

8163

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

R. Ferrell Cochran, Jr., Circuit Court Judge
George M. McFaddin, Jr., Circuit Court Judge

RECEIVED
JAN 09 2018
SC Court of Appeals

Appellate Case No. 2017-002617
Case No. 2016-CP-45-544

Terry Tisdale as Guardian for Amber Lynn Bush and Terry Tisdale in her individual capacity,..... Appellant,

v.

John Michael Mitchum as personal representative for the Estate of Susan T. Mitchum and John Mitchael Mitchum in his individual capacity,..... Respondent.

RESPONDENT'S MOTION TO DISMISS

NOW COMES W. Evan Reynolds, Esquire, upon motion to this Court in the above captioned action, to dismiss same upon the following grounds:

1. The Defendant has not timely filed and served a Notice of Appeal with this Court and on all parties to this action as required by South Carolina Appellate Court Rule 203(b)(1) in regards to the applicable Williamsburg County Court of Common Pleas Order dated June 22, 2017.

Pursuant to South Carolina Appellate Court Rule 203(b)(1), "A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment. When a timely motion for judgment n.o.v. (Rule 50, SCRCP), motion to alter or amend the judgment (Rules 52 and 59, SCRCP), or a motion for a new trial (Rule 59, SCRCP) has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion. When a form or other short order or judgment indicates that a more full and complete order or judgment is to follow, a party need not appeal until receipt of written notice of entry of the more complete order or judgment." **"The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending**

or ignoring the deadline for service of the notice.” *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 651, 661 S.E.2d 791, 795 (2008) (quoting *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004)); *see also Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 21, 698 S.E.2d 612, 623 (2010) In the absence of a timely served Notice of Appeal, this court has no jurisdiction.

On June 8, 2017, the parties were before the Court of Common Pleas in Williamsburg County pursuant to the Defendant/Respondent's Motion to Dismiss. An Order dismissing the Plaintiff's second cause of action was signed by Judge Cochran and was electronically served on the Plaintiff/Appellant's attorney on June 27, 2017. (**Supp. Doc., pp. 4 & 9**) The Plaintiff/Appellant was given a second chance to gather information and amend her first cause of action portion of her complaint, to present evidence of Amber Lynn Bush becoming incompetent after the 2005 probate court order, and to gather sufficient evidence to overcome the Defendant's Motion to Dismiss. This Order dismissed the only cause of action that the Plaintiff/Appellant filed in her individual capacity. No post-trial motions were ever made in regards to this Order. A Notice of Appeal was not filed or served on any parties to this action within thirty (30) days of June 27, 2017, and the appeal as it relates to Judge Cochran's Order should be dismissed as it is untimely.

2. The Defendant is currently represented by counsel and is not entitled to hybrid representation, and her Notice of Appeal has not been submitted by counsel. This Court has been directed by the South Carolina Supreme Court not to accept such a Notice of Appeal. Therefore, the Defendant has not timely filed and served a Notice of Appeal with this Court and on all parties to this action as required by South Carolina Appellate Court Rule 203(b)(1) in regards to the applicable Williamsburg County Court of Common Pleas Order dated December 5, 2017.

In *Miller v. State*, 388 S.C. 347, 697 S.E.2d 527 (2010), the Supreme Court held that “there is no right to “hybrid representation” that is partially *pro se* and partially by counsel, substantive documents, with the exception of motions to relieve counsel, filed *pro se* by a person represented by counsel are not to be accepted unless submitted by counsel. Because [Miller] was represented by counsel, the *pro se* motion was not proper, should not have been accepted, and should not have been ruled upon. The motion was essentially a nullity. We therefore vacate the order ruling on the motion and dismiss [Miller's] notice of appeal as moot. **We also take this opportunity to remind judges and clerks of court of our directive in *Foster* not to accept substantive documents, with the exception of motions to relieve counsel, filed *pro se* by a party who is represented by counsel.**” This directive was followed by the Court of Appeals in *State v. Devore*, 416 S.C. 115, 784 S.E.2d 690 (S.C. App. 2016).

On September 28, 2017, the parties were before the Court of Common Pleas in Williamsburg County for a second hearing on the Defendant/Respondent's Motion to Dismiss. An Order dismissing the Plaintiff's first cause of action, and thus entire case, was signed by Judge McFaddin and was electronically served on counsel for the Plaintiff/Appellant on December 6, 2017. (**Supp. Doc., pp. 10 & 13**) No post-trial motions were ever made in regards to this Order. The Defendant/Respondent received the Plaintiff/Appellants *pro se* Notice of Intent to Appeal; however, the Defendant/Respondent notes that counsel for the Plaintiff/Appellant has not signed this Notice of Intent to Appeal and has not served or filed a Motion to be relieved as counsel. A Notice of Appeal was not filed or served on all parties to this action within thirty (30) days of December 6, 2017, and the appeal as it relates to Judge McFaddin's Order should be dismissed as it is untimely.

Therefore, the Court of Appeals lacks the jurisdiction to consider the appeal in regards to the Plaintiff/Appellant's second cause of action which was dismissed by Judge Cochran's Order signed June 22, 2017. Additionally, under the Supreme Court's directive, the Court of Appeals cannot accept the Plaintiff/Appellant's *pro se* Notice of Intent to Appeal, the time to properly file and serve a proper Notice of Intent to Appeal in regards to Judge McFaddin's Order expired on January 6, 2018. Therefore, the Court of Appeals lacks the jurisdiction to consider this entire appeal and it should be dismissed.

January 6, 2018
Kingstree, South Carolina



W. Evan Reynolds, Esquire
South Carolina Bar No. 102352

JENKINSON, JARRETT & KELLAHAN, P. A.

Post Office Drawer 669

Kingstree, SC 29556

Ph. (843) 355-2000

Fax (843) 355-2010

ATTORNEYS FOR THE RESPONDENT

STATE OF SOUTH CAROLINA)
)
COUNTY OF WILLIAMSBURG)

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT
CASE NO.: 2016-CP-45-544

TERRY TISDALE AS GUARDIAN FOR)
AMBER LYNN BUSH AND TERRY)
TISDALE IN HER INDIVIDUAL)
CAPACITY,)

PLAINTIFFS,)

VS.)

JOHN MICHAEL MITCHUM AS)
PERSONAL REPRESENTATIVE FOR)
~~THE ESTATE OF SUSAN T. MITCHUM~~)
AND JOHN MICHAEL MITCHUM IN)
HIS INDIVIDUAL CAPACITY)

DEFENDANT.)

ORDER PURSUANT TO
DEFENDANT'S MOTION TO DISMISS
(First Hearing)

HEARING DATE:
PRESIDING JUDGE:
ATTORNEY FOR PLAINTIFFS:
ATTORNEY FOR DEFENDANT:
COURT REPORTER:

June 8, 2017
R. Ferrell Cothran, Jr.
Eleazer R. Carter
W. Evan Reynolds
Frances B. Ray

This matter comes before the Court upon Defendant's motion to dismiss based on SCRCPC 12(b)(6), SC Code Ann. §15-78-110, collateral estoppel and res judicata. Present at the hearing was both Plaintiffs with their attorney, Eleazer Carter. Present on behalf of the Defendant was his attorney, W. Evan Reynolds.

At the start of the hearing, Mr. Reynolds moved to strike the name of the Defendant John Michael Mitchum in his individual capacity based on there being no allegations in the Plaintiff's complaint pertaining to John Michael Mitchum in his individual capacity. Mr. Carter informed the Court that John Michael Mitchum was named in his individual capacity because he stands to take property under the Will of Susan T. Mitchum that would allegedly otherwise belong to Amber Lynn

Bush. Mr. Carter also asked the Court for time to go back and submit an amended complaint. Mr. Reynolds had no further objection to John Michael Mitchum being named in his individual capacity.

As to Plaintiffs' first cause of action, Mr. Reynolds presented an argument to the Court that Amber Lynn Bush, through her own testimony from a probate court hearing back in 2005, was deemed competent and was distributed any property from the estate of her mother, Jewel Balentine Bush, personally and free from any trust or accounting responsibility on the part of Susan T. Mitchum. Additionally, Mr. Reynolds read from the probate court order and into the record, "Both Susan Mitchum and Amber Bush testified that during the administration of this estate, [the estate of Jewel Balentine Bush] no decisions have been made without both of them making them. Ms. Bush testified that she was aware of the financial situation of the Estate [the estate of Jewel Balentine Bush] and had approved any and all disbursements made by Mrs. Mitchum." This Court notes that this order from 2005 was not appealed and is the law of this case.

On rebuttal, Mr. Carter indicated that Amber Lynn Bush has become incompetent since that time. Additionally, Mr. Carter claims that Amber Lynn Bush was owed a one-third (1/3) interest in Susan's Floral & Gifts that was supposed to be distributed outright to her in accordance to her mother's [Jewel Balentine Bush] Will, pursuant to the probate court order from 2005, but Mr. Carter alleges that Susan T. Mitchum never distributed said one-third (1/3) interest in Susan's Floral & Gifts to Amber Lynn Bush. Mr. Carter alleges Amber Lynn Bush was incompetent and therefore, she did not realize that she did not receive said one-third (1/3) interest in Susan's Floral & Gifts and any statute of limitations would have tolled until the date of Susan T. Mitchum's death as Amber is incompetent and realized she was not receiving an interest in Susan's Floral & Gifts when said interest was not left to her in the Will of Susan T. Mitchum.

This Court retains jurisdiction and gives Mr. Carter ninety (90) days from the date of this hearing to amend the first cause of action portion of the complaint, to present evidence of Amber Lynn Bush becoming incompetent after the 2005 probate court order, and to gather sufficient evidence to overcome the Defendant's motion to dismiss

As to the second cause of action, Mr. Reynolds noted that both the signatures of Terry Tisdale and Susan T. Mitchum were on a 1993 deed to the described family home that is the subject of Plaintiff's second cause of action. Mr. Reynolds also noted that the Plaintiff admits in her complaint, in paragraph 11, to being on notice that both names were on the deed when she paid the mortgage off. Mr. Reynolds noted that the mortgage was paid off in 2008. Therefore, the Plaintiff's allegations of fraud and misrepresentation that constitute the entirety of the Plaintiff's second cause of action should be dismissed based on SC Code §15-78-110.

Mr. Carter did not offer anything in rebuttal and thus the Plaintiff's second cause of action is dismissed pursuant to SC Code §15-78-110.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

1. That the Court does hereby retain jurisdiction of this case and grants the Plaintiffs ninety (90) days from the date of this hearing to amend the first cause of action portion of the complaint, to present evidence of Amber Lynn Bush becoming incompetent after the 2005 probate court order, and to gather sufficient evidence to overcome the Defendant's motion to dismiss;
2. That the Plaintiffs' second cause of action is dismissed pursuant to SC Code §15-78-110.
3. That the issue of attorney's fees is held in abeyance pending the second hearing in or about ninety (90) days from the date of this hearing.

IT IS SO ORDERED.

R. Ferrell Cothran, Jr.
Circuit Court Judge
Third Judicial Circuit

June ____, 2017
Manning, South Carolina



Williamsburg Common Pleas

Case Caption: Terry Tisdale , plaintiff, et al VS John Michael Mitchum , defendant,
et al

Case Number: 2016CP4500544

Type: Order/Other

So Ordered

s/ R. Ferrell Cothran, Jr., 2144

Electronically signed on 2017-06-22 10:37:56 page 5 of 5

Evan Reynolds

From: efiledonotreply@sccourts.org
Sent: Tuesday, June 27, 2017 8:25 AM
To: Evan Reynolds
Subject: Courtesy NEF RE: 2016CP4500544

***** IMPORTANT NOTICE - READ THIS INFORMATION *****
NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2016CP4500544

Official File Stamp: 06-27-2017 08:25:06 AM
Court: CIRCUIT COURT
Common Pleas

Case Caption: Terry Tisdale , plaintiff, et al VS John Michael Mitchum , defendant, et al
Document(s) Submitted: Order/Other
Filed by or on behalf of: Gayle Brunson

This notice was automatically generated by the courts auto-notification system.

The following people were served electronically:

William Evan Reynolds for John Michael Mitchum et al
Eleazer R. Carter for Terry Tisdale
Ernest Joseph Jarrett for John Michael Mitchum et al

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

The Carter Law Firm

~~~~ 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.

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF WILLIAMSBURG )

IN THE COURT OF COMMON PLEAS  
THIRD JUDICIAL CIRCUIT  
CASE NO.: 2016-CP-45-544

TERRY TISDALE AS GUARDIAN FOR )  
AMBER LYNN BUSH AND TERRY )  
TISDALE IN HER INDIVIDUAL )  
CAPACITY, )

PLAINTIFFS, )

VS. )

JOHN MICHAEL MITCHUM AS )  
PERSONAL REPRESENTATIVE FOR )  
THE ESTATE OF SUSAN T. MITCHUM )  
AND JOHN MICHAEL MITCHUM IN )  
HIS INDIVIDUAL CAPACITY )

DEFENDANT. )

ORDER PURSUANT TO  
DEFENDANT'S MOTION TO DISMISS  
(Second Hearing)

HEARING DATE:  
PRESIDING JUDGE:  
ATTORNEY FOR PLAINTIFFS:  
ATTORNEY FOR DEFENDANT:  
COURT REPORTER:

September 28, 2017  
George M. McFaddin, Jr.  
Eleazer R. Carter  
W. Evan Reynolds  
Frances B. Ray

This matter comes before the Court for a second hearing upon Defendant's motion to dismiss based on SCRCP 12(b)(6), SC Code Ann. §15-78-110, collateral estoppel and res judicata. Present at the hearing was both Plaintiffs with their attorney, Eleazer Carter. Present on behalf of the Defendant was his attorney, W. Evan Reynolds.

Prior to the start of the hearing, Mr. Reynolds informed the Court that this was second hearing pursuant to the Defendant's motion to dismiss. Mr. Reynolds further informed the Court that at the first hearing, Judge Cothran dismissed the Plaintiff's second cause of action and gave Mr. Carter ninety (90) days from the date of the June 8, 2017, hearing to amend the Plaintiff's first cause of action portion of the complaint, to present evidence of Amber Lynn Bush becoming incompetent

after the 2005 probate court order, and to gather sufficient evidence to overcome the Defendant's motion to dismiss.

After hearing arguments from counsel for both parties, this Court finds that the Plaintiff has not provided sufficient evidence showing that Amber Lynn Bush had become incompetent subsequent to the 2005 probate court hearing in which she was deemed competent, within ninety (90) days of Judge Cothran's order from the first motion to dismiss hearing on June 8, 2017. As such, the Defendant's motion to dismiss is granted.

**NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:**

1. That the Defendant's motion to dismiss is granted as the Plaintiff had not provided sufficient evidence showing that Amber Lynn Bush had become incompetent after the 2005 probate court hearing in which she was deemed competent, within ninety (90) days of Judge Cothran's order from the first motion to dismiss hearing on June 8, 2017;
2. That this case be dismissed with prejudice; and
3. That each party is responsible for their respective attorney's fees.

**IT IS SO ORDERED.**

---

George M. McFaddin, Jr.  
Circuit Court Judge  
Third Judicial Circuit

December \_\_\_\_, 2017  
Sumter, South Carolina



Williamsburg Common Pleas

**Case Caption:** Terry Tisdale , plaintiff, et al VS John Michael Mitchum , defendant,  
et al

**Case Number:** 2016CP4500544

**Type:** Order/Dismissal

So Ordered

S/George M. McFaddin, Jr., #2759

Electronically signed on 2017-12-05 10:37:29 page 3 of 3

ELECTRONICALLY FILED - 2017 Dec 06 9:27 AM - WILLIAMSBURG - COMMON PLEAS - CASE#2016CP4500544

\*\*\*\*\* IMPORTANT NOTICE - READ THIS INFORMATION \*\*\*\*\*  
NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2016CP4500544

Official File Stamp: 12-06-2017 09:27:21 AM

Court: CIRCUIT COURT

Common Pleas

Williamsburg

Case Caption: Terry Tisdale , plaintiff, et al VS John Michael Mitchum , defendant, et al

Document(s) Submitted: Order/Dismissal Order/Dismissal

Filed by or on behalf of: George Mcfaddin

This notice was automatically generated by the Court's auto-notification system.

**The following people were served electronically:**

William Evan Reynolds for John Michael Mitchum  
et al

Eleazer R. Carter for Terry Tisdale

Ernest Joseph Jarrett for John Michael Mitchum  
et al

**The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:**

The Carter Law Firm

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY  
Court of Common Pleas

R. Ferrell Cochran, Jr., Circuit Court Judge  
George M. McFaddin, Jr., Circuit Court Judge

RECEIVED

JAN 09 2018

SC Court of Appeals

Appellate Case No. 2017-002617  
Case No. 2016-CP-45-544

Terry Tisdale as Guardian for Amber Lynn Bush and Terry Tisdale in her individual capacity,..... Appellant,

v.

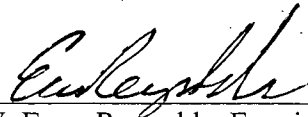
John Michael Mitchum as personal representative for the Estate of Susan T. Mitchum and John Michael Mitchum in his individual capacity,..... Respondent.

**MEMORANDUM WITH CITATION OF AUTHORITIES**

In accordance to South Carolina Appellate Court Rule 240(c)(2), the Respondent herein submits this memorandum with citation of authorities in support of the Respondent's Motion to Dismiss. The Respondent has relied on the following authorities in submitting said Motion to Dismiss:

- 1) South Carolina Appellate Court Rule 203(b)(1)
- 2) *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 651, 661 S.E.2d 791, 795 (2008)
- 3) *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004)
- 4) *Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 21, 698 S.E.2d 612, 623 (2010)
- 5) *Miller v. State*, 388 S.C. 347, 697 S.E.2d 527 (2010)
- 6) *State v. Devore*, 416 S.C. 115, 784 S.E.2d 690 (S.C. App. 2016)
- 7) *Foster v. State*, 298 S.C. 306, 379 S.E.2d 907 (1989)

January 6, 2018  
Kingstree, South Carolina



---

W. Evan Reynolds, Esquire  
South Carolina Bar No. 102352

**JENKINSON, JARRETT & KELLAHAN, P. A.**

Post Office Drawer 669

Kingstree, SC 29556

Ph. (843) 355-2000

Fax (843) 355-2010

**ATTORNEYS FOR THE RESPONDENT**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY  
Court of Common Pleas

R. Ferrell Cochran, Jr., Circuit Court Judge  
George M. McFaddin, Jr., Circuit Court Judge

Appellate Case No. 2017-002617  
Case No. 2016-CP-45-544

**RECEIVED**  
JAN 09 2018  
SC Court of Appeals

Terry Tisdale as Guardian for Amber Lynn Bush and Terry Tisdale in her individual capacity,..... Appellant,

v.

John Michael Mitchum as personal representative for the Estate of Susan T. Mitchum and John Michael Mitchum in his individual capacity,..... Respondent.

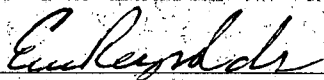
**CERTIFICATE OF SERVICE**

I, W. Evan Reynolds, hereby certify that I have served a copy of the *Respondent's Motion to Dismiss* on the below stated parties at the stated addresses, by placing a copy of same, on January 8, 2018, with sufficient postage attached thereto in the United States Mail, addressed as follows:

Eleazer R. Carter, Esquire  
105 S. Brooks St.  
Manning, SC 29102

Terry Tisdale  
4993 Martin Luther King, Jr. Blvd  
Salters, SC 29590

January 8, 2018

  
W. Evan Reynolds, Esq.  
**JENKINSON, JARRETT & KELLAHAN, PA**  
P.O. Drawer 669  
Kingstree, South Carolina 29556  
Ph: (843) 355-2000  
Fax: (843)-355-2010  
**ATTORNEYS FOR RESPONDENT**



# Jenkinson, Jarrett & Kellahan, PA

ATTORNEYS AT LAW

120 WEST MAIN STREET • POST OFFICE DRAWER 669 • KINGSTREE, SOUTH CAROLINA 29556  
TELEPHONE (843) 355-2000 • FACSIMILE (843) 355-2010 • TOLL FREE 1-888-354-7417  
www.jenkinsonlaw.com

W. E. Jenkinson, III  
Ernest J. Jarrett\*  
Jennifer R. Kellahan\*\*

J. Thomas Thompson  
William Evan Reynolds

\*Certified Family Court Mediator  
\*\*Certified Circuit Court Mediator

January 8, 2018

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

RECEIVED

JAN 09 2018

SC Court of Appeals

Re: Terry Tisdale v. John Michael Mitchum  
Appellate Case No. 2017-002617

Dear Ms. Kitchings:

Please find enclosed the following documents:

- 1) Original and six (6) copies of the Respondent's Motion to Dismiss the appeal in the above captioned case; further containing
- 2) Original and six (6) copies of Certificate of Service on all parties and Memorandum with Citation of Authorities.

Please find enclosed my firm's check in the amount of \$25 for filing fees. By copy of this letter to opposing counsel, I am serving them with a copy of these documents.

We appreciate your continued cooperation.

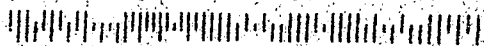
With warm personal regards, I am

Very truly yours,

W. Evan Reynolds  
[evan@jenkinsonlaw.com](mailto:evan@jenkinsonlaw.com)

WER/

Pc: Eleazer R. Carter, Esquire  
Terry Tisdale  
John Michael Mitchum



Jenkinson, Jarrett & Kellahan, PA  
Post Office Drawer 669  
Kingstree, South Carolina 29556

**RECEIVED**

JAN 09 2018

SC Court of Appeals

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