

The State of South Carolina
In the Court of Appeals

Appeal from Richland County Court of Common Pleas
Tonya A. Gee, Circuit Court Judge

Appellate Case No. 2015-001845

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FEB 08 2016
SC Court of Appeals

JOHN M. MCINTYRE AND SILVER OAK LAND, Appellants,

v.

SECURITIES COMMISSIONER OF SOUTH CAROLINA, Respondent.

MOTION TO DISMISS APPEAL

Respondent, the Securities Commissioner of South Carolina, through his undersigned counsel, respectfully moves to dismiss this appeal due to the Appellants failure to meet the deadlines of the Appellate Court Rules and the failure to prosecute this appeal with the due diligence required as discussed below.

I. Procedural Background and Facts

A hearing was held on April 17, 2015, before Judge Tonya Gee of the Richland County Court of Common Pleas regarding the Appellants' appeal of an adverse decision of the Securities Commissioner. The court upheld the decision of the Securities Commissioner through an order dated May 7, 2015. On or around May 28, 2015, the Appellants filed a motion for reconsideration before Judge Gee. On July 21, 2015, Judge Gee denied the motion for reconsideration. On or about August 27, 2015, Appellant filed a notice of appeal with this court initiating

this proceeding. No transcript of the hearing held on April 17, 2015, was ordered at this time. Therefore, pursuant to Rule 208, SCACR, the Appellants initial brief was due thirty days after serving the notice of appeal. On September 25, 2015, the Appellants requested an extension of thirty days to prepare the initial brief. No return was filed by the Respondent and the request was granted by notice dated October 12, 2015. The time for filing the Appellants' initial brief was thereby extended until November 9, 2015. On or around November 9, 2015, the Appellants filed a second request for an extension to file their brief and to request, out of time, the transcript of the appellate hearing held April 17, 2015. Again, the Respondent did not formally object to the request. By court notice dated December 2, 2015, the Clerk of the Court of Appeals granted the request and required the Appellants to notify the court of the date the transcript was received such that the schedule to file briefs may be set based on that date.

More than sixty days have passed since the order granting permission to request the transcript out of time. No extension has been requested by the court reporter and no extension has been requested by the Appellant. To the knowledge of the Respondents, the only correspondence filed by the Appellants has been (1) an initial letter to the Clerk of Court of the Richland County Court of Common Pleas requesting the name and information of the court reporter dated December 11, 2015, and (2) a letter dated January 29, 2016, to the court reporter.

II. Law and Analysis

Pursuant to Rule 260, SCACR, whenever it appears that an appellant has failed to comply with the requirements of these Rules, the clerk shall issue an

order of dismissal, which shall have the same force and effect as an order of the appellate court. Rule 207, SCACR, and Rule 208, SCACR, lay out the timeline for ordering the transcript and filing initial briefs. If an appellant has not received the transcript within sixty days and has not been notified of an extension, the appellant shall notify the Office of Court Administration, the clerk of the appellate court, and the court reporter. Rule 207, SCACR. No notification nor request for an extension has been sent to this court. Therefore, the Appellants have failed to satisfy the requirements of Rule 207, SCACR, and this matter should be dismissed.

Further, the Appellants have not diligently pursued the prosecution of this appeal. This Court requires that appellants act with due diligence to effectuate the full prosecution of an appeal. Joyner v. Glimcher Properties, 356 S.C. 460, 463, 589 S.E.2d 762, 763 (2002). In *Joyner*, an appeal to circuit court from a magistrate's court decision awarding monetary damages was dismissed because a return was never filed by the magistrate's court. Id. at 462, 589 S.E.2d at 763. The Respondent filed a motion to dismiss for failure to prosecute the appeal which was granted by the circuit court. Id. at 461-62, 589 S.E.2d at 763. On appeal from that decision, this Court upheld the dismissal and held that the appellant was required to act with due diligence. Id. at 463, 589 S.E.2d at 763. In *Joyner*, that requirement included the duty to proceed with the rather extraordinary act of seeking a writ of mandamus to force the magistrate's court to file the return. Id. The Appellant in *Joyner* failed to seek the writ and therefore failed in its duty to act with due diligence. Similarly, the Appellants in this matter have failed to

reasonably pursue ordering and obtaining the transcript and failed in their duty to act with due diligence.

The Supreme Court of South Carolina has also found that appellants must pursue appeals with due diligence. State v. Adams, 244 S.C. 323, 137 S.E.2d 100 (1964). Following a criminal conviction in magistrate's court, the Respondent filed a notice of appeal in circuit court. Id. at 325, 137 S.E.2d at 101. The Respondent then filed a motion to dismiss the charges and set aside the conviction because the record of proceedings in magistrate's court had not been filed with the circuit court. Id. at 326, 137 S.E.2d at 101. That motion was granted with no notice to the State and the State appealed. Id. The South Carolina Supreme Court held that it was the moving party, here the Respondent, who held responsibility to transmit the record. Id.

“It was the duty of the Respondent as he was the moving party in the appeal from Magistrate's Court to prosecute it with due diligence and have it promptly disposed of...Having failed to take any step toward effecting a prompt disposition of his appeal, Respondent was not entitled to have his conviction set aside and the charges against him dismissed.”

Id. Therefore, the moving party has a duty to act with due diligence to ensure the prompt disposition of the matter.

In this matter, the Appellants failed to request or obtain the transcript within the first sixty days after filling the notice of appeal, even though the rules require it be done within ten days. After requesting and being granted permission to request the transcript out of time, and after another sixty days passed, the Appellants still failed to request or obtain the transcript. The Appellant has failed

to pursue the transcript with due diligence and has failed to ensure that this appeal is promptly disposed of as required.

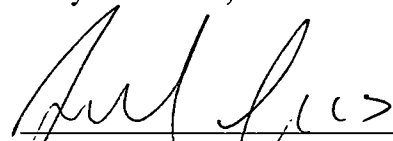
III. Conclusion

Appellant has failed to reasonably pursue obtaining the transcript of the hearing held on April 17, 2015. Further, the Appellant has failed to satisfy Rule 207, SCACR. These failures are sufficient to form the basis for the dismissal of this appeal.

WHEREFORE, Respondent respectfully prays that this Court dismiss the appeal and such other relief as this Court deems just and proper.

Respectfully Submitted,

By:


Jordan Crapps
S.C. Bar No. 100580

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February 8, 2016
Columbia, South Carolina

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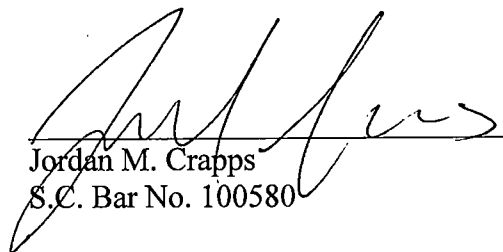
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SECURITIES COMMISSIONER OF SOUTH CAROLINA, Respondent.

PROOF OF SERVICE

I, Jordan Crapps, attorney for the Respondent, certify that I have served the Motion to Dismiss Appeal on Appellant by depositing a copy of it in the United States Mail postage prepaid on February 8, 2016, addressed to attorney of record for the Appellants, Mr. Robert V. Mathison, Jr., Mathison and Mathison, P.O. Box 5271, Hilton Head Island, South Carolina 29938.


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February 8, 2016
Columbia, South Carolina



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ALAN WILSON
SECURITIES COMMISSIONER

February 8, 2016

The Honorable Jenny Abbot Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Post Office Box 11629
Columbia, South Carolina 29211

Re: John McIntyre v. Securities Commissioner of South Carolina
Appellate Case No. 2015-001845

Dear Ms. Kitchings:

Enclosed, please find a Motion to dismiss the above referenced appeal and six (6) copies. If you have any questions, please contact me at the information below or by email at JCrapps@scag.gov. Thank you for your assistance.

Sincerely yours,

Jordan M. Crapps
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S.C. Bar No. 100580

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Enclosures

Cc: Robert V. Mathison, Jr. Esq. (with copy of enclosure)