

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas
Maite D. Murphy, Circuit Court Judge

Case No. 2019-001719

RECEIVED

May 12 2020

SC Court of Appeals

Innovative Waste Management Inc., Respondent,

v.

Crest Energy Partners, GP, LLC, Dunhill Products GP, LLC, Henry
Wuertz, Innovative Waste Management, Inc., Crest Energy Partners
LP, Dunhill Products LP, Edward H. Girardeau, C. Russ Lloyd,
Defendants, Of Whom,

Crest Energy Partners GP, LLC, Crest Energy Partners LP, Dunhill
Products, LP, and Henry Wuertz, are the Appellants.

**APPELLANTS' RETURN TO
RESPONDENTS' MOTION TO DISMISS**

COME NOW APPELLANTS, through undersigned counsel, who hereby offer this Return
in Opposition to Respondents' Motion to Dismiss.

Appellants note that, following the filing of Respondents' Motion, they filed their Initial
Brief and Designation of Matter along with a Motion for Enlargement of Time, Out of Time.
Appellants respectfully request that the arguments stated therein be incorporated in this Return by
reference.

Respondents correctly note that Appellants appeal an Order of the Court dated October 1,
2010, filing and serving their Notice of Appeal on October 9, 2010. Thereafter, the undersigned

miscalendared the date to order the transcript under Rule 207(a)(1), SCACR, apparently misreading the rule as applying the thirty (30) day period to appeals from common pleas. Additionally, as this case spans eight years of litigation and the issues on appeal arise from five separate hearings, Appellants' counsel needed to determine which transcripts had previously been ordered and which ones were needed, which had not been accomplished when he received the Court's letter of November 4, 2019 advising that the deadline had passed.

On that same date, the Court also issued a letter advising of a deficiency in the Notice of Appeal, in that the proof of service was not in compliance with the Appellate Court Rules. Concerned that this deficiency in the Notice of Appeal could affect appellate jurisdiction, Appellants' counsel corrected that issue immediately upon receiving the Court's November 4, 2019 letters. In the process of and after correcting that issue, Appellant's counsel failed to follow through with ordering the transcripts until he received the Court's November 21, 2019 Order dismissing the Appeal. This issue was addressed in Appellant's Petition to Reinstate, filed November 26, 2019, which the Court granted on February 21, 2020.¹

In the meantime, the transcript of the hearing that directly resulted in the October 1, 2019 Order was received on December 2, 2019. Appellants' counsel notified the Court of that fact immediately.

If Appellants intended to delay the appellate process, they could have waited until October 31, 2019 to serve Notice of Appeal, which would have made November 11, 2012 the correct deadline for ordering the transcript under Rule 207(a)(1). Given that Rule 207(a)(2) gives the

¹ Respondent's Motion states that "[a]ppellants argued that there would be no prejudice to Respondents because they now had all the materials necessary to prepare their initial brief prior to the reinstatement order." [sic]. That statement is simply false, exemplifying respondent's counsel's inherent tendency to mis-state the record. Appellants Petition to Reinstate did state that "all relevant transcripts" had been "received or ordered" and that the ordered transcripts were "anticipated to be received within sixty days of" the date they would have been due from the court reporter if they had been timely ordered, which was, in fact, a correct assessment.

court reporter a full sixty (60) days to deliver the transcript without requesting an extension, Appellants actually received the transcript more than forty-five days before the date that the Appellate Court Rules appear to consider reasonable from the date of the Order under Appeal. Regardless, even after counsel's errors described above, the transcript was actually received more than fifteen days before the court reporter's sixty-day deadline would have expired had Appellants ordered the transcript ten days after filing and serving the Notice of Appeal.

The only reason that this appeal was delayed from that point was because Respondent formally opposed Appellants' Petition to Reinstate.² Ironically, Respondent stayed the deadlines for additional filings in this appeal again by filing its Motion to Dismiss. Rule 240(b), SCACR. That action and the instant motion seem disingenuous given that, in the first appeal in this case, Respondent's counsel failed to request the transcript within 10 days of serving the Notice of Appeal (See Ex. A), was required to file a Motion for Extension of Time, out of time, to file the Record on Appeal (See Ex. B) and failed to file a Certificate of Counsel with either of its Final Briefs. (Ex. C). Appellants did not protest any of those filings, and otherwise have done nothing to willfully delay the progression of the case or either appeal.

If Respondent had not contested Appellants' Petition to Reinstate, Appellants' Initial Brief and Designation of Matter would have, presumably, been due on January 2, 2020, thirty days after

² An issue of timeliness arose with regard to Respondent's Return in Opposition to the Petition to Reinstate. The Petition was filed by hand on November 26, 2019, although appellants had until December 6, 2019 to do so under Rule 260(a), SCACR. Hoping to achieve actual delivery on Respondent's counsel prior to the Thanksgiving holiday, Appellants' counsel served the petition via Federal Express rather than U.S. Mail. Respondent's counsel's office closed before delivery was first attempted, and actual delivery was not accomplished until the Monday after the holiday, December 2, 2019. By letter of December 16, 2019, Respondent's counsel asked the Court to consider their December 11, 2019 Return timely. Appellants' counsel's correspondence to the Court of December 20, 2020 stated that Appellants had no objection to the timeliness of Respondent's Return and further stated that Appellants did not intend to file a Reply to the Return. Again, Appellants' prompt actions to correct its prior failure to order the transcript expedited the appellate process.

receipt of the first transcript, or January 6, 2020, thirty days after receipt of the second. Either date would have been well before the coronavirus emergency began to impact South Carolina.

Ultimately, it was not due until March 23, 2020, thirty days after the Court granted Appellants' Petition to Reinstate. Appellants filed their first Motion for Extension three calendar days before that deadline. At that point, the Supreme Court had cancelled all jury trials and all upcoming terms of circuit court but had not yet addressed the appellate court system. If Appellants had waited until the end of the day on March 20, 2020, no motion would have been required because the Supreme Court's Order granted a twenty-day extension in every appellate case. In fact, the transmittal letter to Appellants' first Motion for Extension of Time explicitly requested "[i]n the event the Court issues a blanket extension in all pending matters, thereby mooted this motion, you may shred the enclosed documents without need for processing or returning." The Motion was processed and granted nonetheless.

Arguably, Appellants second Motion for Extension should have been treated as its first. In any event, Appellants believe that it would not have been unusual for any party to an appeal to request a thirty-day briefing extension after the automatic twenty-day extension granted by the March 20, 2020 Order, and if Appellants had requested that relief, it likely would have been granted. Appellants Initial Brief and Motion for Enlargement of Time were filed twenty-two days after the expiration of the blanket extension. Appellants requested only fourteen additional days in its Second Motion for Extension, believing that to be more than sufficient. Unfortunately, Appellants' counsel underestimated the number of hours that would be required to complete the Initial Brief, while also grossly overestimating the number of hours that would be available to devote to this effort while under the "work or home" order issued by Governor McMaster on April 6, 2020. One would think that working from home would promote efficient research and writing;

if anything, the undersigned has been reminded why he maintains an office despite the technology available today.

Respondents' Motion to Dismiss does cite any particular standard applicable to its Motion. However, Rule 208(a)(4), SCACR does provide for dismissal "upon the failure of the appellant to file and serve his brief within the time prescribed", allowing for reinstatement of the appeal "as provided by Rule 260." In turn, Rule 260(a), SCACR allows the Court to Reinstatement the Appeal pursuant to a procedural default upon a showing of good cause. Therefore, Appellants submit that a showing of good cause should serve to defeat a Motion to Dismiss on procedural grounds.³

Appellants assert that the court must find good cause to allow the appeal to proceed under the standard articulated in Sundown Operating Co. v. Intedge Indus., 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009), which interprets the good cause standard applicable to Rule 55, SCRCF. In Sundown Operating, the Supreme Court found that the "mere 'good cause'" standard "requires a party . . . to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice." Id. (emphasis added). The Court must also consider the timing of the motion for relief; whether the Appellant has a meritorious appeal; and any prejudice to the Respondent if relief is granted. Id.

Appellants believe that the explanations provided herein and in their Motion for Enlargement of Time Respondent are more than sufficient to establish good cause, and further believe that the Orders of the Supreme Court and memoranda of Chief Justice Beatty have affirmatively stated such a finding generally. Appellants also sought relief promptly, not only moving for relief before the appeal was dismissed by the Clerk, but also filing their Initial Brief and Designation of Matter with the Motion, thereby fully addressing the default and establishing

³ In the event the Court finds that dismissal is required under Rule 208(a)(4), Appellants respectfully request that the Court treat its filings as a Petition to Reinstatement the appeal, and grant that relief.

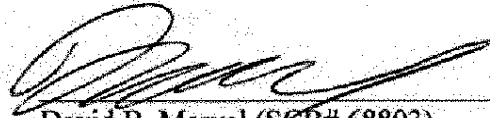
a meritorious basis for the appeal.⁴ Most importantly, Respondent cannot, and has not attempted to, establish that it has been prejudiced by the delay. While Appellants do not intend to belittle their failure to file the brief within the April 27, 2020 deadline, the delay was at most ten days, and actually four given that Respondent's Motion to Dismiss stayed further deadlines.

The undersigned is aware that the Rules "are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals in this State." Henning v. Kaye, 307 S.C. 436, 437-38, 415 S.E.2d 794, 794 (1992) (holding that dismissal is an inappropriate sanction for several instances of failing to comply with rules relating to content and format of Initial Brief). Appellants' counsel did not willfully disregard the Appellate Court Rules, and the efforts made to address his inability to meet the April 27, 2020 due date were done in a manner that would allow the appeal to proceed without prejudice to the Respondent and in an attempt to reduce the extent of the Court's involvement. Given all of the issues addressed by the Supreme Court's operational orders over the past sixty days, and which have had real and direct implications in the lives of counsel, the Court, and the entire Court staff, the Court should accept the filing of the Initial Brief and Designation of Matter Out of Time, in the interests of justice and judicial economy.

Appellants submit that good cause exists and the Court should therefore allow Appellants leave to file their Initial Brief and Designation of Matter out of time. Appellants respectfully request that this Honorable Court Deny Respondent's Motion to Dismiss and/or Grant Reinstatement of the Appeal, and grant Appellants leave to file their Initial Brief and Designation of Matter out of Time.

⁴ Respondent's Motion also notes that as of May 1, 2020, the Court had "no record of having received Appellants Initial Brief", which counsel finds curious given that a filing mailed on April 27, 2020 would have been unlikely to clear quarantine by May 1, 2020.

RESPECTFULLY SUBMITTED:



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ATTORNEY FOR THE APPELLANTS

May 11, 2020

Charleston, South Carolina

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Defendants, Of Whom,

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Products, LP, and Henry Wuertz, are the Appellants.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 11th day of May, 2020 I served Respondent's
counsel with Appellants' Return to Respondent's Motion to Dismiss, by mailing a copy to its
counsel by U.S. Mail, postage prepaid, at the following address:

Wm. Michael Gruenloh
Gruenloh Law
67 Moultrie St., Second Floor
Charleston, SC 29403



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Charleston, SC 29413
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ATTORNEY FOR THE APPELLANTS

May 11, 2020
Charleston, South Carolina



DAVID B. MARVEL

Attorney at Law • Proctor in Admiralty
Certified Civil and Federal Court Mediator
Admitted to Practice in South Carolina and Georgia

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May 12 2020
SC Court of Appeals

Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

Re: Innovative Waste Mgmt. v. Crest Energy Partners, *et al.*
Case No. 2019-001719

Dear Ms. Kitchings,

I hope this letter finds you and everyone at the Court well. I have enclosed Appellants' Return to Respondent's Motion to Dismiss, along with a certificate of service.

Please file this in your usual prompt and efficient manner. I will retrieve a clocked copy from the C-Track system.

Thank you for your continued assistance with this matter. If you have any questions, comments, or concerns, please do not hesitate to contact me. With best regards, I remain

Sincerely,

David B. Marvel

/DBM

cc: Wm. Michael Gruenloh



DAVID B. MARVEL

Attorney at Law • Proctor in Admiralty
Certified Civil and Federal Court Mediator
Admitted to Practice in South Carolina and Georgia

May 11, 2020

VIA FAX TO (803) 734-1839

Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

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SC Court of Appeals

Re: Innovative Waste Mgmt. v. Crest Energy Partners, *et al.*
Case No. 2019-001719

Dear Ms. Kitchings,

I hope this letter finds you well. I have briefly reviewed Respondent's Return to Appellant's Motion for Enlargement of Time, which was filed by email this afternoon. I will file a Reply in due course. In the meantime, I note that page 3 of the Return states

Appellant, who was served with a copy of the Motion to Dismiss on May 1, 2020, has filed no return or request for an extension to respond to that Motion and the deadline to do so has passed.

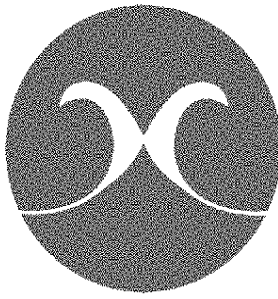
By my calculation, the deadline to file a Return to Respondent's Motion was today. Rule 240(e), SCACR. For the sake of good order, I hereby submit a copy of the Return that was filed and served in accordance with Rule 262, and which will likely reach quarantine tomorrow or Wednesday. I am providing this copy so the Respondent's statement is not taken as true while the Court awaits the Return. I am transmitting it by fax because the Supreme Court's Order explicitly states that after-hours filings by fax will be considered received on the date of the fax, but does not provide similar guidance for filings by email.

Thank you for your continued assistance with this matter, and please accept my apologies for this burden on the Court. With best regards, I remain

Sincerely,
s/ David B. Marvel
David B. Marvel

/DBM

cc: Wm. Michael Gruenloh
Enclosure



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May 12 2020

SC Court of Appeals

FAX COVER SHEET

May 11, 2020

TO: Clerk, SCCOA (803) 734-1839
Gruenloh (843) 577-0721

FROM: David B. Marvel

RE: IWM v. Crest Energy Partners
Case No. 2019-001719

11 Pages Including Cover

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