

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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JUL 02 2012
SC Court of Appeals

Appeal from Beaufort County
Carmen Tevis Mullen, Circuit Court Judge

Case No. 2011-CP-07-1610

Elizabeth O'Meara, Respondent,

v.

Brookdale Senior Living, Inc., Southern Assisted Living, LLC Appellants,

and

Sonia S. King, Defendant.

**RESPONDENT'S REPLY TO APPELLANT'S RETURN TO RESPONDENT'S MOTION
FOR INVOLUNTARY DISMISSAL**

Respondent Elizabeth O'Meara, by and through her undersigned counsel, hereby replies to the return of Brookdale Senior Living, Inc., and South Assisted Living, LLC, (Appellants).

Appellants state Respondent's Motion for Involuntary Dismissal is "unusual" and "novel." It is not. The South Carolina Appellate Court Rules (Rules) provide for such a motion. Rule 240(a), SCACR, states, in pertinent part, "This Rule governs all motion or petitions filed in the appellate court, including, but not limited to: . . . motions to remand or dismiss . . ." Rule 260(a) provides for involuntary dismissal of an appeal when the appellant fails to comply with the requirement of the Rules.

Respondent's Motion for Involuntary Dismissal is not baseless and inappropriate, as Appellants suggest. Respondent did wait until after the scheduled mediation to file this motion because a good faith resolution of this case prior to appeal would be in the best interests of the parties and judicial resources. The case did not settle; therefore, Respondent must take the necessary steps to protect her interests and rights.

Appellants have failed to follow the Rules. They claim to have requested a transcript from the court reporter in a timely fashion, but they did not. Rule 207(a)(1), SCACR, requires the appellant to request the transcript within ten (10) days after service of the notice of appeal. As evidenced by Appellants' post-marked envelope attached in their Exhibit A to their Return, Appellants did not mail the request until October 5, 2011, one day past the time specified under the Rules.¹ Therefore, the appeal must be dismissed pursuant to Rules 207(a)(1) and 260, SCACR.

Appellants in their Return briefly discuss Henning v. Kaye, 307 S.C. 436, 415 S.E.2d 794 (1992), cited by Respondent in her Motion for Involuntary Dismissal, in which a respondent moved under Rule 231, SCACR,² to dismiss the appellant's appeal for failing to comply with Rules 207 and 208, SCACR. The Rules and the Henning case allow a motion for involuntary dismissal on the grounds the appellant has failed to follow the Rules and such a motion is neither unusual nor novel because it is provided for in the Rules and appellate courts will entertain such a motion.

Henning does not suggest, as Appellants argue, that Respondent's Motion for Involuntary Dismissal should be denied. In Henning, the appellant failed to comply with formatting and

¹ Appellants served their notice of appeal on September 22, 2011. Ten days from that date is October 4, 2011.

² Rule 231, SCACR is identical to the current Rule 260, SCACR.

citation rules in his initial brief. The appellant alleged substantial compliance with the Rules and moved to amend his brief to make it compliant. Henning, 307 S.C. at 437 415 S.E.2d at 794. The South Carolina Supreme Court stated it “would be completely justified in dismissing this appeal based on appellant’s numerous violations of the Rules,” but in that case instead allowed the appellant fifteen days to file a compliant initial brief. Henning, 307 S.C. at 437 415 S.E.2d at 794.

The important distinction between the facts of Henning and the facts of this case is that in Henning, the respondent’s rights were not prejudiced by the formatting and citation errors to the same degree that Respondent here is prejudiced by the appeal drifting along for nearly ten months with no progress. Under the timelines mandated in the Rules, Appellants should have filed an initial brief on or about January 2012. Although it appears the court reporter failed in her obligations to provide the transcript, Appellants cannot use this as an excuse to fail to move their appeal forward. The Rules provide mechanisms —notifying the Court and Office of Court Administration, proceeding without a transcript—that would remedy this delay, but Appellants chose not to make use of those procedures. Importantly, the transcript at issue is of a fifteen minute hearing on Appellants’ motion to dismiss and compel arbitration. No evidence was presented, only arguments by counsel. Moreover, Appellants have agreed Judge Mullen’s order accurately portrayed her ruling at the hearing. To continue to delay this appeal—and the underlying trial on the merits—is unconscionable.

Finally, contrary to Appellants’ suggestions, Respondent is under no obligation to secure the transcript or assist Appellants in doing so to help them advance their appeal. Appellants’ have the sole responsibility under the Rules to advance its appeal in a timely fashion. Also, Appellants’ assertion they were “unaware” Respondent took issue with Appellants’ failure to

secure the transcript is disingenuous—Appellants know this interlocutory appeal, which Respondent believes has no merit, has stayed a trial on the merits and that Respondent is eager to have her day in court. Respondent Elizabeth O'Meara is a 93 year old woman suffering from Alzheimer's Disease. Her health has deteriorated significantly during the nearly ten months she has been waiting for this appeal to go forward and be concluded so that she can bring her case to trial. Further delay is inherently unfair.

CONCLUSION

Respondent respectfully requests this Court grant its Motion for Involuntary Dismissal. Appellants have failed to follow the Rules in perfecting their appeal and justice mandates that Respondent be granted her opportunity to bring her case to a jury where Appellants have failed to follow the Rules and failed to progress their appeal.

Respectfully submitted,

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By: *Kelly M. Jolley with permission by Amber B. Martella*
Attorneys for Respondent Elizabeth O'Meara

June 29, 2012
Hilton Head Island, South Carolina

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Appeal from Beaufort County
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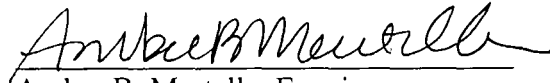
and

Sonia S. King, Defendant.

CERTIFICATE OF SERVICE

I, Amber B. Martella, do hereby certify that I have this date served one (1) copy of Respondent's Reply to Appellant's Return to Motion for Involuntary Dismissal and Memorandum in Support upon the following counsel of record by causing said copy to be deposited with the United States Postal Service, first class postage prepaid and properly affixed thereto, and addressed as follows:

Manton M. Grier, Jr., Esquire
Nexsen Pruet, LLC
Post Office Drawer 2426
Columbia, SC 29202-2426.



Amber B. Martella, Esquire
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June 29, 2012

Columbia, South Carolina

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June 29, 2012

Via U.S. Mail

The Honorable Jenny Abbott Kitchings
Clerk
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29211

RECEIVED
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SC Court of Appeals

Re: Elizabeth O'Meara v. Brookdale Senior Living, Inc., et al.
Tracking No. 2011199666 Case No. 2011-CP-07-1610

Dear Ms. Kitchings:

Enclosed for filing with the Court, please find the original and six (6) copies of Respondent's Reply to Appellant's Return to the Motion for Involuntary Dismissal and Memorandum in Support in the above-captioned appeal.

By copy of this letter and by Certificate of Service accompanying the Reply, we are serving a copy on counsel for Appellant. Should you have any questions with respect to this matter, please do not hesitate to contact us.

Sincerely,

McNAIR LAW FIRM, P.A.



Amber B. Martella

Enclosure

Cc: Marcus A. Manos, Esquire
Manton M. Grier, Jr., Esquire

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