

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS  
Appellate Case No. 2013-000922

Appeal from the Court of Common Pleas  
The Honorable Alison Renee Lee  
Trial Court Case No. 20 12-CP-40-062S1

**RECEIVED**

SEP 03 2013

**SC Court of Appeals**

Robert J. Thomas and Rogers Townsend & Thomas, PC,  
Appellants

v.

Richland County Probate Court,  
Respondent.

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RESPONSE IN OPPOSITION TO MOTION TO REINSTATE APPEAL AND TO  
GRANT EXTENSION OF TIME TO FILE AN INITIAL BRIEF AND TO  
DESIGNATE MATTER TO BE INCLUDED IN THE RECORD ON APPEAL  
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After missing multiple deadlines, Appellant now moves the court to reinstate its appeal and to grant an extension of time in which to file an initial brief. Appellant incorrectly argues that the failures to abide by the South Carolina Appellate Court Rules did not prejudice and have not prejudiced Respondent, the Richland County Probate Court (Probate Court). The Probate Court, requests the motion be denied.

Robert J. Thomas and his law firm, Rogers Townsend & Thomas, PC (collectively the "Law Firm"), commenced this lawsuit to require the Probate Court to provide documents to Law Firm after the court refused to do so in the underlying probate matter. In the memorandum supporting the motion to reinstate the appeal, Law Firm argues semantics and insists that no one understands the nature of its complaint against the Probate Court; Respondent would show that Law Firm is still circumventing the rules in attempt to get its way.



### Procedural Background and Facts

Pending before the Richland County Probate Court was a matter regarding an adult, allegedly incompetent, and her guardianship/ conservatorship.<sup>1</sup> Mr. Thomas at Rogers, Townsend & Thomas (Law Firm) had prepared estate planning documents, including a will, for the alleged incompetent adult, and counsel in the pending probate matter requested those documents from Law Firm as the information and materials were pertinent to the case. Law Firm refused to provide the documents. Probate Court therefore ordered Law Firm to produce documents from its files to the parties in the pending incompetency case. (Order dated July 31, 2012). Law Firm apparently produced some documents, but asserted a claim of attorney-client privilege over others; Law Firm, which did not represent the allegedly incapacitated person in the pending case, questioned the personal jurisdiction of the court over the client/incompetent person. The Law Firm maintained it could not be compelled to produce its living client's will because the court that issued the order did not have jurisdiction.

The probate court issued an amended order on August 24, 2012, *nunc pro tunc* to July 31, 2012, clarifying its original order to produce documents. Upon receipt of the amended order, Law Firm filed a motion to amend the prior orders and asserted a claim of privilege. Probate Court requested that Law Firm provide a memorandum of law in support of its motion, to be filed no later than September 14, 2012; to assist Law Firm in responding to the order, Probate Court also provided Law Firm with portions of the court's file relevant to the alleged incompetent adult.

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<sup>1</sup> . For the Court's reference, the Richland County Probate Court Case Numbers are 2011-GC-40-00047 and 00048.



Law Firm alleged it needed the entire court file in order to address its personal jurisdiction argument, and requested an entire copy of the court's file using the probate court's request form (GC File Request Form). The GC File Request form specifically advised that the court's files "contain a combination of public information/documents and protected information/documents, so we require that you complete this form in order to get information or records from a . . . file. For that reason, we may not be able to provide every document you request." *Id.*

On September 13, 2012, the Law Firm made additional requests documents and Probate Court agreed that the law firm could have the documents requested, but Law Firm filed the Summons and Petition in this case before the information could be produced.

The release of materials from guardianship and conservatorship files is not a matter of right, as Law Firm knows; because of the intensely personal and private nature of information contained in probate court files, release of documents from probate files requires judicial deliberation both as to the nature of the request and the document requested. Counsel for the defendant Probate Court requested that Law Firm dismiss this lawsuit after the court clarified its position regarding judicial discretion, but Law Firm refused. Probate Court therefore responded to the circuit court complaint.

Mere days before the defendant probate court's motion to dismiss this litigation was scheduled to be heard, after Law Firm received the files from the court, as it had previously agreed to produce<sup>2</sup>, counsel for Law Firm, Mr. Wood, advised the undersigned

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<sup>2</sup> Law Firm signed a receipt on September 25, 2012 acknowledging receipt of documents from the relevant files, and a hand-written notation indicated they recognized that it was not receiving all documents from the court's files

that this lawsuit was now moot since Law Firm had gotten what it wanted from the probate court in the incompetency action. He suggested that the parties stipulate to an order of dismissal with prejudice and cancellation of the motion hearing.

The merits of the Probate Court's motion to dismiss were still relevant<sup>3</sup>, and the Probate Court felt those matters needed to be addressed to avoid similar tactics in the future. Furthermore, the county incurred substantial attorneys' fees and costs responding to this lawsuit, and the improper filing of this lawsuit needed to be addressed. The circuit court agreed that since the probate court had given to Law Firm the documents it wanted, mandamus was no longer necessary, but Judge Lee nevertheless addressed the propriety of Law Firm's use of this mandamus action. Law Firm's suit did not request Probate Court to perform a ministerial duty, but rather challenged the authority of the Probate Court to issue an order requiring the Law Firm to produce documents belonging to the allegedly incapacitated person. The circuit court correctly pointed out that Law Firm could have protected itself from being in contempt of Probate Court by properly appealing orders, moving to intervene as a party or on behalf of a party.

#### Argument

This appeal was properly dismissed pursuant to Rule 260, for Appellant's failure to abide by the rules of procedure. Counsel for the Law Firm received the transcript on May 28, 2013. It is now September, and Appellants are requesting that this Court allow (very) late filing of the briefs. Appellant had direct knowledge of the appeal and its deadlines as its counsel in this case is 'in-house', so to speak. Appellant was given

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<sup>3</sup> Furthermore, the Probate Court had been prejudiced by Law Firm's action and had incurred attorney's fees and costs, which Law Firm refused to discuss as a term of stipulated dismissal.

multiple opportunities by the Court to avoid dismissal. "Timeliness of an appeal is a jurisdictional matter." Camp v. Camp, 662 S.E.2d 458, 378 S.C. 237 (S.C.App. 2008)(citing, Elam v. S.C. Dep't of Transp., 361 S.C. 9, 17, 602 S.E.2d 772, 776 (2004)). "An appellant's failure to comply with the procedural rules for appeal deprives the court of appellate jurisdiction but not of subject matter jurisdiction." State v. Brown, 358 S.C. 382, 387, 596 S.E.2d 39, 41 (2004). Respondent Probate Court would show that this appeal would have required dismissal on the merits anyway, so there can be no good cause which would warrant reinstatement.

On its face, the suit was one for mandamus, which seeks from the higher court a command to a public official to perform an act that the public official is legally obligated to perform. Willimon v. City of Greenville, 243 S.C. 82, 132 S.E.2d 169 (1963). Mandamus is based upon the theory that an officer charged with a purely ministerial duty can be compelled to perform it. Federal Land Bank of Columbia v. South Carolina Highway Department, 172 S.C. 207, 173 S.E. 635 (1934). Mandamus would never be appropriate to force a judge to exercise a discretionary act, yet it was attempted here to circumvent the appellate process.

Law Firm did not like the probate court's decisions requiring Law Firm to release its files to counsel for the allegedly incompetent person and denying Law Firm's demand for the entire court file, and because it could not file an appeal of these prior orders in the underlying matter without first being held in contempt, Law Firm filed this mandamus action.

As a general rule, only final judgments are appealable. Culbertson v Clemens, 322 SC 20, 23, 471 SE2d 163, 164 (1996). Section 14-3-330 of the South Carolina Code

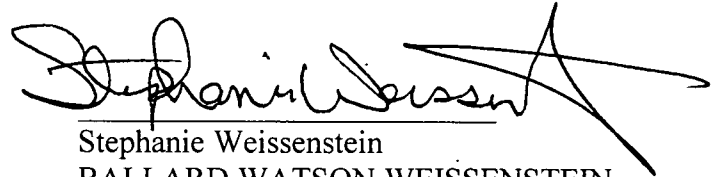
(1976 & Supp. 2010) governs appellate jurisdiction and provides, in relevant part, that an appeal may be made from an “intermediate judgments. . . involving the merits” and from “[a]n order affecting a substantial right... when such order. . . strikes out an answer or any part thereof or any pleading in any action”. The courts have held that orders addressing discovery are not usually directly appealable because they are intermediate decisions. *See generally, Lowndes Products, Inc. v. Brower*, 262 SC 431, 205 SE2d 184 (1974). In this case, the order by the probate court against the Law Firm was effectively an order to compel discovery of its file. The law firm desired to keep secret from the court some aspect of its file, specifically the Law Will of the alleged incompetent person, and it used this mandamus action to combat the probate court’s order where it knew an appeal would not work.

“In an analogous case involving privileged information, the supreme court held a discovery order was not immediately appealable because ‘an order compelling discovery does not ordinarily involve the merits of the case.’” *Estate of George King v. Richland County and Prison Health Services, Inc.*, AP 2008-UP-274 (quoting, *Tucker v. Honda of South Carolina Mfg., Inc.*, 354 S.C. 574, 577, 582 S.E.2d 405, 406 (2003)). “Furthermore, the court explained ‘[s]ince a contempt order is final in nature, an order compelling discovery may be appealed only after the trial court holds a party in contempt.’ *Id.* (Citing, *Tucker* at 577, 583 S.E.2d at 406-07. ‘Thus, a party may comply with the order and waive any right to challenge it on appeal or refuse to comply with the order, be cited for contempt, and appeal.’” *Id.* (Citing *Tucker*, at 577, 582 S.E.2d at 407.)

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Conclusion

For the reasons set forth herein, respondent Richland County Probate Court requests that the Appellant's motion be denied, the dismissal be affirmed, that attorney's fees and costs be assessed against Appellant, and for other such relief as this Court deems just and proper.



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**CERTIFICATE OF SERVICE**

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**SC Court of Appeals**

I, Beth Cogan, an employee with the Law Offices of Ballard Watson Weissenstein, do hereby certify that on September 3, 2013, I served a copy of the **Response In Opposition To Motion To Reinstate Appeal And To Grant Extension Of Time To File An Initial Brief And To Designate Matter To Be Included In The Record On Appeal** in the above-captioned case on the Attorney for Appellants by placing same in United States Mail, with sufficient first-class postage affixed, addressed as follows:

**Robert P. Wood, Esquire (SC Bar No. 6206)  
Rogers Townsend & Thomas, PC  
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September 3, 2013  
West Columbia, South Carolina

  
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Beth Cogan  
Paralegal