

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
SEP 26 2016
SC Court of Appeals

Appellate Case No: 2016-001063

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2009-CP-26-3596

Ronald Jarmuth

.....Appellant

v.

The International Club

.....Respondent

APPELLANT’S OPPOSITION TO RESPONDENT’S
“Motion for Enlargement of Time” to file HOA Initial Response Brief

Appellant Ronald Jarmuth states his Opposition to Respondent’s
“Motion for Enlargement of Time” to file HOA Initial Response Brief and Moves that the
Court DENY the Motion.

The HOA’s motion to extend should be denied because:

- (1) The HOA’s motion is meritless;
- (2) The HOA’s motion was filed eighteen (18) days after the brief was due;
- (3) The HOA did not seek an extension from Appellant prior to filing the motion
to extend:
- (4) The HOA has not shown any reason at all, let alone exigent circumstances,

why it was unable to prepare and file its' Initial Response Brief within the 30 days permitted.

(5) The HOA filed its' motion to extend only after Appellant moved the Court, eleven (11) days after the Initial Response Brief was due -- to order that the case shall proceed using only Appellant's Brief and Appellant's Designation of the Record on Appeal. [1]

(6) The "inclement weather" excuse stated by the HOA is inapplicable because there was no inclement weather on September 1, 2016 when the HOA's Initial Response Brief was due. The Clerk's Office and the U.S. Post Office were both open. The inclement weather cited occurred the following day and again, both the Clerk's Office and the U.S. Post Office were open.

(7) Respondent's counsel did not excusably overlook litigation between the parties because:

(a) six (6) days before Initial Response Brief was due, Respondent's counsel filed a 10" thick, approximately 2,500 page thirty-four (34) Exhibit Motion to Dismiss a parallel South Carolina federal case involving the same parties and same subject matter (as this appeal). Respondent's Motion to Extend does not plead that this represented an unbearable resource burden (the Motion is silent about the parallel federal case) [2].

(b) Two (2) workdays after the Initial Response Brief was DUE (September 1, 2016), Respondent filed with this Court (September 6, 2016) an approximately 400 page long "Motion to Dismiss". The Motion to Extend does not plead

1 The Respondent failed to file its' initial Designation of the Record on Appeal and has not moved for permission to belatedly file such a designation.

2 Ronald Jarmuth and S.C. Attorney General v International Club HOA, USDC-SC, Case 4:16-CV-00242

that the Motion to Dismiss was a burden on the attorney's resources.

On page 2 of Respondent's Motion they wrote

(8) The weather and holiday which the HOA mentions occurred AFTER the September 1, 2016 due date for Respondent's Initial Brief. Per the Myrtle Beach Sun New it was sunny and rain free on September 1, 2016 in Myrtle Beach, SC. Yet the HOA wrote:

"The east coast of South Carolina experienced extreme weather from late September 1, 2016 through September 3, 2016 due to tropical storm Hermine. McNair Law Firm, P.A.'s offices were closed early on September 2, 2016 and were closed on September 5, 2016 in order to observe Labor Day. Due to the weather and the observance of a federal holiday, the Association did not serve its Motion to Dismiss until September 6, 2016."

Whatever the truth the HOA managed to file its' Motion to Dismiss on Tuesday, September 6, 2016 notwithstanding the same weather and holiday circumstances. The argument is akin to pleading, in a vehicular homicide case, that the driver was not negligent in driving into a pedestrian because the car unpredictably skidded due to the rain that fell five days after the accident.

Simply put, the HOA Respondent had sufficient time and resources to file its' Initial Response Brief but chose to ignore the rules. Appellant speculates that there simply is no winning argument that the HOA could offer in a response brief as to how a trial court had subject matter jurisdiction to grant relief for a claim which has not been plead in a counter – claim and which was first mentioned in the testimony of one of Defendant / Respondents' witnesses at trial and where a demand for reimbursement of attorney fees to defend a housing discrimination claim constitutes criminal retaliation by both the attorney and the client under federal law. [3]

3 The federal case, footnote #2, was filed on January 26, 2016. After reviewing the federal complaint and directing certain modifications, the federal court found that it is both plausible and supported by evidence that the HOA Respondent, enabled by its attorneys in

Exhibits supporting facts above:

Exhibit 1 – Timeline HOA Pleading Activity and Obligations

Exhibit 2 – Myrtle Beach SC Weather, Thursday September 1, 2016. Myrtle Beach Sun News.

Exhibit 3 - Myrtle Beach SC Weather, Friday September 2, 2016. Myrtle Beach Sun News.

Exhibit 4 – Myrtle Beach SC Weather, Tuesday September 6, 2016. Myrtle Beach Sun News.

Exhibit 5 –HOA 2,500 page “Motion to Dismiss” filed August 26, 2016 (picture) in US District Court – South Carolina, Jarmuth & SC Attorney General v International Club HOA #4-16-CV-00242.

Exhibit 6 – HOA 400 page “Motion to Dismiss” filed September 6, 2016 in this case (picture).

**The Law Regarding Extensions of Time to File a Brief
HOA Respondent Does Not Qualify**

The controlling case regarding Motions to Extend in the South Carolina Court of Appeals is Wade v. Gore, 151 S.E. 470 (S.C. 1930) Supreme Court of South Carolina.

In that case the Court noted that the appellant took no steps to secure the consent of the respondent and did not file a motion with the court for an extension of time prior to the expiration of the deadline. The court wrote:

"At almost every session of this Court motions of this character are made, and in a majority of cases they are refused. Such motions take up much time that could be better used in disposing of cases awaiting on the docket to be heard, cases prepared diligently for hearing. Because of the prevalence of these motions, we think it well to state, and to have reported, for the information of the bar, the attitude of the Court ...

If, for any reason, counsel ... see that the proper steps or proceedings in the preparation ... of the appeal cannot be taken within the permitted time, such counsel

this case, committed criminal retaliation for filing a housing discrimination complaint and pursuant to a federal enabling statute, ordered on August 1, 2016 that a summons and complaint in the matter be served on the same HOA which is a respondent in this case for parallel reasons.

should seek early enough, and before the time has expired, to procure the consent of the opposing counsel for further time in the matter; and the proper and safer practice, for the protection of all parties, and for the Court as well, is to have such consent, if obtained, evidenced by writing.

If the opposing counsel do not consent to an extension of time, or, if for any good reason counsel cannot, or should not, ask opposing counsel for the extension, then ... counsel should proceed on motion ... from one of the justices of this Court, an order allowing the time to be extended. Attorneys should be reminded, perhaps, that the motion for such extension must be made before the expiration of the time limited, and at least four days' notice of such notice must be given to the opposite party. (citing Tribble v. Poore, 28 S.C. 565, 6 S.E., 577; Deal v. Deal, 85 S.C. 262, 67 S.E., 241.

Discretion will not be exercised in favor of litigants and their attorneys who have "allowed things just to rock along," expecting this Court to take care of them under any and all circumstances. A party seeking relief under that section will have to show clearly that the acts, which were necessary for him to do, were omitted "through mistake or inadvertence," ...

An applicant ... should show also that he has endeavored to secure extension of time within the proper time, as hereinbefore indicated, or that for some especially good reason he could not secure the same"

Rules of Appellate Procedure promulgated by the South Carolina Supreme Court clearly envisions a failure to file a brief as a default. The Rules clearly construe a failure to file a brief as a waiver by the defaulting party of the right to contest an appeal. Rule 208(a)(4), SCACR, provides in part: "Upon the failure of the respondent to timely file a brief, the appellate court may take such action as it deems proper." The effect of a Respondent's failure to file a brief is to reverse the judgment below - Wierszewski v. Tokarick, 308 S.C. 441, 418 S.E.2d 557 (Ct.App.1992).

The Court has stated that

"this court should not be inclined to do what Campbell neglected to do [by failing to file a brief], i.e., "search the record for reasons to affirm." - Wierszewski at 308 S.C. at 444 n. 2, 418 S.E.2d at 559 n. 2; also stated in Smith v South Carolina Dep't of Soc. Servs., 284 S.C. 469, 327 S.E.2d 348 (1985)

In Turner v Santee Cement Carriers 277 S.C. 91 (1981) 282 S.E.2d 858 Respondent

Turner did not file a brief with the Court. The Court wrote that

“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”

The HOA initially declared in its’ Motion to Dismiss (filed – filed September 6, 2016, five (5) days after the HOA’s brief was due -- that it had unilaterally chosen to defer filing its’ Initial Response Brief. This is explicitly prohibited by SCRAP Rule 263 Time:

(b) Extending and Diminishing Time Prescribed by These Rules. The time prescribed by these Rules for performing any act ... may be extended or shortened by the appellate court, or by any judge or justice thereof. The time prescribed by these Rules for performing any act or taking any action may not be extended by agreement of the parties.

The rule requires that a motion must be filed with the Court of Appeals. The case law set out in Wade v Gore op cit and reiterated in countless cases since then establishes the following requirements:

1. Seek the consent of the opposing side well before the time has expired.
2. File a motion with the Court of Appeals early enough for the Court to rule on the motion BEFORE the time to perform some act has expired.

In the more recent case of Assoc'd Petrol. Carriers v. Mut. Properties, Inc 235 S.C. 195 (1959) 110 S.E.2d 861 the Supreme Court wrote that a:

"failure shall amount to a waiver" and

"If, for any reason, counsel ... see that the proper steps or proceedings in the preparation ... of the appeal cannot be taken within the permitted time, such counsel should seek early enough, and before the time has expired, to procure the consent of the opposing counsel for further time in the matter”;

"counsel should proceed on motion ... to secure ... from one of the justices of this court, an order allowing the time to be extended. Attorneys should be reminded, perhaps, that the motion for such extension must be made before the expiration of the time limited, (citing Tribble v. Poore, 28 S.C. 565, 6 S.E. 577; and Deal v. Deal, 85 S.C. 262, 67 S.E. 241.)"

Federal Appellate Practice

The parallel federal appellate circuit courts have taken a harsher line regarding failures to file a brief. None of them recognize filing a motion to dismiss at the appellate level as a reason not to at least ask, in advance, for an extension of time to file a brief.

The USCA-4th Circuit has addressed the inclement weather “strawman” issue cited by the HOA and disallowed it. The rule only contemplates the circumstance where the Clerk’s office is shut down due to a weather event. Parties are expected to use the thirty days (30) available to them to get their briefs in on time:

“Local Rule 26. Inclement Weather. ... Whenever a party in computing a filing or service date relies upon an extension of time due to the inaccessibility of the Clerk’s Office because of inclement weather or other conditions, ... counsel must certify such reliance in the certificate of service or by separate written declaration.

The 4th Circuit has specifically addressed the issue of late briefs through its’ local rules:

4th Circuit Local Rule 31(c); Briefing Extensions. Extensions of time to file briefs will be granted only when extraordinary circumstances exist. A motion for extension of time to file a brief must be filed well in advance of the date the brief is due and must set forth the additional time requested and the reasons for the request. The court discourages these motions and may deny the motion entirely ...

The federal appellate rules themselves treat the failure to file a brief as a waiver of the party’s right to dispute an appeal:

Fed. R. App. P. 31(c). “If ... (a party) fails to timely file its brief, the clerk’s office will issue notice under Local Rule 45 that the appeal will be dismissed unless counsel remedies the default within 15 days. If appellant is represented by court-appointed counsel, the clerk will issue notice of intent to initiate disciplinary action under Local Rule 46(g) instead of threatening dismissal under Local Rule 45. If appellee fails to file a brief, the appellee will not be heard at any oral argument scheduled in the matter except by leave of court. Fed. R. App. P. 31(c).”

USCA-10th Circuit

The USCA-10th Circuit has done the most to clarify the pre-requisites to obtaining an extension to file an appeal. That guidance also emphasizes an inflexible insistence on filing for an extension prior to the expiration of the date due and demonstrating a real necessity. This framework has been stated in City of Chanute v. Williams Natural Gas Co., 31 F.3d 1041, 1046 (10th Cir. 1994) ; and Bishop v. Corsentino, 371 F.3d 1203, 1207 (10th Cir. 2004) (quoting Advisory Committee's Note to 2002 Amendments to FRAP 4).

The Tenth Circuit has addressed Extending the Time to File a Brief in multiple local rules. Those rules state twice that motions to extend time to file briefs are “disfavored,”[4] and as a result, the court imposes a number of specific requirements on such motions, including the following: (a) the motion must state the brief’s due date and the opposing party’s position and must list any prior motions for extension and the court’s action on them;[5] (b) the motion “must establish that it will not be possible to file the brief on time, even if the party exercises due diligence and gives priority to preparing the brief”:[6] and (c) the motion must be filed at least five court-business days before the brief’s due date, unless the reasons for the requested extension did not exist or were unknown earlier.[7]

The movant must provide specific factual bases for the requested extension and may not rely on generalities.[8] .

Reasons that the Tenth Circuit will consider include that other litigation presents a scheduling conflict, that the appeal is so complex that additional days are necessary to

4 10th Cir. R. 27.4(A), 31.4.

5 10th Cir. R. 27.4(B)(1)-(3).

6 10th Cir. R. 27.4(C).

7 10th Cir. R. 27.4(F).

8 10th Cir. R. 27.4(C)(1)-(2).

prepare an adequate brief, or that counsel will suffer extreme hardship if required to file the brief without an extension.[9] Whatever the reason, it must be supported by specific factual information. Thus, if other litigation presents a conflict, the motion should identify the other litigation by caption, number and court, describe the action taken to obtain a continuance in the other action (or why no such action was taken), state why the other litigation should receive priority, state why another attorney cannot prepare the brief for timely filing or handle the competing matter and state any other relevant circumstances.[10] If the motion is based on the complexity of the appeal, the motion must demonstrate the complexity through specific facts.[11] If the motion asserts the prospect of extreme hardship to counsel, it must state the nature of the hardship.[12] An extension also may be warranted where parties are coordinating to file a single brief. [13] In addition, if the circuit mediation office has ordered a mediation conference, that office may extend the time for filing a brief.[14]

CONCLUSIONS

1. The HOA Respondent failed to file its' Initial Response Brief.
2. The HOA failed to request an extension prior to the deadline for filing the brief.
3. The HOA has not plead any allowable or even non-allowable extenuating circumstances.
4. The HOA's failure to file its' Initial Brief was not a result of neglect or error.

9 10th Cir. R. 27.4(D)(1)-(3).

10 10th Cir. R. 27.4(D)(1)(a)-(e).

11 10th Cir. R. 27.4(D)(2).

12 10th Cir. R. 27.4(D)(3).

13 10th Cir. R. 31.3(C).

14 10th. Cir. R. 33.1(F).

5. The HOA Respondent had ample resources and opportunity to file its' Initial Response Brief within the mandated deadline but chose to expend those resources on other matters.

6. The applicable authority supports a denial of the HOA's Motion to Extend.

7. There is no meritorious reason to grant the extension.

8. An extension would be unfair to Appellant who has diligently acted within the rules.

9. The case should proceed using only Appellant's Brief and Designation of the Record on Appeal; or in the alternative, the failure of the HOA to file its' initial brief should be treated as a waiver and Appellant's petition for reversal should be granted.



Ronald Jarmuth, Plaintiff Pro Se
249 Pickering Drive
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SEP 26 2016

SC Court of Appeals

September 26, 2016

EXHIBITS

TIMELINE HOA PLEADING ACTIVITY AND OBLIGATIONS

Day	Date	SC Court of Appeals Event	USDC-SC Federal Event	Weather
Monday	August 1		USDC-SC Order for Service on HOA of Federal Complaint	
Tuesday	August 2	Jarmuth Initial Brief Served		
Wednesday	August 3	Jarmuth Initial Brief Filed		
Friday	August 5	Jarmuth Initial Brief Received by HOA	USDC-SC Federal Complaint Received by HOA	
Friday	August 26		HOA Motion to Dismiss filed 2,500 pages 10" thick 34 Exhibits (4 days early)	
6 more day lefts				
Thursday	September 1	HOA Initial Response Brief DUE		SUNNY
Friday	September 2			Rain in AM Storm in PM
Monday	September 5	Holiday		SUNNY
Tuesday	September 6	HOA Motion to Dismiss w 400 pages		SUNNY
		* HOA Brief 5 days late		
Monday	September 12	Jarmuth Response to HOA Motion to Dismiss		
		* Notes HOA Brief is 11 Days Late		
Monday	September 19	HOA Motion to Extend Time for Initial Response Brief		
		* HOA Brief 18 Days Late		

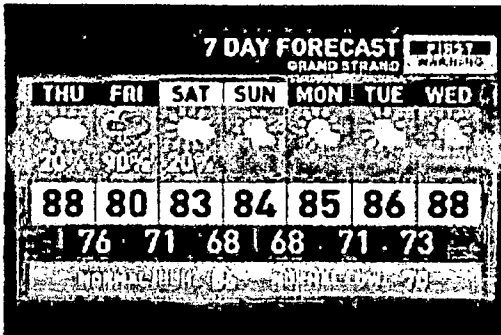
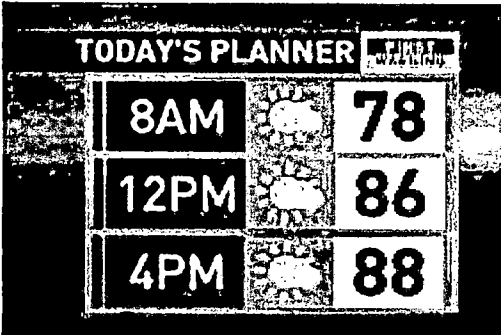
Myrtle Beach, SC Weather
Thursday September 1, 2016

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Weather

THURSDAY SEPTEMBER 1, 2016
MYRTLEBEACHONLINE.COM

THE SUN NEWS



Today will be a decent day with only a small chance for a shower or storm. Tropical Storm Hermine will move over South Carolina on Friday afternoon and night. Rain will increase and wind will pick up later Friday afternoon and through the night. We are expecting rainfall totals of 4-8" and wind gusts up to 50 mph. Rain ends by daybreak Saturday and winds diminish through the day.
Ed Piotrowski - Chief Meteorologist

Yesterday's Rainfall: Myrtle Beach
 Myrtle Beach: 1.20" Rainfall:
 N. Myrtle Beach: 0.50"
 Surfside Beach: 0.67" Month-to-Date:
 Pawleys Island: 0.22" 4.00"
 Georgetown: 0.18" Year-to-Date:
 Carolina Forest: 0.25" 25.64"
 Conway: 0.25" Normal-to-Date:
 Aynor: 0.13" 35.35"
 Socastee: 0.70" Last Year-to-Date:
 Little River: 0.49" 32.76"

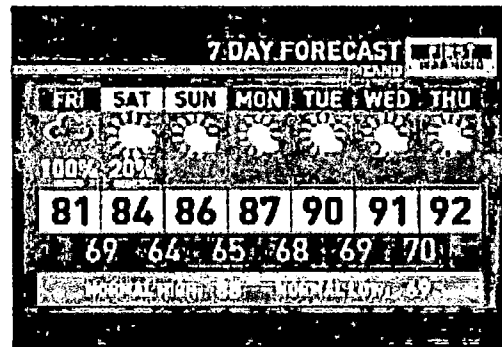
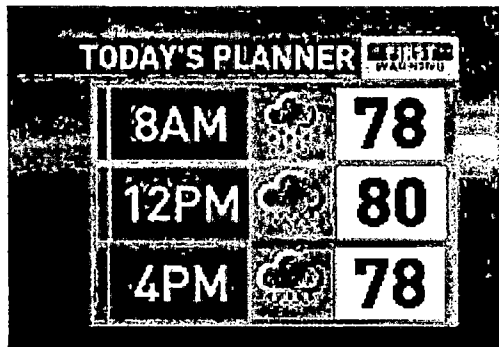
Myrtle Beach, SC Weather
 Friday September 2, 2016

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Weather

FRIDAY SEPTEMBER 2 2016
 MYRTLEBEACHONLINE.COM

THE SUN NEWS



Hermine will move through the area today and tonight. Expect periods of heavy rain especially this afternoon and this evening. Rain begins tapering off after midnight. Most areas will receive between 3-6 inches of rain. Winds will gradually pick up and gust near 50 mph this evening and tonight. The winds will diminish as we head toward Saturday morning.

Ed Plotrowski- Chief Meteorologist

Yesterday's Rainfall:	Myrtle Beach
Myrtle Beach:	0.00" Rainfall:
N. Myrtle Beach:	0.00"
Surfside Beach:	0.00" Month-to-Date:
Pawleys Island:	0.00" 0.00"
Georgetown:	0.00" Year-to-Date:
Carolina Forest:	0.00" 25.64"
Conway:	0.00" Normal-to-Date:
Aynor:	0.00" 35.61"
Socastee:	0.00" Last Year-to-Date:
Little River:	0.00" 32.76"

"Hermine will move through the area today and tonight. Expect periods of heavy rain especially this afternoon and this evening. Rain begins tapering off after mid-night. Most areas will receive between 3-6 inches of rain. Winds will gradually pick up and gusts near 50 mph this evening and tonight. The winds will diminish as we head toward Saturday morning.

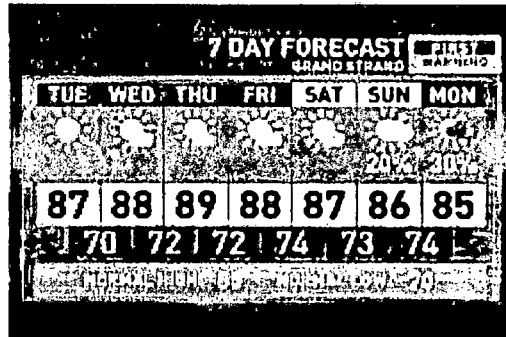
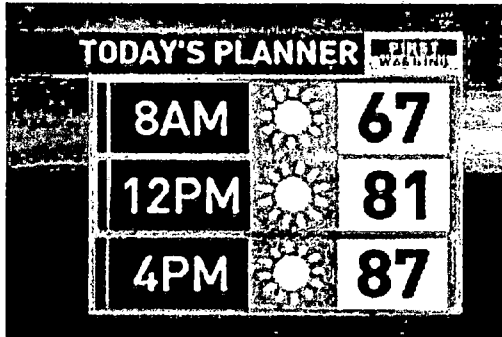
Myrtle Beach, SC Weather
 Tuesday September 6, 2016

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Weather

TUESDAY, SEPTEMBER 6, 2016
 MYRTLEBEACHONLINE.COM

THE SUN NEWS

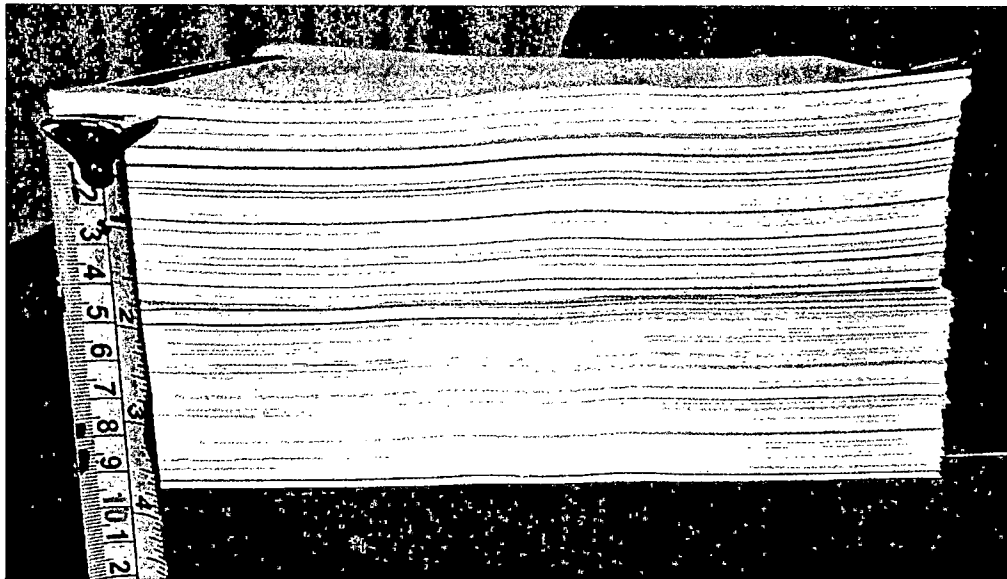
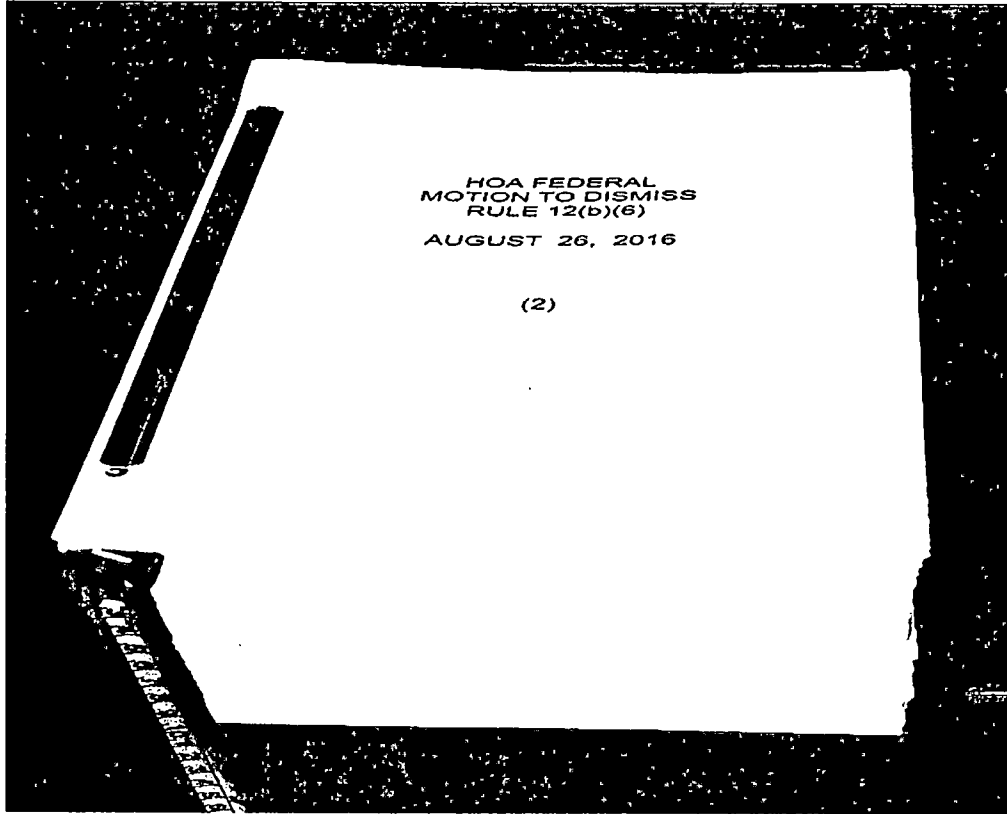


Hermine is well to our northeast and a front is well to our south. The result? Less heat and humidity continuing for the Grand Strand through mid-week. Temperatures will be in the upper-80s most days with dew points in the mid-60s. No rain is expected until the beginning of next week. Get outside and enjoy!

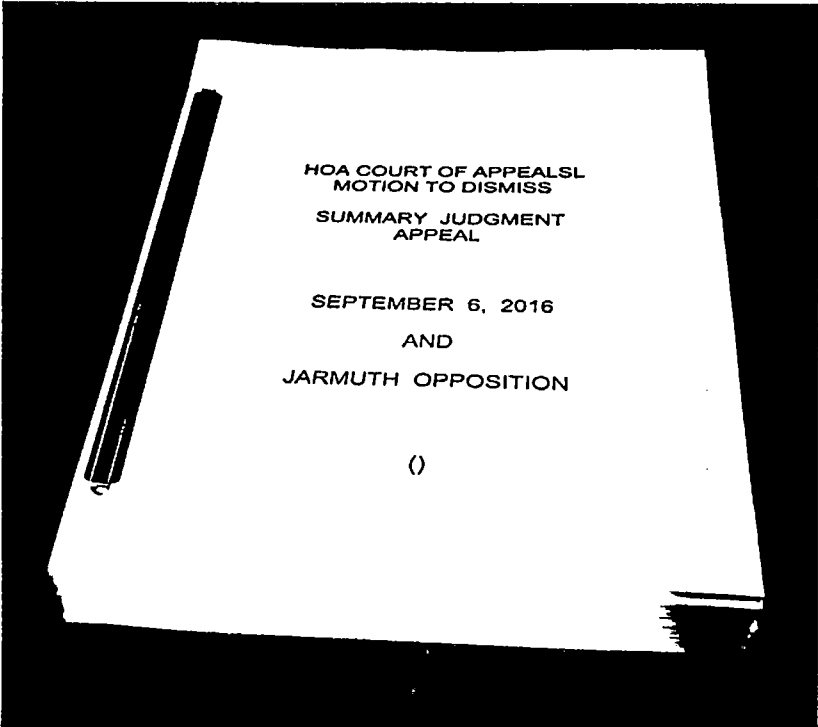
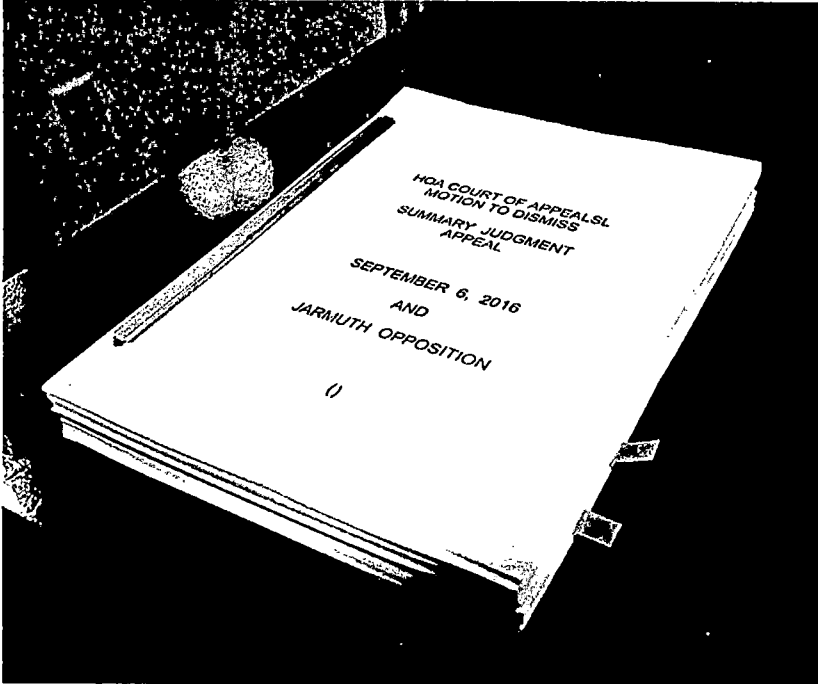
Brittany Van Voorhees - Meteorologist

Yesterday's Rainfall: Myrtle Beach
 Myrtle Beach: 0.00" Rainfall:
 N. Myrtle Beach: 0.00"
 Surfside Beach: 0.00" Month-to-Date:
 Pawleys Island: 0.00" 8.91"
 Georgetown: 0.00" Year-to-Date:
 Carolina Forest: 0.00" 34.55"
 Conway: 0.00" Normal-to-Date:
 Aynor: 0.00" 36.65"
 Socastee: 0.00" Last Year-to-Date:
 Little River: 0.00" 35.05"

Respondent International Club HOA's 2,500 page
Motion to Dismiss filed August 26, 2016
in U.S. District Court - South Carolina
"Jarmuth & SC Att'y Gen. v International Club HOA"



**Resppndent International Club HOA's Motion to Dismiss
Filed September 6, 2016 in Court of Appeals
Approximately 400 pages long**



THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Appellate Case No: 2016-001063

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2009-CP-26-3596

Ronald Jarmuth

.....Appellant


v.

The International Club

.....Respondent

PROOF OF SERVICE

Ronald Jarmuth, Appellant Pro se, certifies that on September 26, 2016 service of the attached "Appellant's Return in Opposition to Respondent's 'Motion for Enlargement of Time' to file HOA Initial Response Brief together with Appellant's Exhibits, was made upon the Respondent HOA by depositing a copy of same in the United States Mail, first class postage prepaid, addressed to Respondent's counsel, Henrietta U. Golding; McNair Law Firm, P.A.; 2411 Oak Street; Suite 206; Myrtle Beach, SC 29577-3164.



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September 26, 2016

Ronald Jarmuth
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September 26, 2016

The Honorable Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Post Office Box 11629
Columbia, South Carolina 29211-1629
803-734-1890

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SEP 26 2016
SC Court of Appeals

Re: Appellant's Return in Opposition to Respondent's
"Motion for Enlargement of Time" to file HOA Initial Response Brief

Dear Madam Clerk:

Please file the attached Appellant's "Return in Opposition to Respondent's 'Motion for Enlargement of Time' to file HOA Initial Response Brief" with supporting Exhibits together with a Certificate of Service.

Thank you for your attention to this matter.

Sincerely,



Ronald Jarmuth
Appellant Pro Se
249 Pickering Drive
Murrells Inlet, SC 29576

Encl: as
CF: Henrietta Golding, Attorney for Respondents