

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHESTER COUNTY
Court of Common Pleas
Sixth Circuit Court

Honorable J. Ernest Kinard, Jr., Chief Administrative Judge

Case No. 2013-CP-12-00267

RECEIVED

DEC 23 2013

SC Court of Appeals

T.B. Patterson, Jr.,.....Appellant,

v.

Justo P. Carmona Ortega.....Respondent.

RESPONDENT'S MOTION TO DISMISS


GEORGE V. HANNA, IV
MICHAEL S. TRAYNHAM
HOWSER, NEWMAN & BESLEY, L.L.C.
Post Office Box 12009
Columbia, SC 29211
(803) 758-6000

December 23, 2013

Attorneys for Respondent Justo P. Carmona Ortega

RESPONDENT'S MOTION TO DISMISS

The Respondent moves to dismiss this appeal on the grounds that the pro se Appellant has failed to file and serve a timely Notice of Appeal within thirty days after receipt of written notice of entry of the order or judgment below, as required by Rule 203(b), SCACR. This motion is made pursuant to Rules 240 and 260, SCACR and supported by an accompanying memorandum and affidavits.



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**RESPONDENT'S MEMORANDUM IN SUPPORT
OF MOTION TO DISMISS**

The Respondents respectfully file this memorandum in support of their Joint Motion to dismiss this appeal.

Failure to Timely File and Serve the Notice of Appeal

The Appellant in this matter did not served a notice of appeal upon the respondent within thirty days of written notice of entry of the order or judgment in this matter. See attached Affidavit of Traynham. Under Rule 203(b)(1), SCACR, the Appellant had thirty days after receipt of written notice of entry of the order or judgment to serve a notice of appeal.

As outlined in the attached affidavit, the Appellant was provided with notice of the entry of judgment below on several occasions well prior to the November 16, 2013 date cited in Appellant's Notice of Appeal. See attached Affidavit of Traynham. Despite the fact that Appellant received such notice at least as early as September 19, 2013, no Notice of Appeal was received by Respondent until December 16, 2013. Accordingly, the Court lacks jurisdiction.

Rule 203(b), SCACR, requires a party to serve his notice of appeal within thirty days after receiving written notice of the entry of a final order or judgment, and failure to do so divests this court of subject matter jurisdiction and results in dismissal of the appeal. The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to "rescue" the delinquent party by extending or ignoring the deadline for service of the notice.

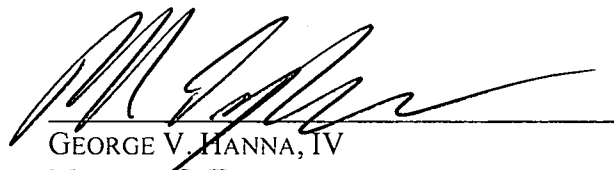
USAA Property and Cas. Ins. Co. v. Clegg, 377 S.C. 643, 651, 661 S.E.2d 791, 795 (2008) (quotations and citations omitted).

The Respondents respectfully request that the Court enter an order dismissing the

appeal for lack of jurisdiction on the basis of the Appellant's failure to serve a timely notice of appeal upon any respondent.

Conclusion

The Appellant's failure to serve the Respondent with a timely Notice of Appeal is sufficient reason for the clerk or the Court to dismiss. Further, the failure to timely serve the Respondent with a Notice of Appeal is jurisdictional and cannot be cured. Therefore, the Respondent respectfully requests that an appropriate order dismissing the case be entered.



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v.

Justo P. Carmona Ortega Respondent.

AFFIDAVIT OF MICHAEL S. TRAYNHAM

Personally appeared before me the undersigned who, after being duly sworn, deposes and says that:

1. I am over the age of 18 and competent to make this affidavit. I have personal knowledge of every fact herein.
2. I represent the Respondent Justo P. Carmona Ortega in this matter.
3. This matter was heard by the Honorable J. Ernest Kinard, Jr., on July 7, 2012, and was the subject of a final order signed on July 24, 2013 and filed August 2, 2013. By scrivener's error, that Order was mistakenly captioned "Proposed Order." See attached exhibit A.
4. A corrected "Final Order" was signed on September 14, 2013 and filed September 23, 2013. See attached exhibit B. The Orders were identical in all respects but the

Caption.

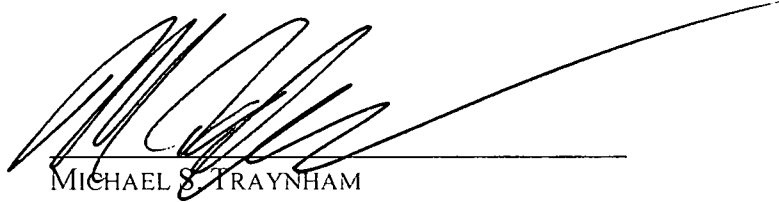
5. In each case, counsel for respondent received a copy of the signed Orders within a week of signing. On information and belief, Appellant was similarly provided with a copy of each Order by the Court.

6. Appellant was copied on correspondence between counsel for respondent and the Court on numerous occasions concerning the Orders, and was provided with a copy of the signed Final Order via correspondence to the Clerk of Court on September 19, 2013. See attached Exhibits C, D, and E.

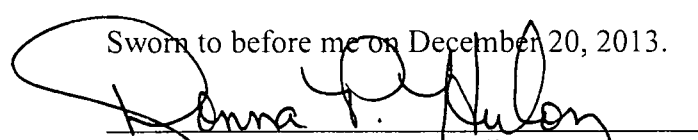
7. Appellant was copied on additional correspondence between Counsel for the Respondent and the Court on or about November 11, 2013, which corresponds roughly with the time alleged in his Notice of Appeal, however such correspondence was not Appellant's first notice of entry of judgment in this matter. See attached exhibit F.

8. No Notice of Appeal was received by counsel for respondent prior to December 16, 2013, more than thirty days after appellant received written notice of entry of judgment in this matter.

Further affiant sayeth not.



MICHAEL S. TRAYNHAM

Sworn to before me on December 20, 2013.

Notary Public for South Carolina
My Commission Expires: 1-12-14

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v.

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PROOF OF SERVICE

I, the undersigned, an employee of Howser, Newman & Besley, L.L.C. do hereby state that I have on December 23, 2013, served a copy of the enclosed **RESPONDENT'S MOTION TO DISMISS, RESPONDENT'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**, together with all attachments and exhibits upon the pro se Plaintiff by depositing same in the United States Mail, first class, sufficient postage prepaid, with the return address clearly noted, addressed as follows:

**VIA REGULAR U.S. MAIL AND
CERTIFIED MAIL-RETURN RECEIPT REQUESTED**

T.B. Patterson, Jr.
P.O. Box 340
Lancaster, SC 29721-0340



DONNA P. HULON
HOWSER, NEWMAN & BESLEY, L.L.C.
Post Office Box 12009
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R. Davis Howser
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Michal Cooper Jones
Kylieene L. Keesley <
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Vincent C. Northcutt
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Jeffrey I. Silverberg

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& BESLEY, L.L.C.**

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December 23, 2013

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Via Hand Delivery

The Honorable Jenny Abbott Kitchings
Clerk of Court, Court of Appeals
1015 Sumter Street
Columbia, SC 29201

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SC Court of Appeals

RE: T.B. Patterson v. Justo Carmona
C. A.: 2013-CP-12-00267
Our File No.: 479-271
Claim No.: 18-1249-1-14

Dear Ms. Kitchings:

Enclosed for filing please find the original and nine (9) copies of **Respondent's Motion to Dismiss** in the above-referenced action. Also enclosed is our firm check in the amount of \$25.00 representing the filing fee. Please file the original and return the clocked-in copies of to me via our courier.

By copy of this letter I am serving the *Pro Se* Appellant with a copy of the Motion.

Respectfully submitted,



Michael S. Traynham

MST/dph
Enclosures

cc: **VIA REGULAR U.S. MAIL AND**
CERTIFIED MAIL-RETURN RECEIPT REQUESTED
T.B. Patter, Jr. (w/encl.)