

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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Appeal From York County  
Court of Common Pleas  
S. Jackson Kimball, Master-in Equity

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Case No. 2011-CP-46-01595

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**RECEIVED**  
JUN 28 2013  
SC Court of Appeals

Crescent Resources, LLC, . . . . . Respondent,

v.

J&J Properties of Lake Wylie, LLC  
and  
Jerrold H. Pettus, Sr. . . . . Appellants.

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**RETURN TO MOTION TO RECONSIDER AND REINSTATE APPEAL**

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Pursuant to Rules 240 and 260, SCACR, Respondent Crescent Resources, LLC ("Crescent") respectfully submits the following return in opposition to Appellants' Motion to Reconsider and to Reinstate Appeal served June 17, 2013 ("Appellants' Motion").

**Facts and Procedural Background**

Appellants filed a Notice of Appeal with this Court dated December 13, 2012. By correspondence dated January 14, 2013 the Court notified Appellants of their failure to file a proper Proof of Service, as required to perfect an appeal under Rule 203, SCACR, and granted Appellants ten days to cure

the deficiencies. On April 30, 2013 the Court sent a second letter to Appellants granting them an additional ten days from the date of the letter to cure the same deficiencies and warning them that the appeal may be dismissed if Appellants failed to cure. Appellants failed to comply with the multiple demands of the Court and on June 7, 2013 the Court entered an Order dismissing the appeal.

#### Legal Standard for Reinstatement of Appeal

Pursuant to Rule 260, SCACR, "[a] case shall not be reinstated except by leave of court, upon good cause shown, after notice to all parties." The undersigned is not aware of any cases construing the "good cause" standard under Rule 260, SCACR. However, guidance for the application of this standard can be found in either of the following lines of cases: (1) cases denying reinstatement of appeals under the Supreme Court Rules<sup>1</sup> and (2) cases construing the "good cause" standard under Rule 55(c), SCRCP.

The "good cause" standard for reinstatement under the Supreme Court Rules was fairly rigorous.<sup>2</sup> Under this standard the Courts have denied a number of motions to reinstate

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<sup>1</sup> In effect prior to September 1, 1990. Rule 102, SCACR.

<sup>2</sup> "[T]his court may, in our discretion, 'permit such act or acts to be done at any time to perfect the appeal.' But this discretion will not be exercised in favor of litigants and their attorneys who have 'allowed things just to rock along,' expecting this court to take care of them under any and all circumstances. . . . An applicant for reinstatement, under the provisions of section, should show also that he has endeavored to secure extension of time within the proper time, as hereinbefore indicated, or that for some especially good reason he could not secure the same." Wade v. Gore, 154 S.C. 262, 151 S.E. 470, 471-72 (1930).

appeals, particularly where the cases were dismissed on account of the negligence of appellant or counsel for appellant in failing to perfect an appeal within the prescribed time period. Wade v. Gore, 154 S.C. 262, 151 S.E. 470, 472 (1930) (denying a motion to reinstate appeal where appellant failed to show "exceptionally good cause" for failure to perfect an appeal with the prescribed time period); Fann v. State Highway Dep't of S. Carolina, 160 S.C. 156, 159 S.E. 617 (1931) (denying motion to reinstate appeal where appellant made no effort to secure additional time to perfect appeal).

A second source of guidance for construing Rule 260, SCACR, would be the "good cause" standard as applied in cases involving relief from entry of default under Rule 55(c), SCRCR. In general, Rule 55(c) requires a defaulting litigant "to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice." Sundown Operating Co., Inc. v. Intedge Indus., Inc., 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009). The courts have repeatedly held that the negligence of a defaulting party fails to satisfy the "good cause" standard. Richardson v. P.V., Inc., 383 S.C. 610, 682 S.E.2d 263, 267 (2009) (holding that "[n]egligence of an insurance company is imputed to a defaulting litigant and cannot constitute good

cause to relieve Appellants from the entry of default"); Sundown Operating Co., Inc. v. Intedge Indus., Inc., 383 S.C. 601, 609, 681 S.E.2d 885, 889 (2009) (holding that negligence of an attorney or insurance company is imputable to client and does not constitute "good cause" under Rule 55, SCRPC); Limehouse v. Hulsey, 397 S.C. 49, 70, 723 S.E.2d 211, 222 (Ct. App. 2011) (holding that defaulting parties wrongful assumption that thirty-day time period to file starts anew upon remand does not constitute "good cause" for relief from default); Stark Truss Co., Inc. v. Superior Const. Corp., 360 S.C. 503, 510, 602 S.E.2d 99, 103 (Ct. App. 2004) (holding that depression suffered by a company's president does not constitute "good cause" for failure to timely answer complaint).

#### Discussion

Pursuant to Rule 260, SCACR, Appellants Motion should be denied for failure to set forth facts that would constitute "good cause" for their failure to cure the deficiencies in their Rule 203 filings. Crescent points to the following reasons in support of its argument.

First, the Appellants had approximately six months to cure the deficiencies. During this time period, this Court provided multiple notices to Appellants setting forth the nature of the deficiencies, granting additional time to cure

the deficiencies and warning of the dismissal in the event of a failure to comply. In spite of these warnings Appellants never cured the deficiency.<sup>3</sup>

Second, the reasons offered by Appellants' for their failure to cure the deficiencies do not constitute "good cause" and are not supported by any affidavits or other evidence other than cursory explanations by counsel for Appellants. The Motion refers generally to the illness of counsel and the termination of his representation by Appellants on or about May 14, 2013. (Motion, ¶ 2.) However, these two general reasons fail to address exactly how these events impacted Appellants' ability to cure the defect in the proof of service nor does the Motion address how the two events account for the entire six-month period of unresponsiveness.

The e-mails attached to Appellants' Motion suggest that as of May 14, 2013, Appellants may be retaining new counsel to handle the appeal. If the allegations are presumed accurate, Appellants have had over 35 days to retain new counsel. However, there is no indication that substitute counsel has been retained. Moreover, Appellants' Motion fails to provide an explanation for why a motion for substitution of counsel

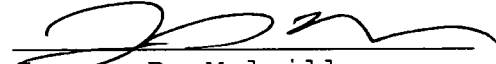
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<sup>3</sup> Appellants' Motion points out that the deficiency in the Proof of Service was minor, but this fact makes their failure to cure the deficiency that much harder to justify.

has not been filed in this Court, as would be required under Rule 264, SCACR.

Finally, if reinstatement is granted, Appellants would be rewarded for delaying the adjudication of this appeal by six months. Pursuant to Rule 208(a)(1), SCACR, Appellants have thirty (30) days after serving a Notice of Appeal to serve a copy of their initial brief on Respondent and to file a copy with the Court.<sup>4</sup> In this case either Appellants have failed to timely file their initial brief or Appellants have figured out a way to delay the time period to file an initial brief by simply failing to perfect their appeal under Rule 203, SCACR. In either event, reinstatement will result in an unjust reward to Appellants at Crescent's expense.

**WHEREFORE**, Crescent respectfully requests that this Court deny Appellants' Motion for the reasons set forth above and grant such other relief as the Court deems just and proper.

  
Jeremy D. Melville  
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Attorneys for Respondent

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<sup>4</sup> Rule 208(a)(1) indicates that the thirty (30) time period begins to run from receipt of a transcript but in this case Appellants have given no indication or notice to Respondent that a transcript has been requested.

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and Jerrold H. Pettus, Sr. . . . . Appellants.

PROOF OF SERVICE

I certify that the foregoing Return to Motion to Reconsider and to Reinstate Appeal has been served by depositing a copy thereof in the United States Mail, postage prepaid, on June 28<sup>th</sup>, 2013, addressed to:

John Martin Foster  
223 East Main Street, Suite 520  
P.O. Box 106  
Rock Hill, SC 29731

  
Jeremy D. Melville  
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June 28, 2013

Via Hand-Delivery

The Honorable Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

Re: Crescent Resources, LLC. v. J&J Properties of Lake Wylie,  
LLC, et al.  
C.A. 2010-CP-46-01595

Dear Ms. Kitchings:

Enclosed please find an original and six copies of the following documents hereby submitted by Respondent Crescent Resources, LLC in the matter referenced above: (1) Return to Appellants' Motion to Reconsider and to Reinstate Appeal and (2) Proof of Service. Thank you for your assistance in this matter. If you have any questions or concerns please call me.

Respectfully,

SPENCER & SPENCER, P.A.



Jeremy D. Melville

Enclosures

cc: John Martin Foster, Esq.

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