

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas
The Hon. Diane S. Goodstein, Circuit Court Judge

RECEIVED

JAN 08 2018

SC Court of Appeals

Appellate Case No. 2016-002193

Civil Action No. 2014-CP-18-0358
Civil Action No. 2014-CP-18-1792
Civil Action No. 2014-CP-18-1793

Bank of North Carolina Respondent,

v.

Anthony M. Whitfield and Cindy Whitfield Defendants.

Of whom Anthony M. Whitfield is the Appellant and Cindy Whitfield is a Respondent.

Anthony M. Whitfield Appellant,

v.

David Swanson Respondent.

MOTION TO REINSTATE

COMES NOW the Appellant, Anthony M. Whitfield, by and through their undersigned counsel, who would move for this Honorable Court to reinstate this matter pursuant to Rule 260 SCACR based on the following grounds:

1. On September 25, 2017, Appellant served the Final Record on Appeal in this matter, along with a proof of service with respect to same, which was filed with the Court.
2. Respondent Swanson objected to the final Record as filed, noting certain deficiencies in the Record on appeal.

3. Shortly thereafter, Counsel for the Appellant spoke with a staff member of the Court, advising them of Respondents objections, and inquiring as to what procedure would need to be used given that although the Final Record had been served upon Respondents, the Court was not yet in possession of the Final Record on Appeal. Counsel was advised that they should notify the Court of the issue and advising them of the same in writing.

4. Accordingly, on September 28, 2017, Appellant sent a letter to the Court advising them of the issue, and advised the Court that they would send the updated Final Record to Counsel with the deficiencies corrected.

5. On October 6, 2017, the Court sent a letter to Appellant advising them that a Motion to Amend the Record on Appeal would need to be filed.

6. On November 2, 2017 Appellant filed a Motion to Amend the Record on Appeal with the Court in both Appeals.

7. In the interim, on October 10, 2017, Respondent Bank of North Carolina filed their final brief with the Court.

8. On November 17, 2017, the Court issued an Order from the Court granting Appellants Motion to Amend the Record on Appeal.

9. Counsel for Appellant received the Court's Order the week of the Thanksgiving holiday, said Order requiring that Appellant file a Proof of Service twenty (20) days from the date of the Order, which would have been December 7, 2017.

10. Apparently, due to a staff / clerical error, this date was not calendared per office policy; a mistake which otherwise would have likely been caught had it not been for the intervening Thanksgiving holidays.

11. On or about December 13, 2017, Appellant first learned of this error when Counsel for Respondent Swanson emailed Counsel for Appellant, inquiring as to the status of the Amended Records.

12. The following day, December 14, 2017 Counsel for the Appellant spoke with Counsel for Respondent Swanson over the phone, apologizing for the inadvertent delay, and confirming which deficiencies needed to be corrected prior to filing the Amended Record on Appeal.

13. During that conversation, Appellant inquired about documents which were the source of Respondents objection to the Record on Appeal in the companion case, as Counsel for the Appellant was not in possession of a copy of the same. Counsel for Respondent stated they would check to see whether they were in possession of the same, and would advise Appellant accordingly.

14. On that same day, Counsel for the Appellant served (electronically, pursuant to a previous request for electronic transmission of documents by Counsel for the Respondent) the Final Record on Appeal to Respondent Swanson for the Dorchester County matter.

15. Further, Appellant requested that Respondent Swanson confirm whether the deficiencies which were the source of Respondents' previous objections were fixed to Respondents' satisfaction.

16. Appellant intended to file the Proof of Service after receiving confirmation from Counsel for Respondent Swanson. However, no response was ever received.

17. On December 21, 2017, the Court issued an Order dismissing Appellants appeals due to their failure to file Proofs of Service for the Record on Appeal.

18. On December 27, 2017, after returning from an out of state trip to visit the parents of his pregnant wife for the Christmas holidays, the undersigned Counsel for Appellant received the Clerk's Order dismissing this appeal.

19. On December 28, 2017, Counsel for the Appellant wrote again to Counsel for the Respondent asking for confirmation regarding whether there were any additional deficiencies, whether Respondent was in possession of certain documents relating to the companion appeal, and whether Respondent would consent to the present Motion.

20. As of the date of filing, Counsel for the Appellant has not received any correspondence from Counsel for Respondent Swanson in response to these requests contained in the correspondence dated December 14 and December 28, 2017.

21. On December 28, 2017, Counsel for the Appellant also wrote to Counsel for Respondent Bank of North Carolina inquiring as to whether they would consent to this motion.

22. As of the date of filing, Counsel for Respondent Bank of North Carolina has Responded confirming they have received Appellant's request for consent, but have not yet provided a response confirming whether or not they will consent to same.

23. Counsel for the Appellant asserts that good cause exists for the reinstatement of this Appeal on the following bases:

- a. The Final Record on Appeal for the present Appeal was previously served upon Respondent;
- b. Appellant has corrected certain deficiencies objected to by Respondent, and moreover has already served an Amended Record on Appeal on Respondents;
- c. The failure to file a proof of service with the Court was due to a clerical error which would have otherwise been caught had it not been for the rush of the impending holidays;

- d. The parties have all already prepared and completed briefing in this matter; and,
- e. The interests of justice would not be promoted by punishing Appellant for a simple clerical error with regard to a procedural rule.

24. Further, Appellant would contend that Respondent Bank of North Carolina will in no way be prejudiced by the reinstatement of this matter as they have already filed their final brief with respect to same.

25. Further, Appellant would contend that Respondent Swanson will in no way be prejudiced by the reinstatement of this matter as they have been served with the Amended Record on Appeal in this matter.

26. As such, Appellant would respectfully and humbly request this honorable Court to issue an Order to reinstate this Appeal as the facts and issues as stated herein provide good cause for same, that the reinstatement of this Appeal will further the interests of justice, and finally, that no party will be prejudiced by its reinstatement.

Respectfully submitted this **5th** day of **January, 2017**.

By: 

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David SwansonRespondent.

PROOF OF SERVICE

I certify that I have served the **Motion to Reinstate** upon the Respondents Bank of North Carolina, Cindy Whitfield, and David Swanson by depositing a copy of same in the United States Mail, postage prepaid, on January 5, 2017, addressed to their attorney of record, as follows:

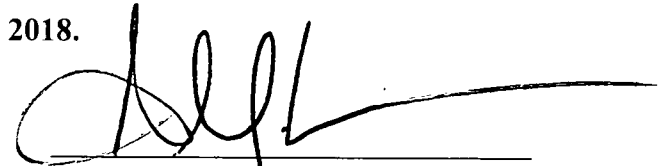
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ATTORNEY FOR RESPONDENT CINDY WHITFIELD

Respectfully submitted this **5th** day of **January, 2018.**

By:

A handwritten signature in black ink, appearing to read 'AJM', written over a horizontal line.

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