

FORM 15

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RECORD ON APPEAL

MAY 17 2021

THE STATE OF SOUTH CAROLINA

SC Court of Appeals

In The Court of Appeals

[In The Supreme Court]

APPEAL FROM ORANGEBURG COUNTY

Court of Common Pleas

Circuit Court Judge Murphy

Case No. 2020-000405

Glenfield Apartments

Respondent,

v.

Jacquita Funchess,

Appellant.

RECORD ON APPEAL

Jacquita Funchess
1303 Glenfield Apartment #J2
Orangeburg, South Carolina 29118
(803)664-3626
Appellant

Theodore von Keller
PO Box 4216
Columbia, SC 29240
Attorney for Respondent

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The undersigned hereby certifies that the Record on Appeal contains the material,
as understood by the appellant, proposed to be included by any of the
parties and not any other material.

May 11, 2021

Jacquita Funchess
1303 Glenfield Apartment #J2
Orangeburg South Carolina
(803)664-3626
Appellant

92346

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Hon. Maite Murphy, Circuit Court Judge

Case No. 2019-CP-38-00655

Jacquita Funchess

Appellant

v.

Glenfield Apartments

Respondent

RECEIVED
MAR 05 2020
SC Court of Appeals

NOTICE OF APPEAL

Jacquita Funchess appeals the order of the Honorable Maite Murphy dated February 7, 2020. Appellant received written notice of entry of Judge Murphy's order on February 7, 2020.

March 3, 2020

SOUTH CAROLINA LEGAL SERVICES

s/Taylor Ott

By: Matthew M. Billingsley, S.C. Bar No. 76095
2803 Carner Avenue
North Charleston, SC 29405
(843) 266-2174

SOUTH CAROLINA LEGAL SERVICES
Taylor Ott, S.C. Bar No. 100737
P.O. Box 1646
Orangeburg, South Carolina 29116
Phone: 803-533-0116
Attorneys for Appellant

Other Counsel of Record:

**Theodore von Keller
Crawford & von Keller, LLC
1640 St. Julian Place
Post Office Box 4216 (29240)
Columbia, South Carolina 29204**

Jacquita Funchess
PLAINTIFF(S)

Glenfield Apartments
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled);
 Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded;
 Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

This matter came before this court on January 16, 2020 on Defendant's Motion to Dismiss. After careful consideration of the arguments and record, the Court has decided to GRANT this motion because Appellant failed to obtain a Return from the Magistrate as required pursuant to S.C. Code Ann. Section 18-7-60.

ORDER INFORMATION

This order ends does not end the case.

See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 02/07/2020 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Maite Murphy, Circuit Court Judge

Case No. 2019-CP-38-00655

Jacquita Funchess

Appellant

v.

Glenfield Apartments

Respondent

RECEIVED

MAR 05 2020

SC Court of Appeals

CERTIFICATE OF SERVICE

I certify that I have served the Notice of Appeal and Motion to Withdraw on Glenfield Apartments by depositing a copy of it in the United States Mail, postage prepaid, on March 3, 2020, addressed to their attorney of record, Theodore von Keller, P.O. Box 4216 Columbia, SC 29204.

March 3, 2020

SOUTH CAROLINA LEGAL SERVICES

s/Taylor Ott

By: Matthew M. Billingsley, S.C. Bar No. 76095
2803 Carner Avenue

North Charleston, SC 29405

(843) 266-2174

Taylor Ott, S.C. Bar No. 100737

P.O. Box 1646

Orangeburg, South Carolina 29116

Phone: 803-533-0116

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
May 29, 2020

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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TRANSACTION REPORT

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Maite Murphy, Circuit Court Judge

Case No. 2019-CP-38-00655

Jacquita Funchess

Appellant

v.

Glenfield Apartments

Respondent

RECEIVED

MAR 05 2020

SC Court of Appeals

CERTIFICATE OF SERVICE

I certify that I have served the Notice of Appeal and Motion to Withdraw on Glenfield Apartments by depositing a copy of it in the United States Mail, postage prepaid, on March 3, 2020, addressed to their attorney of record, Theodore von Keller, P.O. Box 4216 Columbia, SC 29204 .

March 3, 2020

SOUTH CAROLINA LEGAL SERVICES

s/Taylor Ott

By: Matthew M. Billingsley, S.C. Bar No. 76095

2803 Carner Avenue

North Charleston, SC 29405

(843) 266-2174

Taylor Ott, S.C. Bar No. 100737

P.O. Box 1646

Orangeburg, South Carolina 29116

Phone: 803-533-0116

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

Glenfield Apartments,

Plaintiff(s)

vs.

Jacquita Funchess,

Defendant(s)

) IN THE COURT OF COMMON PLEAS
) FIRST JUDICIAL CIRCUIT
)
)
)

) **BOND TO STAY EXECUTION ON**
) **APPEAL TO COURT OF APPEALS**

) C.A. NO.: 2019-CP-38-00656

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MAR 05 2020

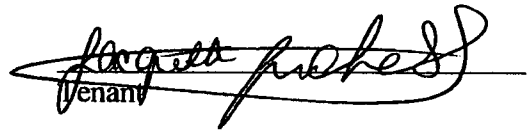
SC Court of Appeals

Now comes the tenant in the above entitled action and respectfully shows the court that a judgment of ejectment was issued against the tenant and for the landlord on April 16, 2019 by the presiding magistrate. Tenant appealed the judgment to the circuit court. Thereafter, the Circuit Court dismissed the appeal and the tenant appeals the decision to the Court of Appeals.

The tenant is obligated to pay rent in the amount of \$0.00 per month due on the 1st day of each month.

Tenant hereby undertakes to pay the periodic rent hereinafter due according to the aforesaid findings of the court and moves the Circuit Court or Court of Appeals to stay execution on the judgment for ejectment until this matter is heard on appeal and decided by the Court of Appeals.

Date: 3/3/2020



Tenant

Upon execution of the above bond, execution on the judgment of ejectment is hereby stayed until the action is heard on appeal and decided by the circuit court. If Tenant fails to make any rental payment within five days of the due date, upon application of the landlord, the stay of execution shall dissolve, the appeal by the tenant to the circuit court on issued dealing with possession must be dismissed, and the sheriff may dispossess the tenant.

Date: _____

Judge or Clerk



**South Carolina
Legal Services**

Balancing the Scales of Justice

2803 Camer Avenue, North Charleston South Carolina 29405
Phone: (843) 720-7044 Fax: (843) 760-1090
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March 3, 2020

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

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MAR 05 2020

SC Court of Appeals


Re: Jacquita Funchess, Appellant v. Glenfield Apartments, Respondent

Dear Ms. Kitchings:

Please find the enclosed Notice of Appeal, Motion to Withdraw, Certificate of Service, copy of the Final Order being appealed, and the filing fee for the above referenced case.

With my kindest regards, I am

Sincerely,


South Carolina Legal Services
Matthew M. Billingsley
Taylor Ott
Attorneys for Appellant

cc: Theodore von Keller



STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Glenfield Apartments

Plaintiff,

vs.

Jacquita Funches

Defendant(s).

IN THE COURT OF COMMON PLEAS

COMMON PLEAS CASE NUMBER

2019CV3810701065

MAGISTRATE CIVIL CASE NUMBER

NOTICE OF CIVIL APPEAL

The defendant Jacquita Funches hereby gives notice of appeal from the judgment of the Magistrate’s Court in the above action, to the Circuit Court of Common Pleas, in the county of ORANGEBURG. This notice of appeal is made subsequent to personal notice of the judgment received on April 16, 2019.

As required by Rule 74 SCRPC, within 30 days after Defendant received notice of the judgment a copy of this notice and grounds for appeal have been filed with the Court of Common Pleas and the Magistrate’s Court and have been served upon Plaintiff or Plaintiff’s Counsel by certified mail with adequate postage affixed and addressed to:

Theodore Von Keller
Crawford and Von Keller, LLC
PO Box 4216
Columbia, SC 29240

Glenfield Apartments
2450 Columbia Road
Orangeburg, SC 29118

The undersigned hereby requests that the Magistrate’s Court transmit the case file of the trial in that Court to the Court of Common Pleas and furnish me with a copy of the case file for which I will pay the costs. The Appellant’s exceptions to the Magistrate’s judgment follow:

- I. The record does not support a finding that Defendant/Appellant materially violated the terms or conditions of her lease agreement with Plaintiff/Respondent.**
- II. The magistrate judge erred by solely basing his decision on inadmissible hearsay evidence contained in police reports. Further, the magistrate judge erred by allowing the police reports into evidence under both the public records exception and the business records exception.**

THEREFORE, Defendant/Appellant hereby respectfully requests that her ejection be stayed, that this matter be set for a hearing at a time mutually convenient to the Court and the parties, and that the Magistrate's judgment be reversed.

Respectfully Submitted,

SOUTH CAROLINA LEGAL SERVICES

May 15, 2019

s/Taylor R. Ott
By: Taylor R. Ott
SC Bar No. 100737
P.O. Box 1646
Orangeburg, SC 29116
Office: (803) 533-0116
Fax: (803) 531-5102
taylorott@sclegal.org
Attorneys for the Defendant/Appellant

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

Jacquita Funchess

Plaintiff,

-vs-

Glenfield Apartments

Defendant(s).

IN COMMON PLEAS COURT

CASE NO. 2019-CP-38-00655

MOTION TO DISMISS

Theodore von Keller, Attorney for the Defendant, moves to dismiss the within appeal pursuant to Rule 75 SCRPC and South Carolina Code of Laws Ann. §18-7-60 as no return has been filed and Appellant has failed to seek a Writ of Mandamus. See *Joyner v. Glimcher Props* 356 S.C. 460, 589 S.E. 2d 762 (2002).

Columbia, South Carolina

October 7, 2019

Crawford & von Keller, LLC

s/Theodore von Keller
Theodore von Keller, SC Bar No. 5718
P.O. Box 4216
Columbia, South Carolina 29240
Attorney for the Defendant

STATE OF SOUTH CAROLINA
COUNTY OF ORANGEBURG

IN COMMON PLEAS COURT

CASE NO. 2019-CP-38-00655

Jacquita Funchess

Plaintiff,

-vs-

Glenfield Apartments

Defendant(s).

**AMENDED
MOTION TO DISMISS**

TO: TAYLOR OTT, ATTORNEY FOR THE PLAINTIFF NAMED ABOVE:

YOU WILL PLEASE TAKE NOTICE that the undersigned, Theodore von Keller, Esquire as attorney for the Defendant, Glenfield Apartments, will move before the Presiding Judge, Orangeburg County, Orangeburg County Courthouse, Orangeburg, South Carolina, on the tenth (10th) day after service hereof or as soon thereafter as counsel may be heard, for an Order dismissing the Appeal pursuant to Rule 75 SCRCP and South Carolina Code of Laws Ann. §18-7-60. The Motion is based upon the following grounds:

1. No return has been filed.
2. Appellant has failed to seek a Writ of Mandamus. See *Joyner v. Glimcher Props* 356 S.C. 460, 589 S.E. 2d 762 (2002).

This Motion is based on the pleadings, Rule 75, *South Carolina Rules of Civil Procedure SC Code Ann. 18-7-60*, and upon applicable cases and statutes.

October 11, 2019

Columbia, South Carolina

Crawford & von Keller LLC

s/Theodore von Keller

Theodore von Keller, SC Bar No. 5718

P.O. Box 4216

Columbia, South Carolina 29240

Attorney for the Defendant

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG)	FIRST JUDICIAL CIRCUIT
)	
Glenfield Apartments,)	
)	
Plaintiff(s))	
)	NOTICE OF MOTION AND MOTION
vs.)	TO COMPEL MAGISTRATE TO FILE
)	ADEQUATE RETURN
Jacquita Funchess,)	
)	
Defendant(s))	C.A. NO.: 2019-CP-38-00655

To: Theodore Von Keller, Attorney for Plaintiff/Respondent

NOTICE IS HEREBY GIVEN that the undersigned counsel for the Defendant/Appellant will move before the Court Of Common Pleas for Orangeburg County for an Order pursuant to Rule 75 of the South Carolina Rules of Civil Procedure (SCRCP) and South Carolina Code Section 18-7-80, compelling the magistrate to file a Return from the case below. The grounds for this motion are as follows:

1. On April 15, 2019, this matter came before Judge Jacob Gillens in Orangeburg Central Region magistrate court, case number 2019CV3010701065.
2. Defendant/Appellant timely filed a notice of appeal on May 15, 2019, and served it on all parties.
3. Pursuant to S.C. Code Section 18-7-60, the magistrate is required to “make a return to the appellate court of the testimony, proceedings and judgment and file it in the appellate court” within 30 days after being served notice of the appeal.
4. More than 30 days have passed, and Defendant/Appellant has not received any notice that the return has been filed. To the best of Defendant/Appellant’s knowledge, having inspected the court file on December 20, 2019, no return has been filed.

5. If the return is defective, S.C. Code Section 18-7-80 provides that “the appellate court may direct a further or amended return as often as may be necessary and may compel a compliance with its order. And the court shall always be deemed open for this purpose.”
6. Defendant/Appellant is informed and believes that a return that has not been filed is defective and subject to this court’s order compelling compliance with the statute.
7. Pursuant to State v. Adams (244 S.C. 323, 137 S.E.2d 100 (1964)) and State v. Barbee (280 S.C. 328, 313 S.E.2d 297 (1984)), it is the appellant’s burden to obtain the magistrate’s compliance when the magistrate has failed to return the trial record, by mandamus if necessary.
8. However, Chapman v. Computers, Parts & Repairs, Inc. (334 S.C. 387, 513 S.E.2d 120 (1999)), held “When the return provided is inadequate, the appropriate remedy is for the circuit court to direct the magistrate to file an amended return.” The court further stated, “The thrust of the order of the circuit court is to place the onus and burden on the parties to comply with §18-7-80. This procedure flies in the face of the statutory mandate. [...] We reject the shift of responsibility under this statute from the court to the parties.” Id.
9. Defendant/Appellant therefore moves for an order of this court directing the magistrate to comply with S.C. Code Section 18-7-60 and file a return from the case below.
10. In the alternative, Defendant/Appellant moves for a continuance of this matter to allow for an action seeking a writ of mandamus to obtain the magistrate’s compliance.

South Carolina Legal Services

s/Taylor R. Ott
Attorney for Defendant/Appellant
South Carolina Legal Services
PO Box 1646
Orangeburg, SC 29116
803-533-0116

Orangeburg, South Carolina

December 20, 2019

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
May 29, 2020

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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