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**Nov 01 2021**

**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
DEBRA R. MCCASLIN, CIRCUIT COURT JUDGE

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Appellate Case No. 2021-000460

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Quality Fresca I, LLC, .....Appellant,

v.

Kenneth R. Davenport, II, Personal Representative of the  
Estate of Kenneth R. Davenport, .....Respondent.

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**RESPONSE AND OPPOSITION TO MOTION TO DISMISS  
OR IN THE ALTERNATIVE, TO DECIDE THE APPEAL  
ON THE BRIEFS, WITHOUT ORAL ARGUMENT**

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Appellant Quality Fresca I, LLC d/b/a Moe’s Southwest Grill (hereafter referred to as “Tenant”) opposes the most recent Motion to Dismiss the Appeal.<sup>1</sup>

Tenant did, in fact, continue to make the argument in his brief that he had advanced throughout these proceeds, *i.e.*, that Tenant’s failure to post an appeal bond in the magistrate’s court was a jurisdictional defect of some kind. *See* Part II, Respondent’s Final Brief pp. 18-25). Landlord’s Final Brief was filed October 21, 2021. Tenant has continued to make the argument, as it has throughout, that Landlord’s failure to appeal the magistrate’s grant of an appeal bond renders this argument moot. (Tenant’s Final Brief, Issue III, pp. 22-30).

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<sup>1</sup> Respondent Landlord moved to Dismiss the Appeal on May 21, 2021, on the same grounds that it now argues again in the current motion. This Court denied the motion to dismiss by order filed June 7, 2021. In a footnote to the order, this Court said “[n]othing prevents the parties from arguing in their briefs that the circuit court should have dismissed the appeal.”

Landlord did exactly what this Court invited him to do in its Order dated June 7, 2021. This Court did not invite Landlord to file another motion to dismiss after final briefs were filed.

The instant motion is a thinly veiled attempt to ask this Court to expedite the appeal, when no possible grounds for expediting this appeal exists. The roster for the November term of this Court's schedule includes appeals filed in 2018, 2019 and 2021.

<https://www.sccourts.org/appealsRosters/dspCOARosterMenu.cfm>

Tenant's counsel has a total of ten (10) appeals currently pending before this Court, all of which have been pending longer than this appeal. One of counsel's appeals filed in 2018 is "ready for consideration" and counsel have received notice that the case "may or may not be considered during [the] December, 2021 [term of court]", which is not yet scheduled. (Letter from COA dated August 9, 2021, Appellate Case No. 2018-002272). The status of this appeal is currently listed on C-Track as "held in abeyance", which likely means this Motion to Dismiss has taken the case off the pending cases that are otherwise ready for consideration.

<https://ctrack.sccourts.org/public/caseView.do?csIID=73635>

Whether this Court holds oral argument on this appeal is solely within the discretion of this Court. Rule 215, SCACR. There is a process by which this happens, and there is no procedure to jump ahead in the line.

The day after filing his Respondent's Final Brief, on October 22, 2021, Landlord filed this Motion to Dismiss the appeal. This time, he argues Tenant abandoned an issue on appeal, which is not the case. However, it is consistent with the false narrative Landlord has asserted since this action was filed, manipulating what is actually into its own version of the facts. That is precisely how Landlord convinced the magistrate to decide this issue solely on the basis of equitable issues,

and to ignoring the legal issues presented. Landlord did the same before the circuit court, which unfortunately did not understand its role as an appellate court on appeal from a magistrate's order.

The issue Landlord claims Tenant has not argued in its Appellant's Brief appears in Landlord's Appellant's Brief as Issue 3 at pp. 22-20. In its Reply Brief, Tenant replied to the Argument made in Respondent's Brief concerning the application of Rule 19 of the magistrate's rules. This is not a new issue raised for the first time in a reply brief but it instead a reply.<sup>2</sup> Rule 208(a)(3), SCACR. "An appellant may file and serve a brief in reply to the brief of respondent."

Tenant opposes Landlord's attempt to continue to manipulate the narrative before each court before which it appears. Tenant objections especially to Landlord's woe-is-me claim of prejudice, when in fact it is receiving full monthly commercial rent from Tenant in downtown Charleston in accordance with the terms of the appeal bond granted by the Magistrate's Court pursuant to a lease agreement that allows it to adjust the rent under certain circumstances.

This Court has noted that there are multiple reasons that appeals take some time to process:

In this case, a seven-year delay occurred between the issuance of the . . . final order . . . and oral argument before this Panel. The reasons for the delay in this case range from the acceptable – [a party's] bankruptcy proceeding – the unacceptable – the rash of motions filed by both parties.

*Clark v. Clark*, 423 S.C. 596, 815 S.E.2d 772 (Ct.App. 2018), citing *Speeuw v. Barker*, 385 S.C. 45, 61, 682 S.E.2d 843, 851 (Ct.App. 2009).

"Patience is a virtue." Piers Plowman,<sup>3</sup> William Langland (1360).

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<sup>2</sup> Appellant Tenant also pointed out in Tenant's reply brief that landlord respondent did not respond to the issues raised by Tenant on appeal, but instead decided to tell its own version of the story. Tenant's Reply Brief pp. 1-2.

<sup>3</sup> <https://quotes.yourdictionary.com/articles/who-said-patience-is-a-virtue.html>

## CONCLUSION

There is an occasional appeal that warrants expedited consideration. This is not one of them.

Respectfully submitted,

s/ Desa Ballard

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November 1, 2021

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STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
DEBRA R. MCCASLIN., CIRCUIT COURT JUDGE

Appellate Case No. 2020-001472

Quality Fresca I, LLC, .....Appellant,

vs.

Kenneth R. Davenport II, Personal  
Representative of the Estate of Kenneth R.  
Davenport, ..... Respondent,

**PROOF OF SERVICE**

I, Beth Cogan, an employee with Ballard & Watson, do hereby certify that on November 1, 2021, I served a copy of the **Response and Opposition to Motion to Dismiss**, in the above-captioned case on the following individuals by electronic mail using their email address listed in the Attorney Information System, addressed as follows:

**Brian Hellman, Esquire**  
**Hellman Yates & Tisdale, PA**  
**bh@hellmanyates.com**

**Jason Smith, Esquire**  
**Hellman Yates & Tisdale, PA**  
**js@hellmanyates.com**

  
\_\_\_\_\_  
Beth Cogan, Paralegal

November 1, 2021

## Beth Cogan

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**From:** Beth Cogan  
**Sent:** Monday, November 1, 2021 12:36 PM  
**To:** Brian Hellman; Jason Smith  
**Cc:** Desa Ballard  
**Subject:** (Quality Fresca v. Davenport 2021-000460) Ltr to COA encl return and Opp. to MTD  
**Attachments:** 2021 11 01 Ltr to COA encl Response and Opp. 2nd MTD.pdf; 2021 11 01 Response and Opp. to 2d MTD.pdf; 2021 11 01 POS Response and Opp. to 2d MTD.pdf

Good afternoon,  
Please see the attached Return that is being filed today with the Court of appeals.

Kindest Regards,  
-Beth

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Ballard & Watson, Attorneys at Law  
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**Ballard & Watson**  
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November 1, 2021

Via Email ([ctappfilings@sccourts.org](mailto:ctappfilings@sccourts.org))  
The Honorable Jenny Abbot Kitchings  
Court of Appeals Clerk of Court  
Post Office Box 11629  
Columbia, South Carolina 29211

**RECEIVED**  
**Nov 01 2021**  
**SC Court of Appeals**

Re: *Quality Fresca I LLC v. Kenneth R. Davenport II, et al.*  
Appellate Case No.: 2021-000460

Dear Ms. Kitchings:

Enclosed for filing please find a Response and Opposition to Motion to Dismiss and Proof of Service for the above-referenced matter.

By copy of this letter and as evidenced by the Proof of Service, these filing has been served upon counsel for the Respondents. Thank you for your time in this matter. If you have any questions, please do not hesitate to contact our office.

With warm personal regards, I am,

Sincerely yours,

Desa Ballard  
[desab@desaballard.com](mailto:desab@desaballard.com)

Enclosures

cc: Via Electronic Mail  
Brian Hellman, Esquire  
Jason Smith, Esquire