

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM COUNTY OF WILLIAMSBURG
W. Haige Porter, Circuit Court Judge

RECEIVED

MAR 14 2017

SC Court of Appeals

THE ESTATE OF JOSEPH S. SMITH,
a/k/a J.S. Smith, Jr. By Its Personal
Representatives, Geneva S. Hall,
And Joseph Keith Ray,

Respondent,

v.

Case No. 2010-CP-45-393
Appellate Case No. 2016-002443

PATRICK S. SMITH, SANDRA B. SMITH,
THOMAS LEWIS SMITH, ELIZABETH S.
KAPPELER, GLORIA DARLENE HALL SMITH,
COURTNEY ELIZABETH SMITH, TIFFANY
ELAINE SMITH, JOSEPH SAMPSON SIMTH, IV,
CHARLES RICHARD RAY, JR., JOHN DOE,
JAN DOE, ET AL,

Appellant.

MOTION TO DISMISS APPEAL PURSUANT TO
SOUTH CAROLINA APPELLATE COURT RULE 208(A)(4)

Steven S. McKenzie
Coffey & McKenzie, PA
2 N. Brooks Street
Manning, S.C. 29102
(803) 435-8847
Counsel for Appellant

William M. O'Bryan, Jr.
O'Bryan & O'Bryan, P.C.
1 Courthouse Square
P.O. Box 1105
Kingstree, S.C. 26566
(843) 355-7471
Counsel for Respondent

Gregory B. Askins
Askins, Chandler & Askins
P.O. Box 10
Hemingway, S.C. 29554
Counsel for Respondent

Comes now Respondent, Joseph Keith Ray, by counsel, and respectfully requests this Court to dismiss the appeal in this case pursuant to Rule 208(a)(4) of the South Carolina Rules of Appellate Procedure, on the following grounds:

1. That on May 16, 2016, this matter was tried before the Honorable W. Haigh Porter. Circuit Court Judge for Williamsburg County, South Carolina.

2. That in preparation for filing an appeal, Appellant requested a copy of the transcript from the court reporter.

3. That in May of 2016 the court reporter sent Appellant a paper copy of the transcript by United States mail, postage prepaid.

4. That by Order dated November 1, 2016, the trial court entered judgment in ordering a public sale of the property.

5. That on December 1, 2016, Appellant filed a Notice of Appeal with this Court.

6. That at the request of Appellant the court reporter sent Appellant a second copy of the transcript between December 2 and 5, 2016 by United States mail, postage prepaid.

7. That the court reporter billed Appellant for the transcript on or about December 5, 2016.

8. That Respondent has not received a copy of Appellant's Initial Brief, and to Respondent's knowledge, no Initial Brief has been filed with this Court.

9. That Rule 208(a)(1) of the South Carolina Rules of Appellate Procedure provides that with thirty (30) days of receiving the transcript, the Appellant must file an Initial Brief with the Court and serve copies of the Initial Brief upon all parties. S.C. R. App. P. 208(a)(1).


10. That Rule 208(a)(4) of the South Carolina Rules of Appellate Procedure provides "[u]pon the failure of appellant to file and serve his brief within the time prescribed, the clerk of the appellate court *shall* sign an order dismissing the appeal, and the appeal shall not be reinstated except as provided by Rule 260." S.C. R. App. P. 208(a)(4) (emphasis added). See Roberts v. LaConey, 375 S.C. 97, 650 S.E.2d 474 (2007).

Wherefore Respondent respectfully requests this Court to dismiss the Appeal.

Respectfully submitted

JOSEPH KEITH RAY

March 10, 2017

By: 
Gregory B. Askins
William M. O'Bryan, Jr.

William M. O'Bryan, Jr.
O'Bryan & O'Bryan, P.C.
1 Courthouse Square
P.O. Box 1105
Kingstree, S.C. 26566
(843) 355-7471
Counsel for Respondent

Gregory B. Askins
Askins, Chandler & Askins
P.O. Box 10
Hemingway, S.C. 29554
Counsel for Respondent

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals
APPEAL FROM COUNTY OF WILLIAMSBURG
W. Haigh Porter, Circuit Court Judge

RECEIVED

MAR 14 2017

SC Court of Appeals

THE ESTATE OF JOSEPH S. SMITH,
a/k/a J.S. Smith, Jr. By Its Personal
Representatives, Geneva S. Hall,
And Joseph Keith Ray,

Respondent,

v.

Case No. 2010-CP-45-393
Appellate Case No. 2016-002443

PATRICK S. SMITH, SANDRA B. SMITH,
THOMAS LEWIS SMITH, ELIZABETH S.
KAPPELER, GLORIA DARLENE HALL SMITH,
COURTNEY ELIZABETH SMITH, TIFFANY
ELAINE SMITH, JOSEPH SAMPSON SIMTH, IV,
CHARLES RICHARD RAY, JR., JOHN DOE,
JAN DOE, ET AL,

Appellant.

MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS APPEAL PURSUANT TO
SOUTH CAROLINA APPELLATE COURT RULE 208(A)(4)

Steven S. McKenzie
Coffey & McKenzie, PA
2 N. Brooks Street
Manning, S.C. 29102
(803) 435-8847
Counsel for Appellant

William M. O'Bryan, Jr.
O'Bryan & O'Bryan, P.C.
1 Courthouse Square
P.O. Box 1105
Kingstree, S.C. 26566
(843) 355-7471
Counsel for Respondent

Gregory B. Askins
Askins, Chandler & Askins
P.O. Box 10
Hemingway, S.C. 29554
Counsel for Respondent

Statement of Facts

On May 16, 2016, this matter was tried before the Honorable W. Haigh Porter, Special Referee for Williamsburg County, South Carolina. By Order dated November 1, 2016, the trial court ordered the premises sold at public sale entered judgment to that effect.

In preparation for filing an appeal, Appellant requested a copy of the transcript from the court reporter. In May, the court reporter sent Appellant a paper copy of the transcript by United States mail, postage prepaid. At the request of Appellant, the court reporter sent Appellant a second copy of the trial transcript by United States mail, postage prepaid, between December 2 and 5, 2016. (See Affidavit of Andrea Kelly, Court Reporter, dated February 1, 2017, attached hereto.)

On December 1, 2016, Appellant filed a Notice of Appeal with this Court.

Respondent has not received a copy of Appellant's Initial Brief, and to Respondent's knowledge, no Initial Brief has been filed with this Court.

Discussion of Authorities

Rule 208(a)(1) of the South Carolina Rules of Appellate Procedure provides the time limits for Appellant to file an Initial Brief. It provides:

(1) Brief of Appellant. Within thirty (30) days after receiving the transcript or, if no transcript is ordered, within (30) day after serving the notice of appeal, appellant shall serve one copy of his brief on all parties to the

appeal, and file with the clerk of the appellate court one copy of the brief with proof of service. S.C. R. App. P. 208(a)(1)

Rule 208(a)(4) of the South Carolina Rules of Appellate Procedure states that an appeal must be dismissed if Appellant fails to file an Initial Brief within the time allowed.

It provides:

(4) Failure to File. Upon the failure of the appellant to file and serve his brief within the time prescribed, the clerk of the appellate court **shall** sign an order dismissing the appeal, and the appeal shall not be reinstated except as provided by Rule 260. Upon the failure of the respondent to timely file a brief, the appellate court **may** take such action as it deems proper. S.C. R. App. P. 208(a)(4) (**emphasis** provided).

Dismissal is mandatory where an appellant fails to file an Initial Brief within thirty (30) days of receiving the transcript; it is an action taken by the Clerk of Court. See Roberts v. LaConey, 375 S.C. 97, 650 S.E.2d 474 (2007). In contrast, where a respondent fails to file an initial brief, the Court has the discretion to decide the case where “the record is sufficient to provide [the] court with an understanding of the issues on appeal.” Parker v. Brown, Opinion No. 2008-UP-324 (S.C. Ct. App. June 27, 2008). See Marrett v. Dallah Forrest & Summersett Golf, Inc., Opinion No. 2014-UP-033 n.1 (S.C. Ct. App. January 22, 2014).

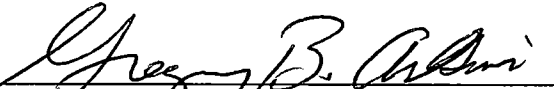
This Court should dismiss the appeal. Appellant filed a Notice of Appeal on December 1, 2016. The court reporter mailed Appellant the transcript twice: first in May and a second time between December 2 and 5, 2016. Appellant was billed for the second copy of the transcript on December 5, 2016. It has been far more than thirty days and Appellant has yet to file an Initial Brief. Dismissal is mandatory.

Conclusion

For the reasons stated above, Respondent respectfully requests that this Court dismiss the appeal.

JOSEPH KEITH RAY

March 10, 2017

By: 
Gregory B. Askins
William M. O'Bryan, Jr.
Counsel for Respondent

William M. O'Bryan, Jr.
O'Bryan & O'Bryan, P.C.
1 Courthouse Square
P.O. Box 1105
Kingstree, S.C. 26566
(843) 355-7471
Counsel for Respondent

Gregory B. Askins
Askins, Chandler & Askins
P.O. Box 10
Hemingway, S.C. 29554
Counsel for Respondent

STATE OF SOUTH CAROLINA

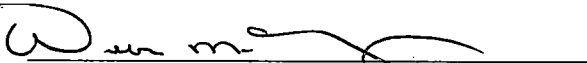
COUNTY OF WILLIAMSBURG

I, Andrea R. Kelly, Court Reporter certify that I mailed a copy of the transcript in the matter of the Estate of Joseph S. Smith versus Patrick S. Smith, et al to Mr. Steve McKenzie on May 18, 2016. I have a copy of the bill which I sent along with the transcript, but apparently the transcript and bill were not received at that time, because the end of November, 2016 Mr. McKenzie's office called and requested a copy of the transcript. I advised his assistant I had mailed them a copy because I have a bill dated May 18, 2016. I again mailed a copy of the transcript to Mr. McKenzie's office on either December 2 or 5, 2016 to the best of my knowledge.

Dated at Kingstree, South Carolina this 1st day of February, 2017.


Andrea R. Kelly

SWORN TO BEFORE
ME THIS 1 DAY
OF FEBRUARY, 2017.


Notary Public for South Carolina
My Commission expires: 11/9/17

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals
APPEAL FROM COUNTY OF WILLIAMSBURG
W. Haige Porter, Circuit Court Judge

RECEIVED

MAR 14 2017

SC Court of Appeals

THE ESTATE OF JOSEPH S. SMITH,
a/k/a J.S. Smith, Jr. By Its Personal
Representatives, Geneva S. Hall,
And Joseph Keith Ray,

Respondent,

v.

Case No. 2010-CP-45-393
Appellate Case No. 2016-002443

PATRICK S. SMITH, SANDRA B. SMITH,
THOMAS LEWIS SMITH, ELIZABETH S.
KAPPELER, GLORIA DARLENE HALL SMITH,
COURTNEY ELIZABETH SMITH, TIFFANY
ELAINE SMITH, JOSEPH SAMPSON SIMTH, IV,
CHARLES RICHARD RAY, JR., JOHN DOE,
JAN DOE, ET AL,

Appellant.

PROOF OF SERVICE

Steven S. McKenzie
Coffey & McKenzie, PA
2 N. Brooks Street
Manning, S.C. 29102
(803) 435-8847
Counsel for Appellant

William M. O'Bryan, Jr.
O'Bryan & O'Bryan, P.C.
1 Courthouse Square
P.O. Box 1105
Kingstree, S.C. 26566
(843) 355-7471
Counsel for Respondent

Gregory B. Askins
Askins, Chandler & Askins
P.O. Box 10
Hemingway, S.C. 29554
Counsel for Respondent

I hereby certify that:

(1) I have filed an original and six (6) copies of the forgoing Memorandum of Law in Support of Motion To Dismiss Appeal Pursuant To South Carolina Appellate Court Rule 208(A)(4) with the Clerk of the South Carolina Court of Appeals 2017 by depositing them in the United States Mail, postage prepaid, on March 10, 2017; and

(2) I have served the forgoing Memorandum of Law in Support of Motion To Dismiss Appeal Pursuant To South Carolina Appellate Court Rule 208(A)(4) on all parties by depositing a copy of it in the United States Mail, postage prepaid, on March 10, 2017, addressed each of to the following:

Steven S. McKenzie
Coffey & McKenzie, PA
2 North Brooks Street
Manning, S.C. 29102

Mr. Thomas Smith
Individually and as Personal Representative
Estate of J.S. Smith, Jr.
1612 Wilson Street
Camden, S.C. 29020

Elbert K. Turbeville, Esq
Nettles, Turbeville & Reddeck
P.O. Box 699
Lake City, S.C. 29032

Elizabeth S. Kappeler
P.O. Box 60406
N. Charleston, S.C. 29419

Joseph S. Smith, IV
1919 Thoroughfare Branch Rd.
Cassatt, S.C. 29032

Courtney Smith
1919 Thoroughfare Branch Rd.
Cassatt, S.C. 29032

Gloria Darlene Hall Smith
1919 Thoroughfare Branch Rd.
Cassatt, S.C. 29032

Charles Richard Ray, Jr.
1614 Wilson Road
Camden, S.C. 29020


Tiffany Smith
1919 Thoroughfare Branch Rd.
Cassatt, S.C. 29032

Keith Ray
1614 Wilson Road
Camden, S.C. 29020

W. Haigh Porter
P.O. Box 4337
Florence, S.C. 29502

William M. O'Bryan, Jr.
O'Bryan & O'Bryan, P.C.
1 Courthouse Square
P.O. Box 1105
Kingstree, S.C. 29556
(843) 355-7471
Counsel for Respondent

March 10, 2017



Gregory B. Askins
Askins, Chandler & Askins, LLP
PO Box 10
Hemingway, SC 29554
(843) 558-2588
Counsel for Respondent

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM COUNTY OF WILLIAMSBURG
W. Haigh Porter, Circuit Court Judge

THE ESTATE OF JOSEPH S. SMITH,
a/k/a J.S. Smith, Jr. By Its Personal
Representatives, Geneva S. Hall,
And Joseph Keith Ray,

RECEIVED

MAR 14 2017

SC Court of Appeals

Respondent,

v.

Case No. 2010-CP-45-393
Appellate Case No. 2016-002443

PATRICK S. SMITH, SANDRA B. SMITH,
THOMAS LEWIS SMITH, ELIZABETH S.
KAPPELER, GLORIA DARLENE HALL SMITH,
COURTNEY ELIZABETH SMITH, TIFFANY
ELAINE SMITH, JOSEPH SAMPSON SIMTH, IV,
CHARLES RICHARD RAY, JR., JOHN DOE,
JAN DOE, ET AL,

Appellant.

PROOF OF SERVICE

Steven S. McKenzie
Coffey & McKenzie, PA
2 N. Brooks Street
Manning, S.C. 29102
(803) 435-8847
Counsel for Appellant

William M. O'Bryan, Jr.
O'Bryan & O'Bryan, P.C.
1 Courthouse Square
P.O. Box 1105
Kingstree, S.C. 26566
(843) 355-7471
Counsel for Respondent

Gregory B. Askins
Askins, Chandler & Askins
P.O. Box 10
Hemingway, S.C. 29554
Counsel for Respondent

I hereby certify that:

(1) I have filed an original and six (6) copies of the forgoing Motion To Dismiss Appeal Pursuant To South Carolina Appellate Court Rule 208(A)(4) with the Clerk of the South Carolina Court of Appeals by depositing them in the United States Mail, postage prepaid, on March 10, 2017; and

(2) I have served the forgoing Motion To Dismiss Appeal Pursuant To South Carolina Appellate Court Rule 208(A)(4) on all parties by depositing a copy of it in the United States Mail, postage prepaid, on March 10, 2017, addressed each of to the following:

Steven S. McKenzie
Coffey & McKenzie, PA
2 North Brooks Street
Manning, S.C. 29102

Mr. Thomas Smith
Individually and as Personal Representative
Estate of J.S. Smith, Jr.
1612 Wilson Street
Camden, S.C. 29020

Elbert K. Turbeville, Esq
Nettles, Turbeville & Reddeck
P.O. Box 699
Lake City, S.C. 29032

Elizabeth S. Kappeler
P.O. Box 60406
N. Charleston, S.C. 29419

Joseph S. Smith, IV
1919 Thoroughfare Branch Rd.
Cassatt, S.C. 29032

Courtney Smith
1919 Thoroughfare Branch Rd.
Cassatt, S.C. 29032

Gloria Darlene Hall Smith
1919 Thoroughfare Branch Rd.
Cassatt, S.C. 29032

Charles Richard Ray, Jr.
1614 Wilson Road
Camden, S.C. 29020


Tiffany Smith
1919 Thoroughfare Branch Rd.
Cassatt, S.C. 29032

Keith Ray
1614 Wilson Road
Camden, S.C. 29020

W. Haigh Porter
P.O. Box 4337
Florence, S.C. 29502

William M. O'Bryan, Jr.
O'Bryan & O'Bryan, P.C.
1 Courthouse Square
P.O. Box 1105
Kingstree, S.C. 29556
(843) 355-7471
Counsel for Respondent

March 10, 2017


Gregory B. Askins
Askins, Chandler & Askins, LLP
PO Box 10
Hemingway, SC 29554
(843) 558-2588
Counsel for Respondent

ASKINS, CHANDLER & ASKINS, LLP

ATTORNEYS AT LAW

307 EAST BROAD STREET, POST OFFICE BOX 10
HEMINGWAY, SOUTH CAROLINA 29554

JEROME P. ASKINS III
GREGORY B. ASKINS

TELEPHONE (843) 558-2588
FAX (843) 558-3234

JEROME P. ASKINS, JR. (1923-1981)
WILLIAM H. CHANDLER (1948-2006)

CARSON J. ASKINS

March 10, 2017

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

Re: The Estate of Joseph H. Smith
Appellate Case No. 2016-002443

RECEIVED
MAR 14 2017
SC Court of Appeals

Dear Ms. Kitchings:

Enclosed please find an original and six (6) copies of Motion to Dismiss Appeal and Proof of Service of Motion to Dismiss Appeal, Memorandum of Law in Support of Motion to Dismiss Appeal and Proof of Service of Memorandum of Law in Support of Motion to Dismiss. Please file the originals and return the clocked copies to me in the envelope provided. A check for the filing fee of \$25.00 is enclosed. All attorneys and unrepresented parties and others listed on Proof of Service (2) are receiving copies of this letter.

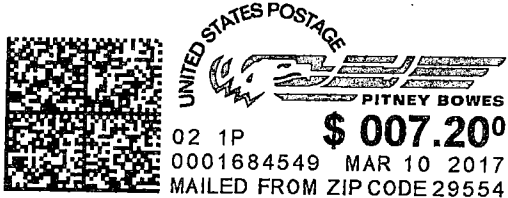
With kindest personal regards, I am

Yours very truly,


Gregory B. Askins

GBA/dcp
Encls.

ASKINS, CHANDLER & ASKINS, LLP
Attorneys at Law
P.O. Box 10
307 East Broad St.
Hemingway, SC 29554



RECEIVED
MAR 14 2017
SC Court of Appeals

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