

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

Appellant Case No. 2015-000942

APPEAL FROM GREENVILLE COUNTY

Court of Common Pleas

Charles B. Simmons, Master in Equity Judge

Case No. 2010-CP-23-8330

Joel Clay Bracken, Appellant.

v.

Green Tree Servicing, LLC., Respondent.

**APPELLANT'S MOTION FOR DENIAL OF RESPONDENT'S MOTION FOR TIME
ENLARGEMENT TO SERVE AN INITIAL BRIEF AND EXPEDITE JUDGMENT
UPON APPELLANT'S BRIEF RECORDS**

Appellant Joel Clay Bracken, respectfully moves the honorable Court to deny the motion of Respondent Green Tree Servicing, LLC for an thirty (30) day enlargement of time to serve it's initial brief and designation of matter abruptly filed November 9, 2015 and here from precipitate the appeal's conclusion upon all the sufficient material facts, matters and arguments from Appellant initial brief, exhibits and the lower court and clerk Orders and records. The Respondent through it's counsel the Finkel Law Firm, failed to prepare and serve it's initial brief upon the Court and Appellant by the clear deadlines on two (2) separate dates this year during the appeal. Further, Respondent's counsel fails to provide and exhibit any proper grounds upon which this high Court shall provide *special* or *exceptional* relief from the rules and deadlines mandated unto both parties.

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SC Court of Appeals

The Respondent had plentiful notice and time to prepare and serve it's initial brief twice now but *chose* not too. Respondent's latest motion is perversely too late to now consider, baseless for deliberation of facts and utterly dilatory to the Court, it's overburdened dockets and valuable time. For the reasons and the supported cited case precedents set forth herein, the Respondent's late motion should be denied as an additional ground and Appellant's Motion for swift adjudication upon the brief on record be granted.

I. RESPONDENT HAD MULTIPLE NOTICES, TIME-FRAMES TO PREPARE AND SERVE IT'S INITIAL BRIEF AND HAS TWICE FAILED TO VOLUNTARILY ACT

Appellant orally noticed the Respondent within hearing April 8, 2015, the lower court's rulings were going to be immediately appealed. (See App. In. Brief Exh. Trans., Pg. No. 7, Ln. No. 5) This appeal was timely filed and served by Appellant and on May 5, 2015 the Appeals Clerk Jenny Abbott Kitchings notified all parties by mail that it had received and assigned the appeal case number. (See Attachment A) Thus, Respondent and it's counsel, had actual notice from May 5, this appeal was initiated, pending and Appellant would soon serve an Initial Brief that Respondent was bound pursuant SCACR Rule 208(a)2 within thirty (30) days afterword to serve it's brief.

Due to issues with communication and acquiring the lower court transcripts from the local court reporter, Appellant was briefly delayed in serving his Initial Brief until June 22, 2015. The Respondent's counsel and Court were served. (See App. Court records) This delay resulted in even more time for Respondent to ponder and prepare it's brief. Respondent's brief was required to be served by July 22, 2015 under Rule 208(a)2. The aforesaid deadline tolled and Respondent's counsel failed to serve a brief or request for extension from the Appellant or the Court.

On October 13, 2015, this Court granted reinstatement of the appeal, after evidence was presented that Clerk of Court Kitchings dismissed the appeal in error regarding Appellant's filling fee payment. (See App. Court records, Order) Within that said Court mailing served upon all parties, was an formal notice that "respondent's initial brief must be filed within thirty (30) days of the date of this letter." (See Attachment B) The particular wordings and meaning of

“must be filed” can not be understated. Respondent was conditionally given another fair second chance (although it need not have) by the Clerk, upon the reinstatement, to comply by November 12, 2015.

Respondent instead wasted it’s allowable time and ludicrously waited up until November 9, 2015 to notify the Court it wanted more time. The very same week a mere three (3) days before it was due. Of note, neither Respondent or counsel attempted to contact Appellant about this issue.

Within the said minuscule motion, Attorney Magalie Creech as undersigned offers only six (6) words for grounds for this exceptional enlargement of “*other pressing deadlines of the undersigned.*” Ms. Creech fails to cite any docketed case and their purported deadlines she refers to be more “pressing” for the Court to consider her motion. No evidence or otherwise for the Court to consider her motion. There is nothing before the Court to substantiate her claim, grounds or motion at all. The motion fails to cite any authorities or case precedents that uphold brief extensions granted because attorneys have *other pressing deadlines.*

Ultimately, Ms. Creech’s motion is an admission, an acknowledgement to this Court this appeal, the initial brief and its deadlines were insignificant to her or the law firm in comparison to other deadlines on her schedule. Is this Court’s time, dockets and pressing deadlines insignificant for it’s judges and there staff? Do this Court entertain pompous attorneys that postulate this Court’s judges should unequivocally bend it’s rules so to work around attorney schedules and deadlines at their behest? Does this court award failure to comply with the rules? NO! This Court and others say not and have grown very, very weary of such practice.

**II. THIS COURT, THE SUPREME COURT AND MANY OTHER JURISDICTIONS
HOLD A RESPONDENT’S FAILURE TO TIMELY FILE A BRIEF EQUAL
ABANDONMENT AS AN ADDITIONAL GROUND AND JUSTIFIES
REVERSAL**

Upon the failure of a respondent to timely file a brief, this appellate court “may take such action as it deems proper.” Rule 208(a)(4), SCACR. South Carolina’s Supreme Court recognized

the failure of a respondent to file a brief triggers cause for reversal and that failure is considered an additional ground for remand.

“Respondent Turner did not file a brief with this Court. Her failure to do so allows this Court to take such action upon the appeal as it deems proper. This failure alone would justify reversal; however, we simply consider it as an additional ground.”

From *Turner v. Santee Cement Carriers, Inc.*, 277 S.C. 91, 96, 282 S.E.2d 858, 860 (1981) (See Attachment C herein).

This Appellate Court routinely reinforces that same doctrine;

“South Carolina courts have recognized the failure of a respondent to file a brief could justify a reversal.”

From *Parker v. Brown*, S.C. 2008-UP-324 (S.C.App. 2008) See also footnotes in *Lewis v. L.B. Dynasty, Inc.*, 732 S.E.2d 662, 400 S.C. 129 (S.C.App. 2012); *Richardson v. Richardson*, 2013-UP-298 (S.C.App. 2013); *Robinson v. Hassiotis*, 364 S.C. 92, 93 n.2, 610 S.E.2d 858, 859 n.2 (Ct. App. 2005); See also *Wierszewski v. Tokarick*, 308 S.C. 441, 444 n.2, 418 S.E.2d 557, 559 n.2 (Ct. App. 1992) (stating where respondent failed to file a brief, “it [was] proper to reverse on the points presented rather than to search the record for reasons to affirm”).

Other state appellate courts, annoyed by non or late filing parties, conclude, “the reviewing court may reverse the judgment without further explanation of the merits of the appeal.” See *Loucks v. Loucks*, 130 Ill.App.2d 961, 266 N.E.2d 924, 926 (1971); See *Sparkman v. Sparkman*, 441 So.2d 1361 (Miss.1983). In others, the appellate court will reverse the lower court’s judgment so long as the “brief of the [appellants] appears to reasonably sustain the assignments of error.” See *Hedden v. Vaughan*, 220 P. 337 (Okl.1923); *Capitol Dodge, Inc. v. Haley*, 154 Ind.App. 1, 288 N.E.2d 766, 768 (1972) (“[I]n such situation, the appellants need

only make a prima facie showing of reversible error in order to obtain reversal of the trial court's decision.").

**III. RESPONDENT'S GROUNDS WERE VOLUNTARY AND FAIL TO BE
EXTRAORDINARY, BEYOND THEIR CONTROL TO EQUATE GOOD CAUSE
FOR TIME EXTENSION**

The Supreme Court of the United States in *Wade v. Gore*, 154 S.C. 262, 151 S.E. 470 (1930) firmly considered and decided preconditions for parties seeking time extensions. The Court in *Wade* set forth parties must:

1. Seek an extension early enough, and before the time has expired, to get opposing counsel's consent to the extension;
2. Seek an extension early enough for the court to rule on it before the time expires.

The Court's records here show the Respondents did neither on two (2) separate occasions in this appeal and their eleventh-hour motion on Nov. 9th was futile to be granted before the deadline. The above SCOTUS concluded appeals will be dismissed and not reinstated unless the parties shows that he or she sought an extension or had some "especially good reason" not to. See *Wade*, 151 S.E. at 472 (emphasis in original). Several South Carolina decisions follow *Wade* and refused to reinstate appeals where an party let the time go by without moving for an extension. See *Southland Mobile Homes of South Carolina, Inc. v. Assoc.*, 270 S.C. 525, 244 S.E.2d 211 (1978)(failure to timely serve proposed case and exceptions); *Sellars v. Nicholson*, 243 S.C. 340, 133 S.E.2d 837 (1963)(failure to timely docket appeal).

The old saying applies "what's goes for the goose goes for the gander." As both parties bear equal burdens of the rules and deadline of the Court. Likewise Rule 260, SCACR, provides that an appeal shall be dismissed if an appellant fails to comply with the Rules, which would include missed deadlines, and that the appeal may not be reinstated "except by leave of the court for *good cause shown*." Respondent can't show good cause to be relieved with extraordinary

time to enter a brief if they never timely moved for that extension early enough for the Court to rule on it before the time expires.

Recently, our state's supreme court addressed these petty time extension requests concluding there should be very little reason for a party to need an extension to complete any of the steps required by the rules and significantly limited the circumstances under which the court will grant extensions in cases seeking a petition for a writ of certiorari to review a decision of the court of appeals. The court lamented dawdling parties seeking extensions when, in its view, the procedures outlined by rule, provide ample time for the parties to file their briefs. Only upon a *showing of good cause*, may a party be granted extensions totaling no more than twenty (20) days during the proceedings. Only extraordinary circumstances such as illness or other circumstances *beyond the control of the movant* will warrant the granting of an extension. See Order on Extensions in Cases Seeking a Petition for a Writ of Certiorari to Review a Decision of the S.C. Court of Appeals, No. 2014-07-16-01 (S.C. July 16, 2014).

Respondent counsel fails to introduce any evidence by affidavit testimony, records of other case deadlines pressing against this present one that are necessary to substantiate her grounds. Claims are meritless without a shred of proof. This Court will not consider statements of fact that are found only within counsel's argument. See *McManus v. Bank of Greenwood*, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933).

In this case, Counsel Creech fails to claim or exhibit a *good cause* for an extension from this Court to serve an brief that should have already been filed prior. Her other pressing deadlines are not related to illness or circumstances beyond her control. Ms. Creech voluntarily choose to act upon other case deadlines within her schedule and neglect to act within this appeal deadline by motioning right before the deadline as a choice. A poor one, that does not warrant good cause, extraordinary circumstances out of her control.

If Ms. Creech was too burdened, she or someone in the law firm should have timely assigned it to another, competent attorney. The Finkel Law Firm proudly boasts to potential clients and the public on the first page of it's website to being;

“a 20-lawyer firm, the attorneys combine their experience with the aim of achieving a favorable case outcome. No matter the legal

issue you are experiencing, Finkel Law Firm LLC is a full-service law firm that can provide the high-quality representation you require” and “all the cases they take on are handled with a team effort.”

See www.finkellaw.com., front page under title “Team Effort on All Cases”

For this client and appeal against others, that does not appear to be true. Further, waiting till the week the brief is due just three (3) days before must be served is absurdly late when she was already aware of conflicting deadlines and are additional grounds to be denied.

IV. ADJUDICATION UPON THE APPELLANT’S BRIEF ISSUES AND MERITS BEFORE THE COURT IS PROPER

On October 20, 2011, the Supreme Court mandated expediting appeals and also requires the court of appeals to so as well;

“[t]o facilitate expediency, there will be a presumption against granting motions for extensions of time to file petitions, returns, briefs, records, and other documents...” “A motion for an extension of time will only be granted in the most extraordinary of circumstances and for the most compelling reasons in the interest of justice.”

See Order Expediting Appeals from Termination of Parental Rights Proceedings, Adoption Proceedings, and/or Dep’t of Soc. Servs. Actions Involving Custody of a Minor Child, No. 2011-10-20-01 (S.C. Oct. 20, 2011).

When a respondent does not file a brief, this court found it efficient, proper and just to address the issues as presented by the appellant. See *Durham v. United Cos. Fin. Corp.*, 326 S.C.

403, 404, 483 S.E.2d 786 (Ct. App. 1997) rev'd on other grounds, 331 S.C. 600, 503 S.E.2d 465 (1998). In other jurisdictions, appellate courts will reverse the lower court's judgment so long as the "brief of the [appellants] appears to reasonably sustain the assignments of error." See *Hedden v. Vaughan*, 220 P. 337 (Okla. 1923); *Capitol Dodge, Inc. v. Haley*, 154 Ind.App. 1, 288 N.E.2d 766, 768 (1972)

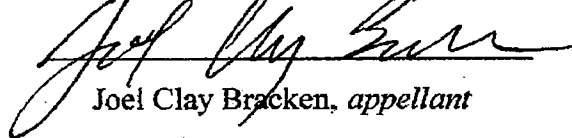
Appellant's Initial Brief, the signed Orders and records of the lower court is more than sufficient to provide this court with an understanding of the issues on appeal. All matters are before the court and ripe for a decision. After all, the appeal is from contended errors or abuse of discretion of the lower court and clerk. What more enlightenment can a Respondent's attorney brief add to the lower court's decision premises than this Court's well trained and versed judiciary would already discern? The Appellant's brief has established reversible error of the lower court and demonstrated a prima facie case that should prevail on the merits.

CONCLUSION

For these arguments against and case precedents set forth above herein and attached, Respondent's motion must be denied and Appellant's motion to swiftly adjudicate the appeal upon its brief with exhibits, the signed Orders and records of the lower court as deemed proper and just.

Respectfully submitted,

Today's Date: November 16, 2015.



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