

State of South Carolina)
County of Orangeburg)

In the Court of Common Pleas
First Judicial Circuit
2019-CP-38-00655

Jacquita Funchess,)
Appellant,)
vs.)
Glenfield Apartments,)
Respondent.)

Transcript of Record

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SC Court of Appeals

January 16, 2020
Orangeburg, South Carolina

B E F O R E:

The Honorable Maité Murphy, Judge

A P P E A R A N C E S:

Matthew M. Billingsley, Esquire
Taylor Rollins Ott, Esquire
Attorneys for Appellant

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TRANSCRIPT OF RECORD

(Whereupon, the proceeding commenced at 2:06 p.m.)

DEPUTY CLERK OF COURT: Next case, 2019-CP-38-00655, *Jacquita Funchess v. Glenfield Apartments*, motion to dismiss.

THE COURT: Good afternoon.

MR. VON KELLER: Good afternoon, Your Honor.

THE COURT: All right. So whose motion do we have here?

MR. VON KELLER: Your Honor, this is -- I'm Ted von Keller. I'm the attorney for Glenfield Properties. Glenfield Properties is a public-housing entity here in Orangeburg.

Ms. Funchess entered into a lease with my client in September of -- of 2018. In April of 2019, my client -- there was a hearing before the magistrate on our application for ejectment. The landlord contended that Ms. Funchess had violated four or five different sections of the lease.

There were three -- there were four different criminal violation arrest and incident -- that was the word I was looking for -- excuse me -- incident reports that involved Ms. Funchess. They -- they had to do with her child's father and her boyfriend, who was on a no-trespass warning from the town of -- from the City of Orangeburg not to come

1 onto the property of Glenfield Properties. He did, in
2 fact, violate that on three occasions. There were criminal
3 charges about domestic violence.

4 So an application for ejectment was brought. A
5 hearing was held on April 16th. And the judge issued his
6 ruling for Glenfield Apartments evicting Ms. Funchess and
7 giving her, I think, 60 days to vacate the property.

8 Opposing counsel filed an appeal on May 5 -- 15, 2019.
9 We waited and waited for him to file a request -- a return.
10 It was never a request for a return made. On October 8,
11 2019, I filed a motion to dismiss, which I amended on
12 October the 11th. And on December 20th, counsel for the
13 defendant, some seven months and, by my count, 219 days
14 later, filed, in response to my motion, a motion to compel
15 the return.

16 Your Honor, there is a case precisely on point. And
17 it is the *Joyner v. Glimcher* case. That is 589 S.E.2d 762,
18 a 19 -- excuse me -- a 2002 ruling by the Court of Appeals.

19 In that case the same facts existed. There was an
20 appeal. The appellant did not request a return. The
21 respondent filed a motion to dismiss for failure to
22 prosecute. And the Court granted it.

23 It went up on appeal. And the Court of Appeals said
24 that South Carolina Code of Laws Section 18-7-60 requires
25 the return to be produced with -- between 10 and 30 days of

1 filing the notice of appeal. If that is not done, the
2 burden is solely upon appellant to take action to rectify
3 that. It is not the duty of the Court. The Court -- the
4 Court of Appeals was very clear that the burden is on the
5 appellant to obtain compliance by mandamus, if necessary.

6 The Court went on to say that it is incumbent on the
7 appellant to proceed. And the Court of Appeals dismissed
8 the appeal for failure to prosecute.

9 We -- it's a harsh -- it's a harsh result, as the
10 Court pointed out. But the statute is very clear. You
11 have 5 to 30 days in which the return has to be produced.
12 If it doesn't, it is incumbent upon you to do something.

13 In this case, it was seven months later and only in
14 response to my motion to dismiss that the appellant did
15 something. And that, unfortunately, is unsatisfactory
16 under the statute. And I ask that the Court dismiss the
17 appeal for failure to prosecute under 18 -- 18-7-60.

18 THE COURT: All right. Thank you, Counsel.

19 Response?

20 MR. BILINGSLEY: Thank you, Your Honor. Matt
21 Billingsley for Ms. Funchess and also Taylor Ott from our
22 Orangeburg office as well, who has some information. With
23 this case and with this appeal, no return was -- was filed.
24 We filed -- I believe Ms. Ott filed a -- a motion to compel
25 in December to compel the return to be served.

1 As far as the -- that -- that case goes, the -- the --
2 the statute does not say itself that the appellant has to
3 file a writ of mandamus or go through this specific process
4 to get the return. And it's only bore out in some fashion
5 in case law.

6 The case at -- in question -- there -- there -- there
7 are other cases cited by the dissent that goes in -- into
8 -- where -- times where different things were done that it
9 wasn't always dismissed, necessarily. But at -- as it says
10 towards the end of the case, it says the -- the appellant
11 must act with due diligence and seek a writ of mandamus, if
12 necessary, to compel the return.

13 Compelling the -- we -- we've tried to compel the
14 return via motion at this point. They also note in that
15 particular case cited by the -- the respondent that --
16 really, the very end of it says that the -- the motion to
17 dismiss was the only motion in front of the Court and the
18 Court didn't have an organization to *sua sponte* direct the
19 magistrate to file a return.

20 Here, we have filed a motion to try to compel that
21 return. In the case law that I've seen, I haven't seen
22 anything that sets out a particular time frame of -- with
23 which to do. And it doesn't specifically say that we --
24 you have to file a mandamus as soon as the 30 day passes or
25 something along those lines.

1 It doesn't set out any kind of time frame and say, you
2 know, if there's no return by X date, then a mandamus has
3 to be filed. Even in that -- in the case cited, it doesn't
4 say that a mandamus has to be filed. That's the more --
5 the most extreme, I -- you know, version of that.

6 What it says is, you know, a mandamus, if necessary.
7 And at this point, unlike the case cited, we have filed a
8 motion to compel that's scheduled to be heard on February
9 the 10th. I believe Ms. -- Ms. Ott could speak to this.
10 But I believe that while at the court, that she did speak
11 with just the secretary up front that indicated they were
12 waiting on something from the circuit court. And
13 certainly, she can speak to that, if necessary.

14 So I think that they're waiting for just to be told
15 they need to do one, which, you know, it -- an order to
16 compel would do that in order for the -- the judge in this
17 particular case to send the return.

18 So we would like to ask for the -- the motion to
19 dismiss either to be dismissed or, in the alternative, even
20 continued and consolidated with the February 10th motion so
21 that I can be heard, far as the motion to compel, that we
22 get an order either to dismiss the appeal or an order to
23 compel the return of the magistrate, which I believe the
24 court -- the magistrate court will comply with once they
25 receive something and receive that order. I don't -- I

1 don't think it would take a mandamus to do that in this
2 case.

3 THE COURT: Why was the return not requested when the
4 appeal was filed?

5 MR. BILINGSLEY: Well, there's not a requirement to
6 request the return, in the ---

7 THE COURT: I didn't ---

8 MR. BILINGSLEY: --- same way ---

9 THE COURT: --- say ---

10 MR. BILINGSLEY: --- a summons ---

11 THE COURT: --- I was just ---

12 MR. BILINGSLEY: --- is.

13 THE COURT: --- asking why ---

14 MR. BILINGSLEY: Oh.

15 THE COURT: --- it wasn't.

16 MR. BILINGSLEY: Well, when we filed the appeal, Ms.
17 Ott -- they filed -- we also filed the notice of appeal
18 with the magistrate court. And under the statute cited,
19 that is what triggers the magistrate -- their time to start
20 for them to do their return.

21 So basically, what -- the request for the -- for the
22 return is essentially filing the notice of appeal.

23 THE COURT: So when it was not received, why wasn't
24 that followed up on?

25 MR. BILINGSLEY: I -- it -- it is -- is more of -- I

1 didn't really realize one had -- had not been received. I
2 got involved with the case. Ms. Ott went on maternity
3 leave. I got involved because she was out.

4 So I got on the case -- I also have the case --
5 there's another one right after this; same parties,
6 different -- different appellant -- and just didn't realize
7 it had -- it had not been done or returned. And so when we
8 followed back up, it just took a while for us to follow
9 back up and figure out what was going on.

10 And then we got missed -- you know, the motion there.
11 That's when we looked back at the case law and what are we
12 supposed to do with this. And, you know, I spoke to a few
13 colleagues of how they usually try to handle it. And
14 that's when we filed the motion to -- or got the motion to
15 compel together to try to compel the return.

16 THE COURT: Do y'all have a copy of the *Joyner* case
17 with you, by any chance?

18 MS. OTT: Yes. Yes, Your Honor.

19 MR. VON KELLER: I do, Your Honor. Unfortunately ---

20 MR. BILINGSLEY: Yeah.

21 MR. VON KELLER: --- it is ---

22 MS. OTT: It's not -- mine's not marked, Your Honor.

23 THE COURT: Okay.

24 MR. BILINGSLEY: Yeah. There -- we ---

25 THE COURT: Thank you.

1 MR. BILINGSLEY: --- I believe we have several of them
2 going around.

3 THE COURT: That'll save us a little bit of time.

4 MS. OTT: Yes. Yes, ma'am.

5 MR. VON KELLER: May I respond, Your Honor?

6 THE COURT: Of course.

7 MR. VON KELLER: You raise two very good points.
8 Number one, you said why not request. That is addressed in
9 the *Joyner* case. If you will -- if Your Honor will turn to
10 -- I assume your -- this case is printed like mine.

11 It is -- it -- it is on page 3 of 6, up at the top
12 where it says (as read): "The -- the -- the appellant in
13 that case argued before the Court of Appeals that there was
14 no reasonable means for him to ensure that a return was
15 timely filed. We disagree. Glimcher" -- that was the
16 appellant -- "was on notice that a return had not been
17 timely filed when he did not receive a notice in writing
18 from the clerk of circuit court. Having received no such
19 notice, he should have presumed no return had been filed
20 and acted accordingly."

21 And it goes on to say, if you flip over to page 4 of
22 6, it says that the burden is on the appellant to -- to
23 seek this.

24 Now, the second point that counsel makes is that he
25 seeks to distinguish this by saying that there's another

1 motion before the Court. There is, in fact, no other
2 motion before this Court.

3 There is a motion before another judge on another day
4 for a motion to compel that was filed almost 2 1/2 months
5 after I filed my motion to dismiss. So the appeal was
6 filed in May, and the motion to compel was only -- was
7 filed seven months later and two months after my motion to
8 dismiss.

9 This -- Your Honor, that is the -- that is the
10 categorical example of a failure to prosecute. It puts an
11 affirmative duty on the appellant, and they have failed to
12 comply with that duty. And this case law -- this case
13 requires dismissal.

14 THE COURT: Anything further from anyone?

15 MR. BILINGSLEY: I -- just briefly, I just don't -- I
16 don't think -- and if you're reading the dissent, I think
17 they how they referred -- I don't think it requires
18 dismissal. I think it would be more in the Court's
19 discretion, especially when we do -- that -- that ruling or
20 that other motion may not be in front of you today. But it
21 is one that is filed and one that -- that can be considered
22 to be sent over to compel the return so the case can be
23 heard on the merits, as opposed to being dismissed just on
24 the failure for the return. That's it, Your Honor.

25 THE COURT: All right. Thank you, Counsel. I'll take

1 the time to review the case law and let you know of an
2 opinion.

3 MS. OTT: Okay. Thank you, Your Honor.

4 (Whereupon, the proceeding concluded at 2:18 p.m.)

5 --- END OF TRANSCRIPT OF RECORD ---
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CERTIFICATE

I, the undersigned Maryann S. Nevers, CVR-M-CM, RVR, Official Court Reporter for the Eighth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and evidence introduced in the hearing of the captioned cause, relative to appeal, in the Circuit Court for Orangeburg County, South Carolina, on the 16th day of January, 2020.

I do further certify that I am neither of kin, counsel, nor interest in any party hereto.



Maryann S. Nevers, CVR-M-CM, RVR
Official Court Reporter

Columbia, South Carolina

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