

80443

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

JUL 29 2016

APPEAL FROM CHARLESTON COUNTY
Circuit Court Judge J.C. Nicholson, Jr. SC Court of Appeals

JAMES ABBOTT..... Appellant

Vs.

MICHELE BLANK..... Respondent

**RESPONDENT'S MOTION FOR LEAVE
TO FILE AN INITIAL BRIEF AND
DESIGNATION OF MATTER AND TO
STAY THE FILING OF ALL FINAL
BRIEFS AND RECORD ON APPEAL**

Respondent Michele Blank files this Motion for Leave to Serve and File an Initial Brief and Designation of Matter out of time and to Stay the filing of any Final Briefs and the Record on Appeal based upon the following circumstances. This appeal arises from the affirmance by the Circuit Court of a Judgment entered by Charleston County Magistrate Guerard in the amount of \$5000. (plus costs) in favor of the Respondent in 2014. The Appellant was and is pro se throughout the lower court proceedings and Frampton Durban, Jr. Esq. represented Respondent. Appellant filed an earlier appeal from the Order affirming the Judgment, 2014-002751, to which Attorney Durban filed a Motion to Dismiss the Appeal. This Court issued a Remittitur returning the case to the Circuit Court by Order dated March 23, 2015 because of the lack of a final order. Exhibit A. Subsequently the Circuit Court issued a Final Order dated March 3, 2016 affirming the Magistrate's Court Judgment. Appellant

filed a Notice of Appeal dated March 29, 2016 and an Initial Brief and a Designation of Matter on April 25, 2016 and served Attorney Durban with these filings.

During this time period two Ethics Complaints had been pending against Attorney Durban for failing to attend to matters which had been entrusted to him. By Order dated June 24, 2016, the Supreme Court temporarily suspended Attorney Durban and appointed a receiver to oversee his files. Exhibit B. However, Respondent was unaware of the filing of the Notice of Appeal or that Attorney Durban was not responding to it. Respondent first learned about the pendency of this appeal and the need to seek new counsel by Letter dated July 19, 2016 from the Clerk of the Court of Appeals.

Respondent recently received Attorney Durban's file from the Court Appointed Receiver and retained new counsel on July 25, 2016. Upon review of the file, Respondent's new counsel determined that by Letter dated June 16, 2016, the Clerk of the Court of Appeals had directed Appellant to file his Final Brief and Record on Appeal because no Respondent's Initial Brief had been filed. Appellant served his Final Brief and Index to Principal Matters Included in Record on Appeal on July 5, 2015.

MEMORANDUM OF LAW

SCACR 267(b) provides that "The time prescribed by these Rules for performing any act except the time for serving the notice of appeal under Rules 203 and 243 may be extended or shortened by the appellate court, or by any judge or justice thereof." Respondent contends that the interest of justice would be served by allowing her the opportunity to file and serve an Initial Brief and Designation of Matter. Respondent had no notice that there had not been any response to Appellant's Initial Brief and Designation of Matter or that Appellant

was allowed to file his Final Brief. She timely obtained new counsel after learning of the need to do so.

In addition, Appellant's Initial Brief is in violation of various appellate Rules. Appellant's Initial Brief asserts that the Issues on Appeal includes matters outside of the record below including proceedings involving the Charleston County Sheriff and another Magistrate, Thomas Lynn who had nothing to do with the decision being appealed, claims of ethical violations by Attorney Durban not in front of the Courts below and improper action by Judge Nicholson's law clerk. Initial Brief at pages 3-4. Most of the Appellant's Statement of Facts does not refer to the Transcript of Proceedings before Judge Guerard, see Appellant's Initial Brief at pages 4-8. Similarly the Legal Argument addresses these non issues against the County Sheriff, Magistrate Lynn and Judge Nicholson's Law Clerk. Appellant's Initial Brief at pages 14-18, 20. On their face, these are violations of SCACR 208 (b)(1)(B)-(D). The Designation of Matter contains material in violation of SCACR 209(b) that was not submitted before Magistrate Guerard at the time of the trial in November 2013 and was not included in his Return to the Appeal filed in Circuit Court. These extraneous materials include correspondence with the North Carolina Wildlife Resources Commission and a North Carolina court case. Finally, the Appellant's Final Brief is not bound, has the same deficiencies as the Initial Brief and does not comply with SCACR 211(a) and 267(d). There is no prejudice to the Appellant by allowing Respondent to file a late Initial Brief when Appellant has not abided by the Rules of this Court.

Finally, the Court should recognize that the appeal is without merit because the Appellant has admitted before this Court that he owes Respondent the \$5000 awarded to Respondent by Magistrate Guerard, although he claims it is for a different reason than the

Magistrate found. See Appellant's Initial Brief at page 28. Respondent wishes to bring this matter to finality and to do so needs the opportunity to demonstrate the deficiencies of this appeal and to seek sanctions for Appellant's frivolous conduct.

Respectfully submitted,

By: 

Edward A. Bertele, Esq.

S.C. Bar No 72521

1812 Pierce Street

Charleston, SC 29492

843-471-2082

Attorney for Respondent, Michele Blank

Dated: July 27, 2016
Charleston, SC

The South Carolina Court of Appeals

James R. Abbott, Appellant,


v.

Michele Blank, Respondent,

Appellate Case No. 2014-002751

ORDER

It appears that the circuit court has not issued a final decision in this case and intends to schedule a hearing to consider Appellant's motion. Accordingly, this appeal is dismissed without prejudice. Nothing prevents either party from appealing the circuit court's final order. A second filing fee will not be collected from a party who previously appealed.


C.J.
FOR THE COURT

Columbia, South Carolina

cc:
The Honorable J.C. Nicholson, Jr.
James R. Abbott
Frampton Durban, Jr., Esquire

FILED
3/23/15

Exhibit A

The Supreme Court of South Carolina

In the Matter of Frampton Durban, Jr., Respondent.

Appellate Case No. 2016-001336 and 2016-001348

ORDER

The Office of Disciplinary Counsel asks this Court to place respondent on interim suspension pursuant to Rule 17 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The petition also seeks appointment of the Receiver to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of this Court.

IT IS FURTHER ORDERED that Peyre Thomas Lumpkin, Esquire, Receiver, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Lumpkin may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain that are necessary to effectuate this appointment.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Peyre Thomas Lumpkin, Esquire, Receiver, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Peyre Thomas Lumpkin, Esquire, Receiver, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Lumpkin's office.

Mr. Lumpkin's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

Within fifteen days of the date of this order, respondent shall serve and file the affidavit required by Rule 30, RLDE. Should respondent fail to timely file the required affidavit, he may be held in civil and/or criminal contempt of this Court as provided by Rule 30, RLDE.

s/Costa M. Pleicones
Costa M. Pleicones
Chief Justice of South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Circuit Court Judge J.C. Nicholson, Jr.

JAMES ABBOTT..... Appellant

Vs.

MICHELE BLANK..... Respondent

**AFFIDAVIT OF EDWARD A. BERTELE
IN SUPPORT OF MOTION TO FILE INITIAL
BRIEF AND DESIGNATION OF MATTER
AND TO STAY FURTHER FILINGS**

County of Berkeley)

State of South Carolina)

Edward A. Bertele, of full age being duly sworn according to law deposes and says:

1. I am an attorney at Law of the State of South Carolina and have personal knowledge of the facts set forth herein.
2. I respectfully request that this Court grant leave to Respondent to file an Initial Brief and Designation of Matter out of time and to stay and further filing by Appellant of any Final Brief or the Record on Appeal. This request is based upon the following facts. I was retained by the Respondent to represent her in this matter on July 25, 2016 based upon her receipt of a letter from the Clerk of the Court of Appeals advising her that she should obtain new counsel because her attorney in the proceedings below, Frampton Durban, Esq. had been suspended. I reviewed his file and determined that Attorney Durban had been served with the Notice of

Appeal dated March 29, 2016 and an Initial Brief dated April 25, 2016 and a Designation of Matter. However, there is no indication in the file that Attorney Durban ever filed any Initial Brief or Designation of Matter or wrote to Respondent advising her of his intention not to respond to them. I also found that by letter dated June 16, 2016, the Clerk of the Court of Appeals advised the Appellant that he should file his Final Brief and the Record on Appeal. The Appellant served his Final Brief and Index to Principal Matters Included in Record on Appeal on July 5, 2015.

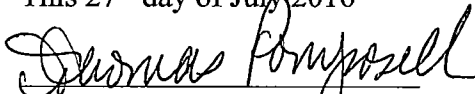
3. The interest of justice would be served by allowing Respondent the opportunity to respond. Based upon information and belief, Respondent had no notice that there had not been any response to the Initial Brief and that Appellant was allowed to file his Final Brief. Appellant's Initial Brief is in violation of various appellate Rules. In his Initial Brief, Appellant asserts that the Issues on Appeal includes matters outside of the record below including proceedings involving the Charleston County Sheriff and another Magistrate, Thomas Lynn who had nothing to do with the decision being appealed, claims of ethical violations by Attorney Durban not in front of the Courts below and improper action by Judge Nicholson's Law Clerk. Initial Brief at pages 3-4. Most of the Appellant's Statement of Facts does not refer to the Transcript of Proceedings before Judge Guerard, see Appellant's Initial Brief at pages 4-8. Similarly the Legal Argument addresses the non-issues against the County Sheriff, Magistrate Lynn and Judge Nicholson's Law Clerk. Appellant's Initial Brief at pages 14-18, 20. On their face, these are violations of SCACR 208 (b)(1)(B)-(D). The Designation of Matter contains material that was not submitted before Magistrate Guerard at the time of the trial in November 2013 and was not included in his Return to the Appeal filed in Circuit Court in violation of SCACR 209(b). These extraneous materials include correspondence with

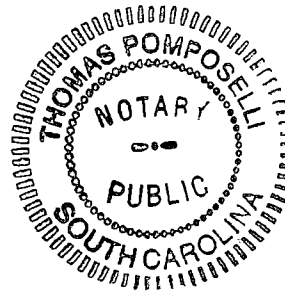
the North Carolina Wildlife Resources Commission and a North Carolina court case. Finally, the Appellant's Final Brief is not bound, is incomplete and does not comply with SCACR 211(a) and 267(d).

4. It would serve the interest of justice to allow Respondent to bring all these deficiencies to the Court's attention so that its resources will not be wasted in trying to understand what Appellant is claiming and to focus the Court on what issues, if any are really involved in this appeal.


Edward A. Bertele

Sworn and subscribed before me
This 27th day of July 2016


Notary Public of South Carolina



**EDWARD A. BERTELE
ATTORNEY AT LAW
1812 PIERCE STREET
CHARLESTON, SC 29492
Email: ebertele@msn.com**

RECEIVED

JUL 29 2016

SC Court of Appeals

Member: SC, NJ & NY bars

Ph: (843) 471-2082

Fax: (843) 471-2082

July 27, 2016

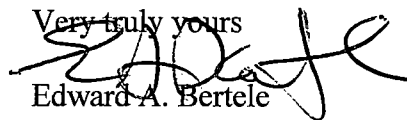
Ms. Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
1220 Senate St.
PO Box 11629
Columbia, SC 29211

**Re: Abbott v. Blank
Case No. 2016-000712**

Dear Ms. Kitchings:

I represent the Respondent in this case, Michele Blank. Enclosed for filing is the original and six copies of Respondent's Motion for Leave to File Initial Brief and Designation of Matter out of time and for other relief and Affidavit of Edward A. Bertele, Esq. Also included is a Certification of Service and the Motion fee (\$25.00). Thank you for your attention to this matter.

Very truly yours



Edward A. Bertele

CC: James Abbott, pro se
Encl:

Edw. J. Bertele, Esq.
1812 Pierce St
Charleston SC 29492



RECEIVED

JUL 29 2016

SC Court of Appeals

Ms Jenny Abbott Ketchings, Clerk
South Carolina Court of Appeals
1220 Senate St.
PO Box 11629
Columbia SC 29211