

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Trial Court Case No. 2015-CP-40-00042
Appellate Case No. 2017-000846

RECEIVED
NOV 20 2017
SC Court of Appeals

Conyers Early Learning Center, Inc.,

Appellant,

v.

Formeicko Smith,

Respondent.

MOTION TO DISMISS APPEAL

Respondent respectfully requests this Court dismiss Appellant's appeal for Appellant's failure to serve and file its Initial Brief in accordance with Rule 208, SCACR, as well as for Appellant's repeated disregard for the South Carolina Appellate Court Rules in prosecuting this Appeal.

BACKGROUND

This matter concerns an appeal of the decision of the Honorable Clifton Newman granting Respondent summary judgment. The Order granting Respondent summary judgment was entered on March 9, 2017. Appellant filed a Notice of Appeal, Statement

of Issues on Appeal and Certificate of Service with this Court on April 6, 2017. On April 12, 2017, this Court sent a letter to Appellant's counsel, informing him of deficiencies in the Notice of Appeal and accompanying proof of service. This Court instructed Appellant's counsel that he must correct the deficiencies to comply with the South Carolina Appellate Court Rules and file an amended notice of appeal "within ten (10) days of the date of this letter or your appeal will be dismissed[.]" (Exhibit 1).

Appellant failed to correct the deficiencies identified by this Court in the April 12, 2017, letter within ten days. On May 17, 2017, this Court dismissed Appellant's appeal for Appellant's failure to correct the deficiencies in its Notice of Appeal and comply with the other requests in the Court's April 12, 2017, letter. (Exhibit 2). Importantly, although not part of the grounds for this Court's dismissal, Appellant also failed to serve and file an Initial Brief within thirty (30) days of serving the Notice of Appeal as required by Rule 208, SCACR.¹

On May 30, 2017, Appellant filed a Motion to Reinstate Appeal, arguing that its failure to correct deficiencies as requested by this Court was due to Appellant's counsel's erroneous belief that his law clerk had corrected the deficiencies. On the same date, Appellant filed an Amended Notice of Appeal and an Amended Proof of Service. This Court granted Appellant's Motion to Reinstate on July 19, 2017, and contemporaneously sent Appellant a letter requiring it to provide proof of its compliance with Rule 207, and

¹ Appellant did not order a transcript of the lower court proceeding within 10 days of serving the Notice of Appeal as required by Rule 207(a)(1), SCACR. Therefore, according to Rule 208, Appellant's Initial Brief should have been served by May 8, 2017. On July 31, 2017, Appellant finally filed a copy of correspondence to the court reporter dated April 19, 2017, regarding obtaining a transcript of the lower court proceeding. (Exhibit 3). Respondent was not copied on this correspondence to the court reporter or otherwise contemporaneously provided a copy of this correspondence, nor was this correspondence contemporaneously furnished to the Office of court Administration or Clerk of the Court of Appeals—all of which is also a violation of Rule 207. *See* Rule 207(a)(1).

to correct additional deficiencies in its Amended Notice of Appeal. Specifically, this Court requested that Appellant file a copy of the letter showing it had ordered a transcript and to file a second amended notice of appeal. Appellant was given ten days to comply with the Court's request.

On July 31, 2017, Appellant filed its correspondence with the court reporter regarding ordering the transcript² and filed its Second Amended Notice on Appeal. (Exhibit 3). However, Appellant failed to provide the Court with documentation showing that a copy of the correspondence with the court reporter was provided to Respondent's counsel or the Office of Court Administration as required by Rule 207(a)(1), SCACR. On August 1, 2017, this Court requested Appellant file this documentation within ten days. Appellant failed to comply with the Court's request within ten days. On August 24, 2017, this Court sent another deficiency notice to Appellant, giving opposing counsel another ten days to correct the deficiencies under the South Carolina Appellate Court Rules noted in the Court's August 1, 2017 letter. The Court also advised Appellant that the proof of service it filed on July 31, 2017, was not in compliance with the SCACR.

On September 5, 2017, Appellant filed an Amended Proof of Service for its Second Amended Notice of Appeal. However, Appellant failed to show that it had provided a copy of its request for a transcript to the Office of Court Administration as required by Rule 207(a)(1), SCACR. On September 19, 2017, the Clerk of the Court of Appeals sent Appellant another deficiency letter requesting Appellant send a copy of its

² As noted in footnote 1, this correspondence shows that Appellant requested the transcript more than ten days after the date of service of Appellant's notice of appeal. Moreover, Respondent was not copied on this correspondence to the court reporter or otherwise contemporaneously provided a copy of this correspondence, nor was this correspondence contemporaneously furnished to the Office of court Administration or Clerk of the Court of Appeals.

request for a transcript to the Office of Court Administration (the Court's third such request for this documentation). Appellant complied shortly thereafter.

On November 16, 2017, in response to the Court's request for a status update regarding Appellant's receipt of the transcript in this matter, Appellant's counsel sent a letter to the Court advising that the transcript was placed in the mail to him on October 9, 2017. (Exhibit 4). As of the date of this Motion, Respondent has not been served with Appellant's Initial Brief. Upon information and belief, Appellant has also not filed an Initial Brief with this Court. In light of Appellant's failure to serve and file its Initial Brief within thirty days of Appellant's receipt of the transcript in accordance with Rule 208, SCACR, Appellant respectfully requests this Court dismiss Appellant's appeal.

ARGUMENT

Appellant's appeal should be dismissed for Appellant's failure to serve and file an Initial Brief in compliance with Rule 208, SCACR. According to Rule 208, an appellant is required to serve a copy of his Initial Brief on the respondent and file the brief with this Court within thirty days after receiving the transcript. Rule 208 further provides that "[u]pon 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[.]**" *Rule 208, SCACR* (Emphasis added). According to Appellant's counsel's November 16, 2017, letter to this Court, the transcript in this matter was mailed to him on October 9, 2017. (Exhibit 4). Upon information and belief, Appellant would have received the transcript within a

matter of days.³ However, as of the date of this Motion, Appellant has not served or filed its Initial Brief. Therefore, per Rule 208, Appellant's appeal should be dismissed.

Although Appellant's failure to serve and file its Initial Brief is, by itself, a sufficient basis for dismissing this Appeal, it is important to point out that Appellant's failure to comply with Rule 208, SCACR is not the first time that Appellant has disregarded and/or failed to comply with the South Carolina Appellate Court Rules in this matter. As detailed in the Background section of this Motion, Appellant has repeatedly failed to ensure that its filings comply with the SCACR.⁴ Appellant has also failed to timely correct deficiencies noted by this Court, which has led to delays in the adjudication of this Appeal. This Appeal has already been dismissed once for Appellant's failure to comply with the SCACR, and Appellant was given a second chance when the Appeal was reinstated. To allow Appellant to continue to flout the SCACR and directives of this Court prejudices Respondent and has created undue delay⁵, which in turn has resulted in increased costs for Respondent and denied Respondent the protection of the SCACR.

The South Carolina Appellate Court Rules are intended to protect the rights of both appellants and respondents. Allowing Appellant's Appeal to proceed would deny

³ According to the postmark on the copy of the envelope that Appellant's Counsel enclosed with his November 16, 2017 letter to this Court, the transcript was mailed locally. (*See* Exhibit 4).

⁴ Over the course of this Appeal, this Court has sent Appellant five deficiency notices.

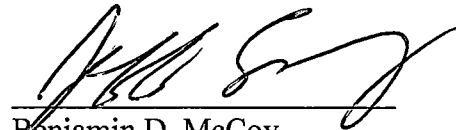
⁵ In addition to the delay in the appellate process caused by Appellant's failure to correct early deficiencies in its filings, Appellant also caused delay by waiting more than a month to tender payment for the transcript after first contacting the court reporter. According to the correspondence filed by Appellant on July 31, 2017, the court reporter advised Appellant's counsel on April 20, 2017 that she would have 60 days from the date she received payment in which to produce the transcript. (Exhibit 3). According to the July 31, 2017 filing, Appellant did not tender a check for the cost of the transcript until on or about May 29, 2017—more than a month after receiving the directive from the court reporter. *Id.* This delay in payment caused undue delay in the appellate process, as it led to a delay in Appellant receiving the transcript.

Respondent the protection of the South Carolina Appellate Court Rules and her right to finality of judgment. *See Trimmier v. Thomson et al.*, 39 S.C. 554 (1893) (“Rules of court are designed to secure the orderly and prompt dispatch of business, and it is very important that these rules should be observed. At all events, when parties invoke the protection of these rules in order to prevent delays in the adjudication of their rights, this court is bound to accord them that protection.”).

CONCLUSION

For the foregoing reasons, Respondent respectfully requests the Court dismiss Appellant’s Appeal.

Respectfully submitted,



Benjamin D. McCoy
Jeff I. Silverberg
Howser, Newman & Besley, LLC
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Phone: (803) 758-6000
Fax: (803) 758-4445
bmccoy@hnblaw.com
jsilverberg@hnblaw.com
Attorneys for Respondent

November 20, 2017



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

April 12, 2017

Mr. Johnny Elliot Watson, Sr., Esquire
PO Box 2305 (29202)
2715 Edgewood Avenue 29204
Columbia SC 29204

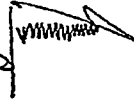
Re: Conyers Early Learning v. Formeicko Smith
Appellate Case No. 2017-000846

Dear Counsel:

Upon reviewing your notice of appeal, the following deficiencies have been noted under the South Carolina Appellate Court Rules (SCACR), and any deficiency must be corrected within ten (10) days of the date of this letter or your appeal will be dismissed:

- The accompanying proof of service is not in compliance with the SCACR. Your proof of service should be substantially in the format shown by Form 7 in Appendix C to part II of the SCACR. It lacks a caption, including a case number.
- The caption/title does not comply with Rule 267(a), SCACR. Specifically, it does not contain the county name or Judge Manning's title.
- You have provided a "statement of issues on appeal." However, what is required is that you provide an amended notice of appeal that names the appellant and states the name and date of the order(s) or judgment(s) you are appealing, as well as the date on which a copy of the order(s) or judgment(s) were received.

Very truly yours,

Jenny Abbott Kildings 

CLERK

cc: Jeffrey Ian Silverberg, Esquire



The South Carolina Court of Appeals

Conyers Early Learning Center, Inc., Appellant,

v.

Formeicko Smith, Respondent.

Appellate Case No. 2017-000846

The Honorable Clifton Newman
Richland County
Trial Court Case No. 2015CP4000042

ORDER

Appellant has failed to correct deficiencies in the notice of appeal as required by Rule 267(a) of the South Carolina Appellate Court Rules, and to make other corrections as requested by the Court's April 12, 2017, letter. Accordingly, this matter is dismissed. The remittitur will be sent as provided by Rule 221(b), SCACR.

FOR THE COURT

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

cc:
Johnny Elliot Watson, Sr., Esquire
Jeffrey Ian Silverberg, Esquire

FILED
May 17, 2017

EXHIBIT
3

LAW OFFICE OF JOHNNY E. WATSON
ATTORNEY AND COUNSELOR AT LAW

2715 Edgewood Avenue
Columbia, South Carolina 29204

Mail Address:
P. O. Box 2305
Columbia, South Carolina 29202
Phone 803-400-1600
Fax 803-400-1200

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JUL 31 2017

FAX COVER SHEET

TO: Ms. Bonnie Kelly, Clerk Court of Appeals

DATE: 5-29-17 # OF PAGES W/COVER PAGE: _____

PHONE NUMBERS: _____

FAX NUMBERS: _____

RE: Transcript Request for
Conyers Early Learning CTR

COMMENTS:
Transcript cost included
in amt of \$181.25.
[Signature]

THE INFORMATION CONTAINED IN THIS FACSIMILE IS ATTORNEY CLIENT
PRIVILEGED AND IS CONFIDENTIAL INFORMATION INTENDED FOR THE USE OF
THE INDIVIDUAL OR ENTITY NAMED ABOVE. YOU ARE NOTIFIED THAT ANY
DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS
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YOU.



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NO THANKS YES

Gmail

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6 of 388

COMPOSE

Request for Transcript; Conyers Early Center v. Formeicko Smith

Inbox x

People (2)

- Inbox (78)
- Starred
- Important
- Sent Mail

Johnny Watson Greeting! Please let me know the cost and availability... Apr 19 (6 days ago) ☆

bkelly

Add to circles

Johnny +

Kelly, Bonnie to watsonlawfirm Apr 20 (5 days ago) ☆

Show details

Make a call

Also try our mobile apps for Android and iOS

?Hello. I estimate the cost to produce this transcript to be \$181.25 for e-tran, meaning I'll send it via email. Payment prior to production is required. Please note, under our rules, I have 60 days from date of receipt of payment in which to produce the transcript.

If you need an expedited production of transcript, I estimate the cost will be \$226.25 for e-tran, and I will have it to you within seven (7) business days from date of receipt of payment. Again, payment is required prior to transcript production.

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JUL 31 2017

SC Court of Appeals

JOHNNY ELLIOT WATSON ATTY. AT LAW
 IOLTA ATTORNEY TRUST ACCOUNT
 210 BENNINGTON CIRCLE
 COLUMBIA, SC 29229
 PH. 803-400-1600

1012
 67-776/532 9335
 2070000123247

Date May 29, 2017

Pay to the Order of BONNIE H. KELLY \$ 181.25
One Hundred Eighty One & 25/100 Dollars

For CORRYERS ELC Johnny E. Watson


 Wells Fargo Bank, N.A.
 South Carolina
 wells Fargo.com

Photo Service
 Debit Card
 Debit Card

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JUL 31 2017
 SC Court of Appeals.

CERTIFICATE OF SERVICE

I, Johnny E. Watson, of 2715 Edgewood Avenue (29204), P. O. Box 2305, Columbia, South Carolina 29202, hereby certify that I have served the individual named below with a copy of the documents described herein by depositing the documents in the United States mail, postage prepaid and sent the same to them at the addresses listed herein below:

RECEIVED

PERSONS SERVED:

JUL 31 2017

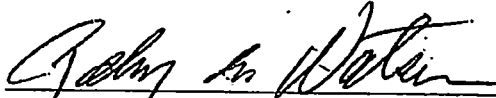
Honorable Jenny Kitching, Clerk
S. C. Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Jeffrey I. Silverberg, Esquire
Houser, Besley and Newman
1508 Washington
Columbia, South Carolina 29201

DOCUMENTS SERVED:

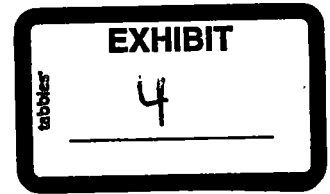
SECOND AMENDED NOTICE OF APPEAL
AND PROOF OF PAYMENT FOR TRANSCRIPT

By:


JOHNNY E. WATSON

Columbia, South Carolina
Date: July 31, 2017

**LAW OFFICE OF JOHNNY E. WATSON
ATTORNEY AND COUNSELOR AT LAW**



2715 Edgewood Avenue
Columbia, South Carolina 29204

Mail Address
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Columbia, South Carolina 29202
Phone: 803-400-1600
Fax: 803-400-1200

November 16, 2017

South Carolina Office of Court Administration
1220 Senate Street, Suite 201
Columbia, South Carolina 29201

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NOV 16 2017
SC Court of Appeals

Re: Conyers Early Learning V. Formeicko Smith
Appellate Case No. 2017-000846

Dear Sir or Madam:

I hope this letter finds you in good health and spirits. Please be advised that the transcript in the referenced case was placed in the mail for delivery to me on October 9, 2017 according to the attached copy of the envelope the transcript was mailed to me in.

If you have any questions and/or comments I can always be reached by cell phone at 1-803-467-6212 or at my office.

With kind regards, I am

Very truly yours,

JOHNNY E. WATSON, ATTORNEY AT LAW

By: Handwritten signature of Johnny E. Watson in dark ink.

cc: S. C. Court of Appeals
Jeffrey Ian Silverberg, Houser, Besley and Newman

50014
02925

15

Mr. Johnny Watson, Esq.
PO Box 2305
Columbia SC 29202



U.S. POSTAGE
\$3.50
FCM LG ENV
29201
Date of sale
10/09/17
06 2500
08282331

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Trial Court Case No. 2015-CP-40-00042
Appellate Case No. 2017-000846

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SC Court of Appeals

Conyers Early Learning Center, Inc.,

Appellant,

v.

Formeicko Smith,

Respondent.

CERTIFICATE OF SERVICE

I certify that pursuant to Rule 240(c)(1), SCACR, I have served Respondent's *Motion to Dismiss Appeal* in this matter on Appellant Conyers Early Learning Center, Inc. by depositing a copy of it in the United States Mail, postage prepaid, on November 20, 2017, addressed to Appellant's attorney of record as follows:

Johnny E. Watson, Sr., Esquire
P. O. Box 2305
Columbia, SC 29202
Attorney for Appellant



Jeff I. Silverberg
Howser, Newman & Besley, LLC
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Columbia, South Carolina 29211
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Attorney for Respondent

November 20, 2017

HNB
**HOWSER, NEWMAN
& BESLEY, LLC**

Attorneys and Counselors at Law

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Fax 843.216.6942
Toll Free 877.216.6970

R. Davis Howser
James P. Newman, Jr. <
William G. Besley <
Benjamin D. McCoy ^
Kelley Shull Cannon ^
Andrew E. Haselden <
George V. Hanna, IV *
Michal Cooper Jones
Kylie L. Keesley ^
Albert Richard Pierce, Jr. *
James P. Sullivan
Justin P. Novak
Jeffrey I. Silverberg
Trevor P. Eddy ‡

< Certified Circuit Court Mediator
^ Certified Circuit Court Mediator and Arbitrator
* Also Admitted in North Carolina
‡ Also Admitted in Maryland

November 20, 2017

(Via Hand Delivery)

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

RECEIVED
NOV 20 2017
SC Court of Appeals

RE: Conyers Early Learning Center, Inc., Appellant v. Formeicko Smith, Respondent.
Appellate Case No.: 2017-000846

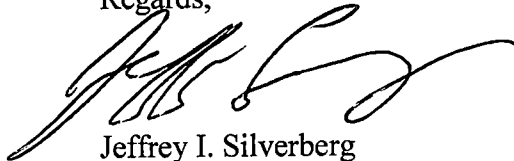
Dear Ms. Kitchings:

Enclosed for filing please find the original and seven (7) copies of a **Motion to Dismiss Appeal** regarding the above-referenced action. Also enclosed is a check for the \$25.00 filing fee.

By copy of this letter, I am serving Appellant's counsel with a copy of this Motion.

Thank you for your attention in this matter. If you have any questions or concerns, please do not hesitate to contact me.

Regards,



Jeffrey I. Silverberg

JIS/cmt

Enclosures

cc: Johnny E. Watson, Sr., Esquire (via U.S. Mail)