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APR 14 2017

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Shirley C. Robinson, Administrative Law Judge

Appellate Case No.: 2017-000066

Pickens County,.....Appellant,

v.

South Carolina Department of Health
and Environmental Control and
MRR Pickens, LLC,.....Respondents,

**RESPONDENT SOUTH CAROLINA DEPARTMENT OF HEALTH AND
ENVIRONMENTAL CONTROL'S RESPONSE IN OPPOSITION TO APPELLANT
PICKENS COUNTY'S MOTION FOR EXTENTION OF TIME FOR FILING INITIAL
BRIEF AND DESIGNATION OF MATTER**

TO: GARY J. POLIAKOFF, AMY E. ARMSTRONG, AND AMELIA A. THOMPSON,
ESQUIRES, ATTORNEY FOR APPELLANT PICKENS COUNTY, AND JESSICA
KING, AND ROBERT F. GOINGS, ESQUIRES, ATTORNEYS FOR RESPONDENT
MRR PICKENS, LLC

NOW COMES Respondent South Carolina Department of Health and Environmental
Control ("DHEC" or "the Department"), by and through its counsel, submits this Response in
Opposition to Appellant Pickens County's ("Appellant") Motion for Extension of Time for
Filing Initial Brief and Designation of Matter ("Third Motion").

Respondent DHEC opposes the Third Motion on the following grounds:

- A. Appellant has already received two extensions of time to file the Initial Brief and Designation of Matter for this appeal.
- B. No extraordinary circumstances exist to support the granting of Appellant's Third Motion.

ARGUMENTS IN OPPOSITION

- A. Appellant Pickens County has already received two extensions of time to file the Initial Brief and Designation of Matter for this appeal.

On January 30, 2017, 11 days from the deadline (February 10, 2017) to file Appellant's Initial Brief and Designation of Matter, Appellant's attorney, Mr. Gary Poliakoff, motioned the South Carolina Court of Appeals ("Court") for a 30-day extension of time to file and serve Appellant's Initial Brief and Designation of Matter ("Brief and Designation"). The Court granted Appellant's request on February 6, 2017, and gave Appellant a deadline of March 13, 2017 to submit its Brief and Designation for the above-captioned appeal.

Subsequently, on March 10, 2017, only three days before the deadline to submit Appellant's Brief and Designation, Appellant's other counsel, Ms. Amy Armstrong, who filed a Notice of Appearance for Appellant on the same date, motioned the Court for another extension of time for filing and serving Appellant's Brief and Designation. The Court granted Appellant's request per an Order issued on March 15, 2017, and stated in the Order that "no further extensions will be granted absent *extraordinary circumstances*." (Emphasis added). In addition, the Order stated that Appellant had until April 12, 2017 to submit its Brief and Designation for the above-captioned appeal. To date, Appellant has been granted two extensions of time to file its Brief and Designation. These extensions have provided Appellant 61 additional days to file its Brief and Designation. This 61-day extension should have been ample time for Appellant to file its Brief and Designation.

- B. No extraordinary circumstances exist to support the granting of Appellant's Third Motion.

As referenced above, the Court stated in its March 15, 2017, Order that "No further extensions will be granted absent extraordinary circumstances." However, despite the Court's Order, Appellant motioned the Court, on April 10, 2017, only two days before its April 12th deadline, for

yet another 30-day extension of time (until May 12, 2017), in which to file its Brief and Designation. In its Third Motion, Appellant states that the basis for the Motion is the fact that the Court will not have had an opportunity to have ruled upon Intervenors' Motion to be Included as Appellants, which was filed with the Court on March 29, 2017. Appellant further reasons in its Motion on Page 3 that the Motion was made "only after carefully considering the best interests of our clients and the judicial efficiencies to be gained from submitting the most pertinent brief possible." Appellant's third extension request neither claims nor explains any "extraordinary circumstances" that constitute the basis for the request as required by the Court's Order. Apparently, Appellant believes that it could submit a more pertinent brief after the Intervenors' Motion to Intervene has been ruled upon, since Appellant's reasoning is that any brief submitted prior to the ruling on Intervenors' Motion "would drastically impact the organization and flow of the complete documents, such that if the Intervenors' Motion is denied, Pickens County would have to move this Court to seek leave to file an amended initial brief and designation of matter." (Third Motion, P. 3). This reason for requesting a third extension simply does not rise to the level of "extraordinary circumstances." It is curious that Appellant failed to request this extension at the same time Intervenors' Motion was filed with the Court. Certainly, the potential outcome of the Intervenors' Motion being denied was the same on March 29, 2017 when the Motion was filed, as it was on April 10, 2017, when Appellant filed its Third Motion.

The Court's Order granting the second extension clearly states that another extension would not be granted absent "extraordinary circumstances." The plain meaning of "extraordinary circumstances" connotes unique or unusual circumstances that are clearly "out of the ordinary." A pending motion before the Court, or the necessity of amending an initial brief, does not constitute an extraordinary circumstance. For instance, even family illness may not rise to the level of an

extraordinary circumstance, in some cases. In *Blakes v. Gruenberg*, the Court ruled that the fact that Plaintiff's attorney had to care for his sick sister did not excuse the failure to timely file Plaintiff's complaint or justify granting an extension of time for late filing of the complaint. *Blakes v. Gruenberg*, 2015 WL 9274919 (E.D. Va., 2015). The Court found that not only is an explanation of the extraordinary circumstance required, but also *how* such circumstances prevented the requisite timely filing. Additionally, the Court stated, an explanation of the time *not* spent on the extraordinary circumstance that *could* have been spent on the timely filing of the complaint was required. In the instant Third Motion, Appellant has made no attempt to explain the extraordinary circumstances that prevent Appellant from timely filing its Brief and Designation. The presence of extraordinary circumstances is a condition of the granting of an additional extension under the Court's Order and it is this condition that Appellant has failed to meet.

Extraordinary circumstances generally connote events akin to a medical emergency, family death, or some type of situation where its untimeliness is out of the control of the requestor and in which the situation relates to either the requestor or to the requestor's immediate family. For example, under the Second Circuit's Rules, a motion to extend the time to file a brief requires an extraordinary circumstance. "Absent an extraordinary circumstance, such as serious personal illness or death in counsel's immediate family, the court will not grant a motion to extend the time to file a brief. A deadline for a brief remains in effect unless the court orders otherwise." *Rule 27.1(f)1(1), U.S. Ct. App. 2d Cir.* Clearly, Appellant's explanation for requesting a third extension does not rise to the extraordinary circumstances in which other courts have found justification for granting such extensions.

Therefore, for the above-stated grounds, Respondent DHEC respectfully requests that Appellant's Third Motion for an Extension of Time for Filing its Initial Brief and Designation of Matter for this appeal be denied.

Respectfully submitted,

Etta R. Williams Linen
Etta R. Williams Linen, Esquire
Assistant General Counsel for SC DHEC
Claire Prince, Esquire
Special Counsel for SC DHEC

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April 14, 2017
Columbia, South Carolina

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South Carolina Department of Health and Environmental Control and MRR
Pickens, LLC,Respondents

CERTIFICATE OF SERVICE

I, Sandra R. Wessinger, Legal Assistant with the South Carolina Department of Health and Environmental Control, hereby certify that I have this ___ day of April, 2017, served the foregoing *South Carolina Department of Health and Environmental Control's Response in Opposition to Appellant Pickens County's Motion for Extension of Time for Filing Initial Brief and Designation of Matter* upon all parties and counsel of record by placing a copy of same in an envelope and depositing it in the U.S. Mail, first-class, with sufficient postage paid, at the address indicated below:

Gary J. Poliakoff, Esquire
Poliakoff & Associates
Post Office Box 1571
Spartanburg, SC 29304

Jessica J. O. King, Esquire
Allen K. McAlister, Jr., Esquire
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Robert F. Goings, Esquire
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Greenville, South Carolina 29606

Sandra R. Wessinger
Sandra R. Wessinger

April __, 2017
Columbia, South Carolina



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SC Court of Appeals

April 14, 2017

Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Pickens County vs. South Carolina Department of Health and Environmental
Control and MRR Pickens, LLC
Appellate Case No.: 2017-000066; OGC #22666

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of the *Respondent South Carolina Department of Health and Environmental Control's Response in Opposition to Appellant Pickens County's Motion for Extension of Time for Filing Initial Brief and Designation of Matter* for filing in the above referenced case. I would appreciate your office returning a stamped copy with our courier.

By copy of this letter, I am serving all counsel of record.

Should you have any questions or need additional information, please do not hesitate to contact our office.

Sincerely,

A handwritten signature in cursive script that reads "Sandra R. Wessinger".

Sandra R. Wessinger
Legal Assistant

Enclosures

cc: Jessica J. O. King, Esquire
Robert F. Going, Esquire
Amy E. Armstrong, Esquire
Amelia A. Thompson, Esquire
Michael G. Corley, Esquire
Gary W. Poliakoff, Esquire