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**Aug 14 2023**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

Hon. William P. Keesley, Circuit Court Judge

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Appellate Case No. 2022-001749

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James John Todd Kincannon,

Appellant,

v.

Ashely Suzanne Griffith,

Respondent.

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**APPELLANT’S RETURN IN OPPOSITION TO RESPONDENT’S  
MOTION TO FILE INITIAL BRIEF AND DESIGNATION OF  
MATTER OUT OF TIME AND FOR AN EXTENSION TO FILE  
INITIAL BRIEF AND DESIGNATION OF MATTER**

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INTRODUCTION

Respondent’s counsel has failed to timely file the Respondent’s Initial Brief and Designation of Matter in this appeal and now files a motion for leave to file out of time. Appellant opposes the motion because: (1) Respondents’ motion is unaccompanied by a verifying affidavit in violation of Rule 240(c)(3), SCACR; and (2) even if an affidavit had been filed, the facts alleged in Respondent’s motion do not establish the sort of “forgivable error” necessary for the Court to forgive a missed initial brief deadline. No explanation is given for how Respondent’s counsel failed to properly calendar the initial brief deadline, and Respondents’ counsel taking an international vacation during the response period without diligently seeking protection for deadlines that might run during the vacation is a fact that favors *Appellant*, not *Respondent*. In fact, that by itself necessitates denial of Respondents’ motion because South Carolina lawyers who take vacations are required to diligently make suitable arrangements to ensure no deadlines are missed in their absence. This is basic to the practice of law.

Accordingly, the Court must—as a matter of law—deny Respondent’s motion for leave to file an Initial Brief out of time. The Court should then remand the matter to the circuit court with instructions to permit Appellant to file an amended complaint, an outcome which will not prejudice Respondent in any way and which is necessitated by Respondent’s failure to file an initial brief and

further failure to file a legally sufficient motion to file an initial brief out of time.

RESPONDENT’S MOTION IS FATALLY FLAWED BECAUSE IT CONTAINS FACTUAL ALLEGATIONS OUTSIDE THE RECORD BUT IS NOT ACCOMPANIED BY AN AFFIDAVIT VERIFYING THE FACTUAL ALLEGATIONS IN VIOLATION OF RULE 240(C)(3), SCACR.

Respondent’s motion must be denied—as a matter of law—because Respondent’s counsel has failed to comply with the clear dictates of Rule 240(c)(3), SCACR, which require that **all** appellate court motions relying on facts outside the appellate record be supported by “affidavits and other documents[.]” Rule 240(c)(3), SCACR. The full text of that rule is as follows:

Where the Record on Appeal or Appendix has not been filed, or where the facts relied upon in support of the motion are not contained in the Record on Appeal or Appendix, the parties shall file affidavits and other documents in support of their positions.

Rule 240(c)(3), SCACR.

The Record on Appeal<sup>1</sup> has not yet been filed in this case and the facts contained in Respondent’s motion would not be contained in a Record on Appeal in any event. Accordingly, Respondent was plainly required to file at least one supporting affidavit or some similar document<sup>2</sup> confirming the facts alleged in the motion. Respondent’s motion must be denied as a matter of law for failure to comply with the clear dictates of Rule 240(c)(3), SCACR.

It is black letter South Carolina law that factual material appearing solely in an unverified filing—which is nothing more than argument of counsel—is not evidence and cannot be considered as such by a court. This has been the law since

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<sup>1</sup> This is an ordinary civil appeal before the Court of Appeals, therefore no Appendix would ever be filed by either party.

<sup>2</sup> It is hard to see how the motion filed could be satisfactorily supported solely by documents without at least one affidavit, but the Court need not worry about that since Respondent did not file any documents at all in support of the motion, affidavits or otherwise.

at least 1933, where the Supreme Court of South Carolina said: “This Court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered.” McManus v. Bank of Greenwood, 171 S.C. 84, 89, 171 S.E.2d 473, 475 (1933). This particular holding of the South Carolina Supreme Court continues to be the law of South Carolina and has been reaffirmed numerous times, by this Court and the state supreme court, as recently as earlier this year in an opinion filed January 26, 2023. Owens v. Stirling, 438 S.C. 352, 358, 882 S.E.2d 858, 861 (2023) (stating that “arguments of counsel are not evidence”).

Respondent’s motion is entirely unverified. It is not supported by affidavit, nor is it supported by any other suitable documents. The factual assertions contained in the motion must therefore be disregarded per clear precedent from the South Carolina Supreme Court and the unambiguous dictates of Rule 240(c)(3), SCACR. As a result, this Court must deny Respondent’s motion for leave to file out of time as a matter of law. This Court has no discretion to even consider the motion because denial is mandated by Rule 240(c)(3), SCACR, and McManus v. Bank of Greenwood, *supra*, and its progeny in light of Respondent’s counsel’s failure to provide one or more affidavits, or some other satisfactory documents, verifying the facts alleged in the motion.

RESPONDENT’S MOTION IS FATALLY FLAWED BECAUSE THE UNVERIFIED  
BAREBONES FACTUAL ALLEGATIONS THEREIN, EVEN IF ASSUMED TRUE,  
DO NOT ESTABLISH THE SORT OF “FORGIVABLE ERROR” NECESSARY  
FOR THE COURT TO FORGIVE A MISSED INITIAL BRIEF DEADLINE

Even if Respondent’s motion was properly supported by an affidavit or

other suitable documents, the Court would still be compelled to deny it as a matter of law because the barebones facts alleged do not in any way establish the sort of “forgivable error” necessary for Respondent to be granted leave to file out of time.

The only explanation for the missed deadline given by Respondent’s counsel is as follows:

The Respondent’s motion is based on the grounds that on July 27, 2023, counsel for Respondent noted that the Initial Brief and Designation of Matter were due on July 26, 2023. Counsel for Respondent has been out of the country and the due date for this brief was inadvertently not calendared correctly. Respondent’s counsel did not realize the deadline had not been calendared correctly until this date.

Respondent’s Motion to File Initial Brief Out of Time at 1-2.

This is not a factually sufficient explanation because it does not explain how the calendaring error occurred, nor does it explain how Respondent’s counsel being out of the country has anything to do with the error. There are all sorts of reasons a deadline might go uncalendared, some of which a court may forgive and some of which are not forgivable. If the failure to calendar the deadline properly occurred due to some sort of inexcusable neglect, then the Court cannot permit Respondent to file out of time. Because Respondent’s motion fails to explain exactly what caused the failure to calendar the brief deadline properly, the Court has no choice but to deny the motion, as there is no way to tell whether the calendaring error was caused by a set of circumstances that are legally “forgivable” or not.

The only additional fact supplied by Respondent’s counsel is that he was

out of country at some point, which is not specified, nor does the motion explain how this had any effect on the failure to calendar the deadline properly. Merely being out of the country, for an unspecified reason, for an unspecified period of time, at some point during the brief-filing period of an appeal is not by itself sufficient to excuse a missed brief filing deadline. The duty of a lawyer to properly calendar deadlines does not magically vanish when the lawyer goes to another country, and because Respondent's counsel failed to provide the dates of the international travel, it is impossible to determine whether it actually could have possibly caused the missed deadline.

Unless Respondent's counsel was out of the country for the entire relevant time period—which would be approximately a month—then it is impossible to see how the international travel alone could be the cause of the calendaring error. And if Respondent's counsel actually was out of the country for an entire month during the pendency of this appeal, then Respondent's counsel should have filed a motion with the Court seeking protection from any deadlines during that time period. South Carolina lawyers have a basic duty of diligence when going on extended out-of-town trips to file motions for protection from deadlines in all pending cases where there is any possibility of a missed deadline.

Ultimately, however, it is impossible to determine from Respondent's motion whether Respondent's counsel's international travel actually was the proximate cause of the calendaring error, since the motion provides no details explaining how the travel caused the error. Appellant respectfully submits that it is likely Respondent's counsel has been intentionally vague on the details because

the details are not favorable to Respondent's counsel. Very few people take international trips that last more than a week or two, and if Respondent's counsel was only out of town for a week or two, then that travel cannot possibly explain the calendaring error and the missed deadline.

Neither the Court nor Appellant should be forced to guess about any of this, or contemplate all the possible ways in which international travel might, or might not, explain a missed calendaring deadline. The onus was on Respondent's counsel to give a full, detailed, satisfactory explanation, verified by affidavit(s) or other documents (if possible), as to exactly how the deadline was not calendared properly and exactly how Respondent's counsel's international travel could possibly have affected the matter.

It appears that no South Carolina reported appellate decision states the standard for an appellate court's ruling on a motion to file a brief out of time, but Appellant would direct the Court's attention to the case of Matute v. Procoast Navigation Ltd., 928 F.2d 627 (3rd Cir. 1991), which states the standard in the United States Court of Appeals for the Third Circuit to be "extraordinary and compelling circumstances." Id. at 631. This is also the rule in the United States Court of Appeals for the District of Columbia Circuit. Id. (citing Barber v. American Security Bank, 841 F.2d 1159 (1988)).

Should this Court proceed to consider the merits of Respondent's motion, despite it being fatally flawed due to the lack of an affidavit or other supporting document, Appellant requests the Court apply the "extraordinary and compelling circumstances" standard used in the above-cited federal cases. Obviously,

Respondent's motion does not set forth any "extraordinary and compelling circumstances" that could permit the Court to forgive the missed filing deadlines. Taking a summer vacation is not "extraordinary and compelling," and even if it could be, Respondent's motion fails to even state the dates this vacation occurred, making it impossible for the Court to determine whether or not the vacation was the proximate cause of the calendaring error and missed deadline.

Importantly, the Court should obviously construe the absence of factual detail against Respondent's counsel. If a fully detailed explanation of what happened to cause the missed deadline would be favorable to Respondent, Respondent's counsel would have included it in the motion. The exceptional vagueness of Respondent's motion strongly suggests that the missing facts would be unhelpful to Respondent's position, and Respondent's counsel omitted them and opted for extreme vagueness for that specific reason.

Finally, the Court should note that even if everything in Respondent's motion is accepted despite its extreme vagueness, Respondent's counsel would still have missed the deadline. Appellant served the Initial Brief on June 21, 2023, making the deadline for Respondent to file an initial brief July 21, 2023. Respondent's counsel appears to believe the five mailing days given by the Rules of Civil Procedure apply to appellate practice, making the deadline July 26, 2023. But this is not correct. Rule 263(a), SCACR expressly states that "No additional time shall be allowed after service by mail[.] Rule 6(e), SCRCP is not applicable to these rules, and no additional time shall be allowed by reason of service by mail[.]" Not only did Respondent's counsel fail to calendar the deadline at all,

even if Respondent's counsel had done so, he would have calendared it incorrectly late and missed the correct deadline anyway.

Accordingly, even if the Court somehow finds a way to excuse Respondent's failure to properly support the motion with an affidavit or other document, the Court must still deny the motion because the facts given in the motion are extremely vague and plainly insufficient to explain why the deadline was missed. And those facts certainly do not constitute "extraordinary and compelling circumstances," the standard Appellant requests the Court use when considering this matter, or any other conceivable standard the Court might apply.<sup>3</sup>

#### FURTHER PROCEEDINGS

In the event the Court denies Respondent's motion, the question of what to do next arises. Rule 208(a)(4), SCACR states that this Court may "take such action as it deems proper" in the event a respondent fails to file a brief. Appellant respectfully submits that the proper thing to do, based on Appellant's filed brief, would be to remand the case to the circuit court with instructions to allow Appellant to file an amended complaint and the case proceed from that point, without deciding any other issues in the appeal.

That outcome would cause **absolutely no legal prejudice** to Respondent, and would not give Appellant any sort of "win by default" on any issue. It would simply give Appellant an opportunity to file an amended complaint in the circuit

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<sup>3</sup> Respondent failed to identify the standard the Court should use when considering this motion. Accordingly, Appellant requests the Court apply the "extraordinary and compelling circumstances" standard from the federal cases cited supra, since there does not appear to be a reported South Carolina decision establishing the standard for motions to file appellate briefs out of time.

court and attempt to cure the deficiencies alleged by Respondent in the original complaint. That is the simplest and fairest way to proceed, and would—quite frankly—be relatively painless to Respondent and her counsel.

#### CONCLUSION

Appellant requests the Court deny Respondent’s motion to file out of time because it is not supported by an affidavit or other supporting document in violation of Rule 240(c)(3), SCACR. Should the Court forgive that error, Appellant requests the Court deny Respondent’s motion to file out of time because it fails to set forth facts sufficient to allow the Court to forgive the missed deadline, as the facts are extremely vague and do not provide any extraordinary and compelling circumstances that would justify forgiveness of the missed deadline.

Should the Court deny Respondent’s motion, Appellant requests the Court remand the case to the circuit court with instructions to allow Appellant to file an amended complaint and proceed in the matter from that point.

Respectfully submitted,

August 14, 2023

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APPEAL FROM LEXINGTON COUNTY  
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Robin B. Stilwell, Circuit Court Judge

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Appellate Case No. 2019-001501

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James John Todd Kincannon,

Appellant,

v.

Ashely Suzanne Griffith,  
Moore Taylor Law Firm, P.A.,  
Vance Stricklin, and Amber  
Fulmer,

Respondents.

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**CERTIFICATE OF SERVICE**

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The undersigned Appellant hereby certifies that he has, on the date below, properly served the foregoing on opposing counsel at the address submitted by opposing counsel to the Court for service in this case.

August 14, 2023

s/James John Todd Kincannon  
James John Todd Kincannon