Paul H. Infinger, of Dukes, Williams & Infinger, of Beaufort, for respondent.

GOOLSBY, J.: Following a jury trial in magistrate's court, Thomas C. Joyner received a verdict against Glimcher Properties in the amount of $2,500.00. Glimcher appealed to the circuit court. The circuit court dismissed the appeal for failure to prosecute. Glimcher appeals. We affirm.

FACTS/PROCEDURAL HISTORY

Thomas C. Joyner was an invitee driving his van across the public parking lot at Cross Creek Shopping Center in Beaufort County. A tree limb fell on his van, destroying the vehicle and causing him personal injuries. He sued Glimcher Properties, the owner/manager of the commercial property, and Smith Land Resources, Inc., the landscaping/maintenance contractor for the property. The case was tried before a jury in magistrate's court on November 18, 1999. The jury returned a verdict in favor of Joyner in the amount of $2,500.00 against each of the two defendants.

Glimcher appealed to the circuit court on December 20, 1999. The magistrate who heard the case did not file a return within 30 days, as required by Rule 75, SCRCP. In fact, he never filed one.[1] Glimcher never requested the circuit court to issue a writ of mandamus to force the magistrate to do so.

On March 23, 2000, Joyner wrote the Chief Administrative Judge for the Fourteenth Judicial Circuit, requesting a court date on April 12, 2000, copying Glimcher with this letter. Glimcher made no response to this letter. On June 2, 2000, Joyner filed a motion to dismiss the appeal for failure to prosecute. The circuit court granted the motion and awarded interest on the judgment and attorney fees in the amount of $500.00. Glimcher appeals.

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[1] The magistrate resigned on February 2, 2000, forty-three days after the Notice to Appeal was given. See S.C. Code Ann. § 18-7-70 (1985) ("When a magistrate by whom a judgment appealed from was rendered shall have gone out of office before a return is ordered, he shall, nevertheless, make a return in the same manner and with the like effect as if he were still in office.").

LAW/ANALYSIS

Having timely appealed, Glimcher argues that the circuit court erred when it dismissed his appeal because the magistrate failed to issue a return. He argues that "the appellant from magistrate's court is under no duty to act once the notice of appeal has been filed," and that the duty to act rests solely with the magistrate.

Generally, the magistrate has a duty to complete the return. After the notice of appeal has been filed, "[t]he court below shall thereupon, after ten days and within thirty days after service of the notice of appeal, make a return to the appellate court of the testimony, proceedings and judgment and file it in the appellate court."[2]

Since the magistrate has no duty to provide a copy of the return to the parties, Glimcher argues there was no reasonable means for him to ensure that the return was timely filed. We disagree. Glimcher was on notice that a return had not been timely filed when he did not receive a notice in writing from the clerk of the circuit court.[3] Having received no such notice, he should have presumed no return had been filed and acted accordingly.

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[2] S.C. Code Ann. § 18-7-60 (1985); see also Rule 75, SCRCP (record must be transmitted within 30 days to the clerk of the court to which the appeal is taken).

[3] See Rule 75, SCRCP ("Upon receipt of the certified record, the clerk of the circuit court shall give notice in writing to the parties that the record has been filed.").

S.E.2d at 298; Eaves, 260 S.C. at 524-25, 197 S.E.2d at 283; Adams, 244 S.C. at 326, 137 S.E.2d at 101. Our supreme court held in each case that the failure of the magistrate to file a return is not a ground for the circuit court to reverse the magistrate's court judgment. See Barbee, 280 S.C. at 329, 313 S.E.2d at 298; Eaves, 260 S.C. at 524-25, 197 S.E.2d at 283; Adams, 244 S.C. at 326, 137 S.E.2d at 101. Without a return, the circuit court has no basis for reviewing the merits of the appeal. Barbee, 280 S.C. at 329, 313 S.E.2d at 298. In those circumstances, the burden falls to the litigant to force the magistrate to fulfill the ministerial duty of filing a return by seeking a Writ of Mandamus, if necessary.

In Adams, the appellant was convicted of Driving Under the Influence of Intoxicants, first offense, in magistrate's court. Id. at 323, 137 S.E.2d at 100. He appealed to the circuit court and moved to reverse the conviction and dismiss the charges because the magistrate failed to file a return. No notice of the motion was provided to the State, the Solicitor, or the Attorney General. The circuit court granted the requested relief, and the State appealed. On appeal, our supreme court reiterated the obligation of the moving party to "prosecute [the appeal] with due diligence and have it promptly disposed of." Id. at 326, 137 S.E.2d at 101. The court stated:

> Respondent is charged with knowledge of the time limit imposed on the Magistrate for filing the record and of the 60 day supersedeas provided by Section 46-189 of the Code. Having failed to take any step toward effecting a prompt disposition of his appeal, Respondent was not entitled to have his conviction set aside and the charges against him dismissed.

Id. The Court then reversed the order of the circuit court setting aside the conviction.

This language and the action taken by our supreme court in Adams is the basis for the majority's conclusion that dismissal is warranted under these circumstances. However, I conclude exclusive reliance upon this language is misplaced. In the later case of Eaves, our supreme court made it clear that under the same circumstances, even though reversal of the conviction was not

perform a ministerial duty." Id. at 39, 512 S.E.2d at 111. Furthermore, "If the public official fails to comply with the writ, the plaintiff can petition the court for an order holding the official in contempt." Id.

I do not agree that a litigant's failure to take these extraordinary steps can reasonably be viewed as a failure to diligently prosecute the appeal, especially in the absence of some directive from the circuit court to do so. This is especially true where, as here, the litigant has complied with all statutorily imposed obligations in a timely fashion and the appeal has only been pending for five months.

In similar settings, our supreme court has been reluctant to affirm the drastic action of dismissing a suit unless the party's misconduct was intentional. For example, where the litigant failed to comply with a discovery order, and the exclusion of the witness eviscerated the party's case, our supreme court found the exclusion of the witness by the circuit court to be an abuse of discretion. In Orlando v. Boyd, 320 S.C. 509, 466 S.E.2d 353 (1996), the court noted:

> [w]here the effect will be the same as granting judgment by default or dismissal, a preclusion order may be made only if there is some showing of wilful disobedience or gross indifference to the rights of the adverse party.
>
> Whatever sanction is imposed should serve to protect the rights of discovery provided by the rules. A sanction of dismissal is too severe if there is no evidence of any intentional misconduct.

Id. at 511, 466 S.E.2d at 355 (alteration in original).

Furthermore, in those instances in which our supreme court has affirmed dismissal of the action based upon the failure to prosecute, the dismissal has been imposed to maintain the orderly disposition of cases in the face of repeated warnings to the offending party or multiple opportunities to proceed with trial, and only then, with a finding of unreasonable neglect. See Small, 254 S.C. at 438, 175 S.E.2d at 802 (finding no abuse in a dismissal where

counsel was apparently in his office and plaintiff and witnesses were at work when case was called for trial, and counsel informed the court that he could not appear for several hours); Don Shevey & Spires, Inc. v. Am. Motors Realty Corp., 279 S.C. 58, 60-61, 301 S.E.2d 757, 758-59 (1983) ("The plaintiff has the burden of prosecuting his action, and the trial court may properly dismiss an action for plaintiff's unreasonable neglect in proceeding with his cause."); Bond v. Corbin, 68 S.C. 294, 294-95, 47 S.E. 374, 374 (1904) (finding where first case on trial docket is set on the first day of jury cases, and, when it is called, plaintiff is absent, and in the afternoon is also absent, and again when called the next morning, a dismissal for failure to prosecute is proper).

The ruling of the majority in this case accomplishes exactly the result condemned by our supreme court in each of its previous decisions on the subject. Here Respondent sought and received an advantage from the failure of a judicial officer to fulfill his statutorily assigned duty. Respondent did not apply for a Writ of Mandamus against the magistrate, a procedure equally available to him as to Appellant. Appellant did not refuse to comply with a mandate, or even a suggestion, from the circuit court to file a Writ of Mandamus. In fact, in Appellant's response to the motion to dismiss, Appellant offered to join in an action to compel the magistrate's compliance. Respondent sought dismissal in the first instance, and the circuit court granted it without giving Appellant an opportunity to undertake this extraordinary action. Under these circumstances, I would reverse the circuit court's order dismissing the appeal and remand to the circuit court for entry of an order requiring Appellant to file an action seeking a Writ of Mandamus within ten days.