiss the action for unreasonable neglect in proceeding with the cause. *McComas V. Ross*, 368 S.C. 59, 626 S.E. 2d 902 (S.C. App. 2006). In this case the Appellant received six (6) separate extensions of time to file the Initial Brief while in the Court of Appeals. However, since the case was remitted, there is no evidence that the Appellant has taken any action whatsoever. In filing an appeal, the Appellant is responsible for fulfilling all rules by the Court. Prior to dismissing a case for failure to prosecute, the Court must consider four factors (1) the Appellant's degree of personal responsibility; (2) the amount of prejudice to other party; (3) drawn out history of the proceeding in a dilatory fashion; (4) effectiveness of less drastic sanctions. *McComas*, supra 626 S.E.2d 902, 904. This estate has been opened since 2012. Because of inaction of the Appellant, more than seven (7) years have passed since the appeal was remitted and not further action has been taken. As a result , no estate assets have been distributed in more than ten years. The Appellant's failure to prosecute this matter has prejudiced the Respondent and all of the heirs of the estate of Dorothy Hatchell. The evidence provided by review of the record shows a long history of proceeding in a dilatory fashion by the Appellant. As a result, the Court did not commit error in finding there were any less drastic sanctions and dismissal.

This Court should uphold the lower Court's Order dismissing the appeal for lack of prosecution.

CONCLUSION

The Court should confirm the lower Court's Order dismissing the appeal of
Harold Wilson for failure to prosecute.

RESPECTFULLY SUBMITTED,



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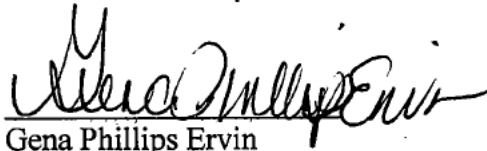
PROOF OF SERVICE

The undersigned hereby certifies that a copy of the Respondent's Initial Brief and Designation of Matter to be Included in the Record on Appeal have been served upon the following via First Class Mail postage prepaid this 13 day of February, 2023.

Harold Wilson, Pro Se Appellant
1549 Country Manor Rd.
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**ATTORNEY FOR RESPONDENT
CYNTHIA BARNETT**

SWORN to before me this 13 day of
February, 2023
Dorine L Day
Notary Public for South Carolina
My Commission Expires: 3-4-32

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February 13, 2023

Jenny Abbott Kitchings, Clerk
The South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

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SC Court of Appeals

RE: Harold Wilson vs. Cynthia Barnett
Case No.: 2022-000261
My File No.: 6141.002

Dear Ms. Kitchings:

Enclosed please find an original and two copies each of Initial Brief of Respondent, Designation of Matter to be Included in the Record on Appeal and Proof of Service in the above mentioned matter. Please file the original and return the clocked copies to me in the enclosed copies in the enclosed self addresses stamped envelope. If you have any questions or need anything further from me at this time, please do not hesitate to call.

Very truly yours,

ORR & ERVIN, LLC

BY:


GENA PHILLIPS ERVIN

GPE/ml
Enclosures
cc: Cynthia Barnett (w/enclosures)



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