

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM OCONEE COUNTY  
In the Court of Common Pleas

J. Cordell Mattox, Circuit Judge

Case No. 2019-CP-37-00320  
Appellate Case No. 2019-001696

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OCT 21 2019

SC Court of Appeals

Sommer Smith,

Respondent,

v.

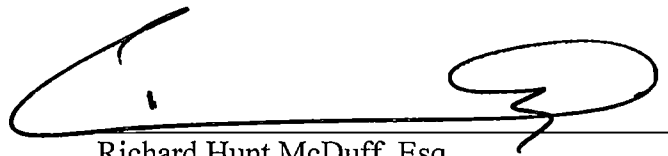
Alma Stone,

Appellant.

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BRIEF OF APPELLANT

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## STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE CIRCUIT COURT ERRED IN FAILING TO DISMISS RESPONDENT'S APPEAL WHEN APPELLANT FAILED TO COMPLY WITH THE STRICT REQUIREMENTS OF SOUTH CAROLINA CODE §§ 62-1-308(d) and (e).
2. WHETHER THE CIRCUIT COURT ERRED IN GRANTING RESPONDENT'S MOTION TO EXTEND THE TIME TO COMPLY WITH THE PROVISIONS OF SOUTH CAROLINA CODE §§ 62-1-308(c), (d) and (e).

## STATEMENT OF THE CASE

This matter is before the Court on appeal from the Order of the Court of Common Pleas dated October 2, 2019, which denied Appellant's motion to dismiss Respondent's appeal and granted Respondent's motion to extend the time to comply with the provisions of *S.C. Code Ann.* §§ 62-1-308(d) and (e).

Harold Junior Stone ("Decedent") died a resident of Oconee County on January 20, 2016. On May 16, 2019, the Probate Court held a hearing regarding the admission of Decedent's written Will to probate. On May 23, 2019, the Probate Court issued its Order admitting the Will to probate.<sup>1</sup> On June 3, 2019, Respondent filed and served a Notice of Intent to Appeal to the Circuit Court.<sup>2</sup> On July 5, 2019, Respondent filed and served her Statement of Issues on Appeal pursuant to *S.C. Code Ann.* § 62-1-308(b). On August 7, 2019, Appellant filed and served her Motion to Dismiss Appeal based upon Respondent's failure to comply with the strict time requirements set forth in *S.C. Code Ann.* §§ 62-1-308(d) and (e), which provide that the appellant shall serve and file her Designation of Matter to be Included in the Record on Appeal<sup>3</sup> and a copy of her brief within thirty (30) days after service of the Statement of Issues on Appeal.

On August 14, 2019, Respondent filed a Motion to Extend Time pursuant to *S.C. Code Ann.* § 62-1-308(c), wherein she asserted that she did not receive the transcript of the Probate Court hearing until July 23, 2019, or more than forty-five (45) days "from the entry of the Order." (Motion to Extend, p. 2). Respondent requested that the Circuit Court "extend the time in this matter by 30 days for "all deliverables" from August 5, 2019 to September 4, 2019 . . ." On August 14, 2019, Appellant filed and served her Memorandum in Opposition to Respondent's Motion to

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<sup>1</sup> The May 23, 2019 Probate Court Order is not an issue in this appeal.

<sup>2</sup> The timeliness of the Notice of Intent to Appeal is not at issue.

<sup>3</sup> Appellant filed and served her Designation of Matters to be Included in the Record on Appeal on August 5, 2019.

Extend Time. (Motion to Extend, p. 2). In the Memorandum in Opposition, Appellant argued Respondent's motion was untimely because (1) Respondent failed to "make satisfactory arrangements" with the court reporter for furnishing the transcript within ten (10) days after service of the Notice of Intention to Appeal in violation of § 62-1-308(c), and (2) the motion was untimely because the Circuit Court was divested of appellate jurisdiction when Respondent failed to timely file her Designation of Matter to be Included in the Record on Appeal and her brief by August 5, 2019. On August 20, 2019, Respondent first filed and served her brief and Designation of Matters to be Included in the Record on Appeal.<sup>4</sup> Respondent filed and served a second brief on September 5, 2019.

On October 2, 2019, the Circuit Court issued its Order denying Appellant's Motion to Dismiss and granting Respondent's Motion to Extend Time (Order, p.2)

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<sup>4</sup> Appellant's August 20, 2019 brief is not in the format described in Rule 208(b)(1), SCACR, as required by *S.C. Code Ann.* § 62-1-308(e).

## STANDARD OF REVIEW

Interpretation of a statute is a matter of law. *Eldridge v. City of Greenwood*, 331 S.C. 398, 416-17, 503 S.E. 2d 191 (S.C. Ct. App. 1998). In an action at law, the “scope of review is limited to correction of errors at law.” *Johnson v. Lloyd*, 399 S.C. 470, 732 S.E. 2d 198, 200 (S.C. Ct. App. 2012).

## ARGUMENT

### I. THE CIRCUIT ERRED WHEN IT FAILED TO DISMISS RESPONDENT'S APPEAL WHEN RESPONDENT FAILED TO COMPLY WITH THE STRICT TIME REQUIREMENTS OF SOUTH CAROLINA CODE §§ 62-1-308(d) and (e).

Pursuant to the Probate Code, orders of the Probate Court may be appealed to the Circuit Court, and in reviewing such orders, the Circuit Court “must apply the same rules as an appellate court would apply.” *Ulmer v. Ulmer*, 369 S.C. 486, 632 S.E. 2d 858 (2006). *South Carolina Code* §§ 62-1-308(d) and (e) clearly and unequivocally provide:

“(d) Within thirty days after service of the Statement of Issues on Appeal, all parties *shall* serve on all other parties to the appeal a Designation of Matter to be Included in the Record on Appeal . . .

(e) At the same time the appellant serves [her] Designation of Matter to be Included in the Record on Appeal, the appellant *shall* serve one copy of [her] brief on all parties to the appeal, and file with the clerk of the circuit court one copy of the brief with proof of service. The appellant’s brief shall be in a format described in Rule 208(b)(1), SCACR.” (Emphasis supplied).

Respondent filed and served her Statement of Issues on Appeal on July 5, 2019 in accordance with § 62-1-308(b). That filing started the thirty-day clock for Respondent to file and serve her Designation of Matter to be Included in the Record on Appeal and her brief no later than August 5, 2019.<sup>5</sup> Respondent admits that the due date for her Designation and brief was August 5<sup>th</sup> when she requested the Court’s leave to extend the time “for all deliverables from August 5, 2019 to September 4, 2019.” (Motion to Extend, p. 2). Respondent did not, however, file and serve her Designation and brief until August 20, 2019, or fifteen (15) days after the statutorily mandated due date.

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<sup>5</sup> Because the 30<sup>th</sup> day fell on Sunday August 4, 2019, Respondent’s filings were due the following day.

Rule 74, SCRCP, provides “[e]xcept for the time for filing the notice of appeal, the procedure on appeal to the circuit court from the judgment of an inferior court . . . shall be in accordance with the statutes providing such appeals.” Appeals from the Probate Court to the Circuit Court are governed by *S.C. Code Ann.* § 62-1-308. In *State v. Brown*, 365 S.C. 382, 387, 596 S.E. 2d 39 (2004), the South Carolina Supreme Court held that “the failure to comply with the procedural requirements for an appeal divests a court of appellate jurisdiction.”

It is beyond cavil that Respondent completely failed to meet the strict procedural requirements of §§ 62-1-308(d) and (e) when she failed to file and serve her Designation of Matter to be Included in the Record on Appeal and brief by August 5, 2019. It was not until fifteen (15) days after the Circuit Court’s jurisdiction had been divested that Respondent attempted to comply with the procedural requirements. Moreover, Respondent’s August 20, 2019 brief failed to even minimally comply with the form requirements set forth in § 62-1-308(e).

The procedural provisions of § 62-1-308 are clear and unambiguous and place mandatory obligations on Respondent to meet statutory deadlines. Sections (d) and (e) use of the imperative command “shall,” rather than the permissive “may,” placed compulsory obligations upon Respondent to perform certain acts within prescribed deadlines. “Where the statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.” *Media General Communications v. South Carolina Dept. of Revenue*, 388 S.C. 138, 694 S.E. 2d 525, 530 (2010) (citing *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E. 2d 578, 581 (2000)).

As a result of Respondent’s failure to comply with the procedural requirements of § 62-1-308, the Circuit Court was divested of jurisdiction as of 12:01 a.m. on August 6, 2019 and should have dismissed Respondent’s appeal. *In re Estate of Cretzmeyer*, 365 S.C. 12, 615 S.E. 2d 116

(2005) (appellant's failure to comply with the procedural requirements for an appeal under *S.C. Code Ann.* § 62-1-308 divested the court of appellate jurisdiction when she failed to file her notice of appeal within ten days of receiving the probate court order in accordance with §62-1-308(a)).<sup>6</sup>

**II. THE CIRCUIT COURT ERRED IN GRANTING RESPONDENT'S MOTION TO EXTEND THE TIME TO COMPLY WITH THE STRICT PROCEDURAL REQUIREMENTS CONTAINED IN SOUTH CAROLINA CODE §§ 62-1-308(d) and (e).**

If a party misses a procedural deadline, the appellate court is divested of jurisdiction and it has no power or ability to “rescue” the tardy party by extending deadlines. *Elam v. S.C. Dep't. of Transportation*, 361 S.C. 9, 14-15, 602 S.E. 2d 772, 775 (2004). As discussed above, *S.C. Code Ann.* §§ 62-1-308(d) and (e) mandate that Respondent's Designation of Matters to be Included in the Record on Appeal and her brief be filed and served no later than August 5, 2019. It wasn't until August 14, 2019, that Respondent filed and served a Motion to Extend Time. In her Motion, Respondent asserted that she was entitled to an enlargement of time to comply with the already missed statutory deadlines because she did not receive the transcript of the Probate Court hearing from the transcribing court reporter on July 23, 2019, or “more than forty-five (45) days from the date of the entry of the Order.”<sup>7</sup> (Motion to Extend, p. 2).

Section 62-1 308(c) require that an appellant to make “satisfactory arrangements” with the court or court reporter for furnishing the transcript within ten (10) days of service of the Notice of Intention to Appeal. Respondent filed and served her Notice of Intention to Appeal on June 3,

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<sup>6</sup> See, also, *Tucci v. Tucci*, 2016-UP-526 (S.C. Ct. App. filed December 21, 2016) (affirming dismissal of appeal to Circuit Court from Probate Court because the appellant failed to timely file Statement of Issues on Appeal). Appellant recognizes this decision has no precedential value as set forth in Rule 268(d)(2), SCACR.

<sup>7</sup> Respondent incorrectly measures the 45-day rule in § 62-1-308(c). The 45 days is measured from the date of receipt of the order, not the date of entry of the order.

2019. Thus, Respondent was required to make “satisfactory arrangements” with the court or a court reporter by June 13, 2019. Respondent does not recite any attempt to obtain the recording of the hearing from the Probate Court within the ten-day deadline. Instead Respondent asserts that she first contacted a court reporter about “an estimate for cost of transcribing audio file” on June 24, 2019, or eleven (11) days after the statutory deadline. Respondent asserts she did not receive a quote for the cost to transcribe the hearing recording at the time of first contact, thereby requiring her to make a second inquiry. It was not until July 19, 2019 that Respondent again contacted the court reporter about furnishing a transcription of the recording of the May 16, 2019 Probate Court hearing, ultimately receiving a transcription of the recording Probate Court hearing on July 23, 2019 (Motion to Extend, p. 2).<sup>8</sup>

Even assuming, *arguendo*, that she could have sought an extension of time to comply with the requirements of §§ 62-1-308(d) and (e) beyond the August 5, 2019 deadline, Respondent was required to seek relief before the Circuit Court was divested of jurisdiction. Instead, she waited until nine (9) days after the Circuit Court had been divested of jurisdiction (and seven (7) days after Appellant filed her Motion to Dismiss Appeal) to first claim entitlement to an extension of time. Then, without leave of the Circuit Court, Respondent filed and served her brief when the Circuit Court had been divested of jurisdiction for fifteen (15) days. The order of the Circuit Court granting Respondent’s Motion to Extend was an improper effort to “rescue” a party whose right to appeal had expired.

### CONCLUSION

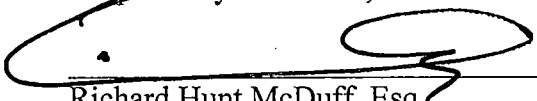
The Circuit Court erred in failing to dismiss Respondent’s appeal dues to lack of jurisdiction because of Respondent’s failure to comply with the strict procedural requirements of

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<sup>8</sup> The forty-fifth day after receipt of written notice of the Probate Court Order would have been July 12, 2019.

*S.C. Code Ann.* §§ 62-1-308(d) and (e). The Circuit Court also erred in granting Respondent's Motion to Extend time to comply with the requirements of § 62-1-308 because (a) she failed to comply with the strict ten-day requirement found in § 62-1-308(c), and (b) the Circuit Court was already divested of appellate jurisdiction and was without power to grant the motion. Appellant requests this Court to reverse the Orders of the Circuit Court, and to remand the matter to the Circuit Court directing it to dismiss Respondent's appeal.

Respectfully submitted,



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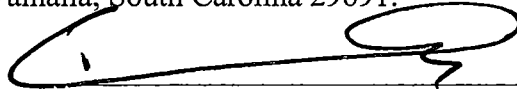
Sommer Smith ..... Respondent

Alma Stone ..... Appellant

PROOF OF SERVICE

I certify that I have served the Brief of Appellant on Sommer Smith by depositing a copy of it in the United States Mail, postage prepaid, on October 18, 2019, addressed to her attorney of record, Keith G. Denny, 50 Short Street, Walhalla, South Carolina 29691.

October 18, 2019



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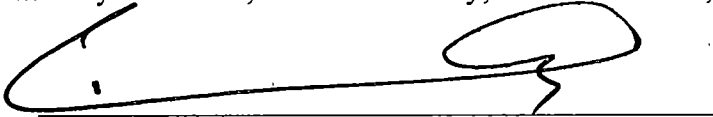
Sommer Smith ..... Respondent

Alma Stone ..... Appellant

PROOF OF SERVICE

I certify that I have served the Notice of Designation of Matter to be Included in the Record on Appeal on Sommer Smith by depositing a copy of it in the United States Mail, postage prepaid, on October 18, 2019, addressed to her attorney of record, Keith G. Denny, 50 Short Street, Walhalla, South Carolina 29691.

October 18, 2019



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October 18, 2019

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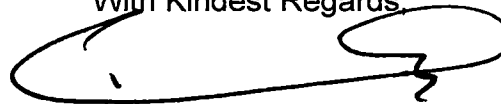
Re: Sommer Smith, Respondent v. Alma Stone, Appellant  
Case No.: 2019-CP-37-00320  
Appellate Case No.: 2019-001696

Dear Ms. Kitchings:

Enclosed, please find one (1) original of the Brief of Appellant and one (1) original of the Designation of Matter to be Included in the Record on Appeal for the above matter.

If you have any questions, please do not hesitate to contact our office.

With Kindest Regards,



Richard H. McDuff, Esq.

RHM/zh

Enclosures

cc: Alma Stone  
Keith Denny

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