

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

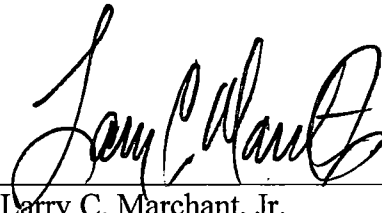
Appellate Case No.: 2016-001334

Caria Gorritz, .....Appellant,

v.

Prime Financial Services, .....Respondent.

INITIAL BRIEF OF RESPONDENT



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November 21, 2016

**Table of Contents**

Table of Authorities ..... *i*

Statement of Issues on Appeal ..... 1

Statement of the Case.....2

Facts .....3

Arguments.....4

    I. Appellant’s Appeal Should be Dismissed as Premature Because Appellant  
    Filed a Motion for a New Trial in the Court of Common Pleas in the Fifth Judicial  
    Circuit which is Still Pending .....4

    II. Appellant’s Appeal Should be Dismissed for Failure to File a Timely SCRCP  
    Rule 60 Motion to Set Aside the Order .....5

    III. The Trial Court Properly Dismissed Appellant’s Appeal from the Judgment  
    of Pontiac Magistrate Andy Surlles Based on Appellant’s Failure to Prosecute nor  
    was Appellant Prejudiced by Respondent’s Withdrawal of Motion to Continue.....5

Conclusion .....7

**Table of Authorities**

**Cases**

Coleman v. Dunlap, 306 S.C. 491, 413 S.E.2d 15 (1992) .....4

Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004).....6

McComas v. Ross, 368 S.C. 59, 626 S.E.2d 902 (Ct. App. 2006) .....4

Parks v. Characters Night Club, 345 S.C. 484, 548 S.E.2d 605 (Ct. App. 2001).....4

RRR, Inc. v. Toggas, 378 S.C. 174, 662 S.E.2d 438 (Ct. App. 2008).....6

Small v. Mungo, 254 S.C. 438, 175 S.E.2d 802 (1970) .....3

Thompson v. Ballentine, 298 S.C. 289, 379 S.E.2d 896 (1989).....5

Wilder v. Blue Ribbon Taxicab Corp., 396 S.C. 139, 719 S.E.2d 703 (Ct. App. 2011) .....6

**Statutes and Rules**

Rule 201(a) of South Carolina Appellate Court Rules .....4

Rule 60 of the South Carolina Rules of Civil Procedure .....4, 5

**STATEMENT OF ISSUES ON APPEAL**

- I. IS THE CURRENT APPEAL PREMATURE DUE TO APPELLANT'S FILING OF A MOTION FOR A NEW TRIAL IN THE COURT OF COMMON PLEAS, FIFTH JUDICIAL CIRCUIT, WHICH IS CURRENTLY PENDING?**
- II. DID THE TRIAL COURT ERR IN DISMISSING APPELLANT'S APPEAL FOR FAILURE TO PROSECUTE?**
- III. DID THE TRIAL COURT PREJUDICE APPELLANT BY DISMISSING APPELLANT'S APPEAL DESPITE RESPONDENT'S WITHDRAWAL OF MOTION OF CONTINUANCE?**

## STATEMENT OF THE CASE

The Ejectment Action underlying the first appeal giving rise to this current Appeal was initiated by Respondent due to Appellant's violation of a lease agreement and failure to pay rent. The Ejectment Action (2016-CV-40-10900010) was heard before Pontiac Magistrate Andy Surles on February 29, 2016, who ruled in favor of Respondent/Plaintiff finding Appellant/Defendant for violation of a lease agreement, past due rent, and accumulation of fees. (Magistrate Order of April 4, 2016). Appellant/Defendant filed an appeal of the Magistrate's Order of Eviction. A bond hearing was heard by Pontiac Magistrate Surles on April 4, 2016 and found Appellant/Defendant had not paid rent to Respondent/Plaintiff for five months and thus set Bond in the amount of \$5629.70 be held in escrow until the conclusion of the Ejectment Action appeal.

Appellant's appeal came before the Honorable L. Casey Manning on May 20, 2016 in the Richland County Court of Common Pleas, Civil Action No. 2016-CP-40-1407, and subsequently was dismissed for Appellant's failure to prosecute. (Order of May 26, 2016). On June 15, 2016, Respondent filed a Writ of Ejectment and Recovery of Past Due Rent and Fees as Ordered which was granted the same day by the Honorable Judge Andy Surles. Appellant was notified of the Order of Dismissal and her right to appeal the Order via Certified Mail Restricted Delivery on or about June 8, 2016 (Respondent's counsel received receipt of delivery signed by Appellant). (Certified Mail Receipt, dated June 10, 2016). Appellant filed Notice of Appeal on June 20, 2016 in the Court of Appeals, Fifth Judicial Circuit and Initial Brief of Appellant was served upon Respondent on August 22, 2016.

Unbeknownst to Respondent, on June 10, 2016 Appellant filed a Rule 59 motion for a new trial in the Court of Common Pleas in the 5th Judicial District; however, Appellant failed to serve or give notice of this motion to Respondent. Respondent was unaware of Appellant's motion for a new trial until approximately November 1, 2016 when notified by the office of the Honorable L. Casey Manning. Respondent filed a motion to dismiss the instant appeal pursuant to Rule 201(a) in this Court on November 7, 2016 and that motion is currently pending resolution.

### **FACTS**

At the hearing on May 20, 2016, the Honorable Casey L. Manning stated on the record, “[y]es, she (Appellant) got notice.” (Transcript p. 4, l. 8). Respondent, however, had no issues with receipt of notice from the Court regarding the hearing. Respondent filed a motion to continue due to filing his brief late. While Judge Manning did not receive a brief from Appellant, his chambers were in possession of Respondent's brief, though filed late. Respondent thus withdrew his motion to continue and the hearing proceeded, resulting in an Order of Dismissal of Appellant's appeal. Prior to initiating the actions which gave rise to the present action, counsel for Respondent tried to contact Appellant by telephone and email prior to the hearing to no avail. Respondent repeats the Procedural History of this matter as set forth in the Statement of the Case.

### **STANDARD OF REVIEW**

“Whether an action should be dismissed for failure to prosecute is left to the discretion of the trial court judge, and his decision will not be disturbed, except upon a clear abuse of discretion.” Small v. Mungo, 254 S.C. 438, 442, 175 S.E.2d 802, 804 (1970). “An abuse of discretion arises where the trial judge was controlled by an error of

law or where his order is based on factual conclusions that are without evidentiary support.” Coleman v. Dunlap, 306 S.C. 491, 495, 413 S.E.2d 15, 17 (1992). “The Court of Appeals will presume that an affirmance by a Circuit Court of a magistrate's judgment was made upon the merits where the testimony is sufficient to sustain the magistrate's judgment and there are no facts that show the affirmance was influenced by an error of law.” Parks v. Characters Night Club, 345 S.C. 484, 490, 548 S.E.2d 605, 608 (Ct. App. 2001). “A circuit judge has the right to direct how a case shall be tried. If he is wrong in the mode of this trial, this court will correct on appeal. When the appellant refused to proceed with the trial when ordered by the court, nonsuit was proper.” McComas v. Ross, 368 S.C. 59, 70, 626 S.E.2d 902, 908 (Ct. App. 2006)

#### **AGRUMENT**

**I. Appellant’s Appeal Should be Dismissed as Premature Because Appellant Filed a Motion for a New Trial in the Court of Common Pleas in the Fifth Judicial Circuit which is Still Pending.**

Rule 201(a) of South Carolina Appellate Court Rules provides that an appeal may be taken from any final judgment. SCACR 201(a). On June 10, 2016, Appellant filed a motion for a new trial with the circuit court (Appellant did not specify which Rule of Civil Procedure on which she based her motion). (Notice of Appeal, June 10, 2016). Respondent was not notified of that filing until November 1, 2016 when the offices of Judge Manning contacted Respondent to notify of a new trial on the motion roster. That motion is currently awaiting a final determination. Respondent promptly filed a motion to dismiss Appellant’s appeal pending before this Court on November 7. (Motion to Dismiss, November 7, 2016). Respondent’s motion for dismissal is currently pending before this Court. As SCACR 201(a) provides that an appeal may only be taken

from a final judgment, Appellant's appeal to this Court must be dismissed as the ruling of the trial court she seeks to appeal is currently awaiting final determination in that court.

**II. Appellant's Appeal Should be Dismissed for Failure to File a Timely SCRPC Rule 60 Motion to Set Aside the Order.**

"Relief from a final judgment must be had through Rule 60 of the South Carolina Rules of Civil Procedure." Thompson v. Ballentine, 298 S.C. 289, 291, 379 S.E.2d 896, 898 (1989). Prior to filing this appeal, Appellant failed to file a Rule 60 motion to set aside the order of dismissal by the trial judge. Rule 60(b) provides for relief from a final judgment, order, or proceeding in the case of mistake, inadvertence, surprise, or excusable neglect and a motion pursuant must be entered within a reasonable time. SCRPC 60. In order to preserve an issue for appeal, it must have been raised to and ruled upon by the circuit court. RRR, Inc. v. Toggas, 378 S.C. 174, 185, 662 S.E.2d 438, 443 (Ct. App. 2008). As Appellant argues in her appeal to this Court that the trial court dismissed her appeal in error, the proper procedure for Appellant to seek relief from that judgment would have been to file a Rule 60(b) motion with the trial court. (Int. Brief of App. p.7). Appellant did file a motion with the trial court, requesting reversal of the order of dismissal and a new trial, but failed to specify the Rules pursuant to which she filed the motion. As South Carolina appellate courts do not observe the "plain error rule," under which courts are allowed to consider and correct an error not raised by the party below, Respondent respectfully asks this Court to dismiss Appellant's appeal for failure to preserve issues for appeal. Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004).

**III. The Trial Court Properly Dismissed Appellant's Appeal from the Judgment of Pontiac Magistrate Andy Surles Based on Appellant's Failure to Prosecute nor was Appellant Prejudiced by Respondent's Withdrawal of Motion to Continue.**

Appellant's contention that the trial court dismissed her appeal for failure to prosecute is without merit. The Richland County Public Index shows that notice of the May 20, 2016 hearing was sent to Appellant on April 29, 2016. (Richland County Public Index). At the hearing, Judge Manning asked whether or not Appellant had received notice, to which counsel replied he had not spoken with her ("I've never talked to her. She's the appellant). (Transcript p. 4, l. 4-7). Despite Judge Manning appearing to direct this question at counsel, it is likely that the Judge was asking the court this question, as it would not have been Respondent or Respondent's counsel's responsibility to ensure notice of the hearing to Appellant. (Notice of Motion Scheduling, April 29, 2016). Further, Judge Manning clarified, "[a]ll right. Yes, she got notice." (Transcript, p. 4, l.8-9). When an action at law is tried without a jury, a trial court's findings will be upheld on appeal when they are reasonably supported by the evidence. Wilder v. Blue Ribbon Taxicab Corp., 396 S.C. 139, 144 719 S.E.2d 703, 706 (Ct. App. 2011). As Judge Manning came to the conclusion that Appellant received notice, this Court should uphold his finding as supported by the public record, and further uphold Judge Manning's order of dismissal for Appellant's failure to prosecute. (Richland County Public Index).


Appellant asserts that because Respondent filed a motion to continue with the circuit court the morning of the May 20, 2016 hearing, followed shortly thereafter by a motion to withdraw the motion to continue, Appellant did not fail to prosecute her case. (Int. Brief of App. p. 7). This contention is without merit, as Appellant was not aware of either motion submitted by Respondent prior to the commencement of the hearing and

therefore cannot base her failure to appear at the hearing on the basis that she was under the impression the hearing had been continued. Further, Judge Manning addressed Respondent's motion in his Order of Dismissal, finding the motion to continue withdrawn. (Order of May 26, 2016).

### CONCLUSION

Based on the foregoing arguments, Respondent respectfully asks this Court to affirm the Order of Dismissal by the trial court and further dismiss Appellant's present appeal.

Respectfully submitted,



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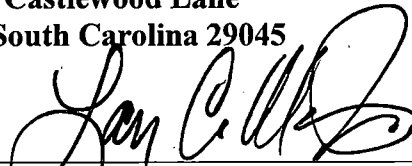
v.

Prime Financial Services, .....Respondent.

PROOF OF SERVICE

I certify that I have served the Respondent's Initial Brief and Designation of Matter to be Included in the Record on Appeal on the persons listed below by depositing a copy in the United States Mail, postage prepaid, on November 21, 2016.

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