

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas & Probate Court

Letitia H. Verdin, Circuit Court Judge
Debora A. Faulkner, Probate Judge

RECEIVED

DEC 29 2016

SC Court of Appeals

Case No. 2016-002015

Wilson Garner, Jr., et al,Appellants,

v.

The Estate of Nell Gaines , et al,Respondents.

MOTION FOR REINSTATEMENT PURSUANT TO SCACR 231(a)

On December 27, 2016, the undersigned counsel for the Appellants received the clerk's Order filed December 21, 2016 DISMISSING the above-captioned appeal. That DISMISSAL was filed due to the failure of the undersigned counsel to "notify this Court of the transcript delivery, as required by Rule 207 of the South Carolina Appellate Court Rules and this Court's letter dated October 21, 2016." Counsel for the

Appellants now MOVE FOR REINSTATEMENT of the appeal under SCACR 231(a) showing the court as follows:

1. On October 21, 2016, the clerk assigned to this particular appeal sent a letter indicating that the time had expired to order the transcript in this case, and advised further that Appellants' counsel was required to notify the court in writing within (10) ten days of the Notice of Appeal that he had done so. Because of that perceived failure, the clerk indicated the appeal would be dismissed. Appellants' counsel immediately contacted the clerk upon receipt of that letter and spoke with Ms. Shelby Snow, who had been assigned this particular appeal. Counsel advised Ms. Snow that he had separately included the letter ordering the transcript along with the Notice of Appeal, all dated September 22, 2016. In fact, Ms. Snow was able to locate that letter in her file during that telephone conversation. She indicated that the letter was sent out in error and that Appellants' counsel was in compliance with Rule 207. She indicated further there was noting more counsel needed to file pertaining to the ordering of the transcript.

2. The court reporter in the Circuit Court was Ms. Teresa Johnson. The clerk of the Circuit Court indicated that the sole means of communicating directly with the Judge Verdin's court reporter was by email. On October 14, 2016, Ms. Johnson indicated that she was in receipt of the request and would have the transcript prepared within (60) days and if not, that she would file for an extension and notify Appellants' counsel accordingly. See copy of email from Teresa Johnson dated October 14, 2016 attached to the *Affidavit of Richard L. Patton* submitted in support of this Motion as required by

SCACR 231(a). Under SCACR 207(3), it is the court reporter's responsibility to file for an extension if the transcript cannot be prepared within the (60) day period under the rule. Starting from September 23 as the first day, the court reporter's (60) day deadline was November 21, 2016. The court reporter did not meet that deadline.

3. Ms. Johnson personally hand-delivered the transcript to counsel's office on December 1, 2016. It now appears that the court reporter did not file for an extension, and that she went beyond the (60) days allotted by exactly (10) additional days. Under SCACR 207(5), the undersigned counsel was required to wait those same (10) days to receive notification of the extension, which did not come. Counsel mistakenly read the rule to require written notice to the clerk of this court if he received neither the transcript nor the notice of extension. Because counsel did receive the transcript on December 1, 2016, the undersigned reasoned that the notice of extension was unnecessary. Upon a closer reading of SCACR 207(5), counsel now understands the court wants written notice that the transcript was lated delivered without an extension. Counsel admittedly failed to provide that written notice to the clerk.

4. In 28 years of practice in this state, counsel has never had a situation like this occur in dozens of appeals filed in two states and multiple federal circuit courts. The court reporter has always delivered the transcript within the allotted time. Upon receipt of the transcript in this case, counsel did advise opposing counsel by email that the transcript was delivered on December 1, 2016. Written notice should have gone to the clerk of this court but did not because of the undersign's misreading of the rule. SCACR

207(5) as written seems to suggest that written notice to the clerk is required for nondelivery of the transcript. Frankly, that appears to be the anticipated scenario of the rule. However, the undersigned counsel now acknowledges that the rule also should be read to encompass late delivery. Apart from reporting nondelivery or late delivery, however, there is no affirmative duty to report delivery of the transcript anywhere in the SCACR 207. Counsel has always read the rule to require the court reporter, not the appellant, to advise court administration of the date of the transcript's completion and delivery. It does not seem that happened in this case. Counsel is not trying to shift blame here to the court reporter. The late delivery in this case was no doubt due to the holidays. These points are raised only to show how confusion arose in this case. Counsel accepts full responsibility for his misreading of SCACR 207(5).

5. In the interests of justice, the undersigned counsel MOVES that this court will REINSTATE the above-captioned appeal for "good cause shown" under SCACR 231(a). Given the unusual circumstances of how this matter came to be dismissed, counsel prays that the court will consider counsel's error as a minor infraction and allow the case to be heard and decided on its merits rather than as a consequence of a technical error in reading SCACR 207(5).

6. This MOTION is not interposed for delay in the proceedings before this court. In fact, Appellants' counsel overnighted the Initial Brief of Appellants on December 27, 2016, the same day the clerks' Order of December 21st was received through the mail. The delivery of Appellants' Initial Brief was within the (30) day period prescribed under

SCACR 208. If this MOTION is granted, counsel will follow the directive of the court for any refiling of the brief. Counsel certainly regrets the confusion and inconvenience caused by all this.

MEMORANDUM OF LAW

SCACR 231(a) allows the reinstatement of an appeal that has dismissed for the failure to comply with the requirements of the rules. That rule states: "A case shall not be reinstated except by leave of court, upon good cause shown, after notice to all parties." (emphasis added). That Motion to Reinstate must be made within (15) days of the order of dismissal pursuant to the rule.

Since the SCACR rules were amended by the S.C. Supreme Court in 2006, there have been no appellate cases interpreting the rule's standard "for good cause shown." However, the trial courts of this state have been reviewed by this court for the application of the same standard under other procedural rules. A review of those cases indicates that "good cause shown" is a matter of discretion within the sound judgment of the court. Absent a clear showing of abuse, the court's exercise of its discretion in determining whether "good cause" has been shown will not be disturbed on appeal. See, *Mauro v. Clabaugh*, 299 S.C. 184, 191, 383 S.E.2d 244, 249 (Ct. App. 1989), reviewing SCRCP 6(b) which states "the ... court may at any time in its discretion ... upon motion made after the expiration of the specific period, for good

cause shown, permit the act to be done." (Emphasis added). The court in *Mauro* found no abuse of discretion in permitting an enlargement of time under SCRCP 6(b).

Under SCRCP 55(c), entry of default may be set aside "for good cause shown," which is a less stringent standard than the excusable neglect standard of SCRCP 60(b). *Sundown Operating Co. v. Intedge Indus. Inc.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009). Under the S.C. Supreme Court's decision in *Sundown*, the "good cause standard" under SCRCP 55(c) requires a party to set forth an explanation for the default and give reasons why vacating the default entry would serve the interests of justice. Once a satisfactory explanation has been given, the court then must apply the three *Wham*¹ factors: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted. 681 S.E.2d at 888. Appellants' counsel believes he has stated a reasonable explanation for his noncompliance with Rule 207(5).

Turning to the three *Wham* factors, this Motion for Reinstatement is being made (7) days after the court's dismissal and only (1) day after having received notice of that dismissal. The first factor of *Wham* is clearly established. There has been no delay in bringing this Motion.

¹ *Wham v. Shearson Lehman Brothers, Inc.*, 298 S.C. 462, 381 S.E.2d 499 (1989).

Second, Appellants have a meritorious case on appeal. The matter before this court involves Appellants' assertion that S.C. Code Ann. § 62-2-504(a), which deals with interested witnesses who attest Wills in this state, cannot be trumped by the common law doctrine of Dependent Relative Revocation [DRR], inasmuch as the statutory language employed by the legislature has mandated a specific consequence for its violation. There have been no cases since the 1942 decision of the S. C. Supreme Court in *Charleston Library v. Citizens & Southern Nat. Bank*, 200 S.C. 96, 20 S.E.2d 623 (1942) reviewing the common law doctrine of DRR, which appears to have been decided well before the legislature's enactment of S.C. Code Ann. § 62-2-504(a) (1986). The litigants are in need of a determination of whether DRR can override or otherwise avoid the directives of the legislature as found in the statute. The Probate Court below found that DRR trumps the statute. Appellants respectfully disagree.


Third, there is no prejudice to the Respondents in this case caused by this Motion. Their time to respond to the appeal begins after service of the Appellants' Initial Brief. Respondents have been anticipating the appeals process since being served with the Notice of Appeal on September 22, 2016. Appellants' time to file the Initial Brief has (2) additional days left after today, so any delay to Respondents caused by this Motion will be minimal.

In *Melton v. Olenik*, 379 S.C. 45, 664 S.E.2d 487 (Ct. App. 2008), this court held that the "good cause shown" standard should be "liberally construed to promote justice and dispose of cases on the merits." 664 S.E.2d at 492. Appellants

counsel asks that the same consideration be given to this Motion. This appeal ought to
decided on its merits, rather than a technical violation of SCACR 207(5).

FOR THE REASONS STATED HEREIN, Appellants MOVE the court for a
REINSTATEMENT of this appeal so that it may be heard and decided upon the merits.

Respectfully Submitted:



Richard L. Patton
SC Bar # 0008627
The Patton Law Firm
818 East North Street
Greenville, SC 29601

Greenville,
December 28, 2016

Attorney for Appellants

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE SOUTH CAROLINA COURT
OF APPEALS

Case No. 2016-002015

AFFIDAVIT OF RICHARD L. PATTON

The undersigned affiant, being first duly sworn, and under penalty of perjury does herewith depose as follows:

1. That he is above the age of (18) eighteen, and that he does not suffer from any physical or mental infirmity that would impair his ability to recall the facts stated in this affidavit.
2. This affidavit is given in support of the Appellants' Motion for Reinstatement filed herewith, and to which this affidavit has been attached.
3. The undersigned is counsel for the Appellants in Case No. 2016-002015 now pending before the S.C. Court of Appeals.
4. On September 22, 2016, the undersigned served and delivered to the clerk of the S.C. Court of Appeals proof that he had ordered the transcript in this case from Ms. Teresa Johnson, Judge Letitia Verdin's court reporter in the Greenville County Circuit Court. The factual allegations contained in paragraph 1. of the Motion for Reinstatement are all true and accurate.

5. On October 14, 2016, Ms. Teresa Johnson responded to the undersigned's order for the transcript indicating by email that she would complete the same within (60) days or obtain an extension from court administration. A true and correct copy of that email is attached to this affidavit. The facts set forth in paragraph 2. of the Motion for Reinstatement are all true and accurate.


6. The undersigned received the clerk's letter dated October 21, 2016 and immediately contacted the clerk by telephone as indicated in paragraph 1. of the Motion for Reinstatement. The factual allegations contained in paragraph 1. of the Motion for Reconsideration regarding the conversation with Ms. Shelby Snow are all true and accurate

7. On November 17 and 29, 2016 the undersigned again contacted Ms. Teresa Johnson by email asking whether the transcript was ready. A true and correct copy of the undersigned's email to that effect is attached to this affidavit.

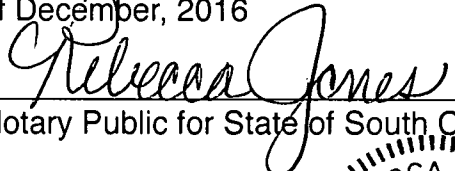
8. On December 1, 2016, the court reporter hand-delivered the transcript to the undersigned's office at 819 East North Street, Greenville, SC 29601. The undersigned sent an email to opposing counsel the same day to advise of the delivery of the transcript. A true and correct copy of that email attached to this affidavit. The facts set forth in paragraph 3 of the Motion for Reinstatement are all true and accurate.

9. On December 1, 2016, the undersigned sent an email to Ms. Teresa Johnson confirming delivery of the transcript that same day. A true and correct copy of that email is attached to this affidavit. The facts set forth in paragraph 3 of the Motion for Reinstatement are all true and accurate.

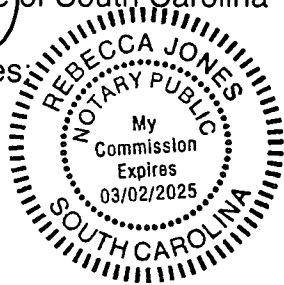
FURTHER AFFIANT SAYETH NAUGHT:


Richard L. Patton

Sworn to before me this 28th day
of December, 2016


Notary Public for State of South Carolina

My commission expires



Thank you,

Teresa B. Johnson, CVR-M
Circuit Court Reporter
Thirteenth Judicial Circuit
P.O. Box 2812
Greenville, S.C. 29602

From: Richard Patton <pattonlawfirm@hotmail.com>
Sent: Friday, October 14, 2016 10:30 AM
To: Johnson, Teresa B.
Subject: Re: Wilson Garner, Jr. et al v. The Estate of Nell Gaines

Paper copy only will be fine, I think.

Rick Patton

Sent from my iPhone

> On Oct 14, 2016, at 10:22 AM, Johnson, Teresa B. <TJohnson@sccourts.org> wrote:

>
> Mr. Patton:
>
> I have received your request to prepare the transcript in the above referenced case held before the Honorable Judge Letitia H. Verdin on August 30, 2016. I have reviewed my records and estimate this transcript to total approximately 25 pages.

>
> Based on our current rate of \$3.25 per page plus postage of \$3.95, I estimate the cost to be \$85.20. I am not requesting a deposit at this time. It is my general practice to receive payment prior to delivery of transcripts. Upon my completing the transcript, the request for payment will be forwarded to your office.

>
> You may further define your request in terms of transcript format (paper copy via U.S. Mail, electronic copy via email, etc.) and the turnaround time that you are seeking, as there are additional fees for electronic copies and expedited services as specified in SCACR Rule 607(h)(1).

>
> Under our rules, I have 60 days to transcribe and deliver your request. In the event I need additional time to complete the transcript, I will request an extension from Court Administration. You will be notified if the extension is granted.

>
>
>

> Thank you,

>

> Teresa B. Johnson, CVR-M

> Circuit Court Reporter

> Thirteenth Judicial Circuit

> P.O. Box 2812

> Greenville, S.C. 29602

>

>

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> ~~~ CONFIDENTIALITY NOTICE ~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

Re: Wilson Garner, Jr. et al v. The Estate of Nell Gaines

Richard Patton <pattonlawfirm@hotmail.com>

Thu 11/17/2016 10:58 AM

To: Johnson, Teresa B. <TJohnson@sccourts.org>;

Please disregard the previous email. I will send you a check. Please advise of how you will deliver the transcript. Thanks!

Richard Patton

From: Richard Patton <pattonlawfirm@hotmail.com>
Sent: Thursday, November 17, 2016 10:50 AM
To: Johnson, Teresa B.
Subject: Re: Wilson Garner, Jr. et al v. The Estate of Nell Gaines

Is it possible to pay your invoice with a credit card? If so, please give me a telephone number where I may contact you.

Very Truly Yours,

Richard Patton

From: Johnson, Teresa B. <TJohnson@sccourts.org>
Sent: Tuesday, November 15, 2016 10:21 AM
To: Richard Patton
Subject: Re: Wilson Garner, Jr. et al v. The Estate of Nell Gaines

Mr. Patton -

This transcript has been completed per your request. ?Please see attached invoice for payment. Thank you for your patience in this matter.

Thank you,

Teresa B. Johnson, CVR-M

Re: Wilson Garner, Jr. et al v. The Estate of Nell Gaines

Richard Patton

Thu 12/1/2016 3:49 PM

To: Johnson, Teresa B. <TJohnson@sccourts.org>;

Dear Ms. Johnson:

This will confirm your hand-delivery today of the transcript in the above-referenced case. Thank you for dropping that by this afternoon, rather than mailing it.

Rick Patton
The Patton Law Firm
819 East North Street
Greenville, SC 29601
(864) 233-9790

From: Richard Patton <pattonlawfirm@hotmail.com>
Sent: Tuesday, November 29, 2016 4:42 PM
To: Johnson, Teresa B.
Subject: Re: Wilson Garner, Jr. et al v. The Estate of Nell Gaines

Dear Mrs. Johnson

I have not yet received the transcript in the Gaines matter. I last contacted you on the 17th of November to advise I was mailing a check in payment. I do not see where that check has cleared my account. Did you receive it? I mailed it to your PO Box address.

Rick Patton
Patton Law Firm
818 East North Street
Greenville, SC 29601

From: Johnson, Teresa B. <TJohnson@sccourts.org>
Sent: Tuesday, November 15, 2016 10:21 AM
To: Richard Patton
Subject: Re: Wilson Garner, Jr. et al v. The Estate of Nell Gaines

Mr. Patton -

This transcript has been completed per your request. Please see attached invoice for payment. Thank you for your patience in this matter.

Thank you,

Teresa B. Johnson, CVR-M
Circuit Court Reporter
Thirteenth Judicial Circuit
P.O. Box 2812
Greenville, S.C. 29602

[Image result for glass half full]

From: Richard Patton <pattonlawfirm@hotmail.com>
Sent: Monday, October 24, 2016 3:41 PM
To: Johnson, Teresa B.
Subject: Re: Wilson Garner, Jr. et al v. The Estate of Nell Gaines

Dear Ms. Johnson:

I have received a notice from the SC Court of Appeals that suggests they need a clarification on my letter dated September 22, 2016 ordering the transcript. That letter does not indicate the price and the arrangement for payment. Could you please quote the cost and confirm by email that you will be sending the bill for payment along with the transcript rather than requiring advance payment. I will notify the SC Court of Appeals accordingly, once I have that information and confirmation.

Thank you in advance:

Rick Patton

From: Johnson, Teresa B. <TJohnson@sccourts.org>
Sent: Friday, October 14, 2016 10:36 AM
To: Richard Patton
Subject: RE: Wilson Garner, Jr. et al v. The Estate of Nell Gaines

Ok. Your request is second up on my requests list. It is not a lengthy transcript so I anticipate getting it completed within the next few business days. You should be hearing back from me the early part of next week.

GAINES APPEAL

Richard Patton

Thu 12/1/2016 3:59 PM

To: Wes@meetzelaw.com <Wes@meetzelaw.com>;

Wes:

I hope your Thanksgiving holidays were enjoyable. This is to let you know that I received by hand-delivery today the transcript of the bench appeal before Judge Verdin. Teresa Johnson was the court reporter assigned to Judge Verdin that day. I plan to have my brief finished well ahead of Christmas.

Thanks:
Rick Patton

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas & Probate Court

Letitia H. Verdin, Circuit Court Judge
Debora A. Faulkner, Probate Judge

RECEIVED
DEC 29 2016
SC Court of Appeals

Case No. 2016-002015

Wilson Garner, Jr., et al,Appellants,

v.

The Estate of Nell Gaines , et al,Respondents.

PROOF OF SERVICE

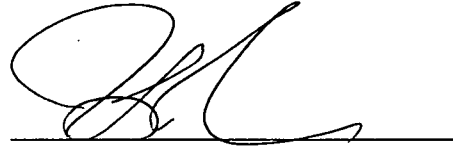
The undersigned certifies that he has served the within MOTION FOR REINSTATEMENT upon opposing counsel in this case by depositing a copy of the same into he United States Postal Service with sufficient postage affixed thereto and addressed as follows:

MARCUS W. MEETZE, ESQ.

PO Box 81118

Simpsonville, SC 29680

This 20 day of December, 2016.



Richard L. Patton

The Patton Law Firm

819 East North Street

Greenville, SC 29601

(864) 233 9797

(864) 233-9790 telefax

Attorney for Appellants

PATTON LAW FIRM

RICHARD L. PATTON

ATTORNEY AT LAW

819 E. NORTH STREET

GREENVILLE, SOUTH CAROLINA 29601

RICHARD L. PATTON*

*ALSO ADMITTED IN GEORGIA

TELEPHONE
(864) 233-9797

FAX
(864) 233-9790

RECEIVED

DEC 29 2016

SC Court of Appeals

VIA FEDERAL EXPRESS

December 28, 2016

Clerk of Court
S.C. Court of Appeals
1220 Senate Street
Columbia, SC 29211

RE: *Garner v. Gaines Estate*
SC Court of Appeals Case No. 2016-002015

Dear Clerk of Court:

Enclosed for filing are the original and (6) copies of the Appellants' Motion for Reinstatement which is being filed following receipt of notice of the court's dismissal on December 21, 2016. That notice was received by the undersigned on December 27, 2016, apparently delayed by the holidays.

Also enclosed is the filing fee in the amount of \$25.00. Please advise if there is anything further you require.

Very truly yours:

Richard L. Patton

C: Clients
Marcus W. Meetze, Esq.