

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELY COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Civil Action No.: 2014-CP-0800395
Appellate Case No. 2014-002669

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JAN 08 2015
SC Court of Appeals

Herbert McDowellAppellant,

v.

Alissa R. Collins, Attorney at Law and
David Tatarsky, General Counsel for
South Carolina Department of Corrections.....Respondents.

MEMORANDUM IN SUPPORT OF THE MOTION TO DISMISS

INTRODUCTION/RELEVANT BACKGROUND

This instant appeal arises from the granting of a Motion to Dismiss as to Appellant’s claim against Alissa R. Collins, Attorney at Law. *See* Notice of Appeal, Attached as Exhibit A. Importantly, Appellant brought the underlying action in this appeal against Respondent Alissa R. Collins *and* Defendant David Tatarsky, General Counsel for South Carolina Department of Corrections. In August of 2014, Judge Dennis issued an Order dismissing the underlying action against Alissa R. Collins, Attorney at Law. On August 26, 2014, Judge Dennis issued an Order dismissing the underlying action against David Tatarsky, as General Counsel for South Carolina Department of Corrections. *See* Order on Dismissal, Attached as Exhibit B. Appellant filed a

Rule 59, SCRCPC, Motion for Reconsideration related to the Order dismissing Alissa R. Collins, Attorney at Law. *See* Appellant’s Motion for Reconsideration, Attached as Exhibit C. No similar motion as to the Order dismissing Defendant David Tatarsky, General Counsel for South Carolina Department of Corrections.

Notwithstanding the foregoing, Appellant filed the Notice of Appeal and only attached the Order related to Alissa R. Collins, yet included David Tatarsky, as general counsel for SCDC, as a Respondent in this appeal. This Motion follows.

ARGUMENT

I. Appellant has not indicated the Order related to Defendant Tatarsky is to be appealed.

Rule 203, SCACR, provides that the notice of appeal should be served only on respondents. Further, the rule provides that Notice of Appeal should be filed with “[a] copy of the order(s) and judgment(s) to be challenged on appeal if they have been reduced to writing.” Because Appellant has not indicated that the Order related to Defendant Tatarsky is being appealed, Defendant Tatarsky is not a proper Respondent and the Appeal should be dismissed as to him.

II. The Notice of Appeal is untimely.

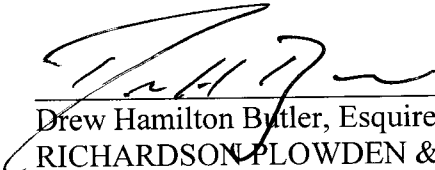
Even assuming, *arguendo*, that the Order as to Defendant Tatarsky were properly included in the Notice of Appeal (which is denied), Appellant has not timely filed the Notice of Appeal. The Order dismissing the claims as to Defendant Tatarsky was filed on August 26, 2014. The Notice of Appeal in this matter was mailed by Appellant on December 10, 2014 and received by the South Carolina Supreme Court¹ on December 17, 2014. Rule 203(b), SCACR,

¹ In error, Appellant filed the Notice of Appeal with the South Carolina Supreme Court, which pursuant to Rule, 204, SCACR, properly the appeal to the Court of Appeals.

requires that Notice of Appeal be filed within thirty days of entry of judgment in this matter. This is a jurisdictional requirement. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004) (“The requirement of service of the notice of appeal is jurisdictional, i.e., if a party missing 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.”). The failure to timely file the Notice of Appeal, as here, requires dismissal of the appeal. See USAA Prop. and Cas. Ins. Co., v. Clegg, 377 S.C. 643, 661 S.E.2d 791 (2008) (“Rule 203(b), SCACR, requires a party 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”) (internal citations omitted).

CONCLUSION

Based on the foregoing reasons, the appeal as to Defendant Tatarsky, General Counsel for the South Carolina Department of Corrections, must be dismissed and the caption corrected to reflect the dismissal.



Drew Hamilton Butler, Esquire
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1900 Barnwell Street
Columbia, South Carolina 29202

ATTORNEY FOR DAVID TATARSKY, GENERAL
COUNSEL FOR SOUTH CAROLINA DEPARTMENT OF
CORRECTIONS

January 8, 2015
Columbia, South Carolina

Reply to: Charleston
dbutler@richardsonplowden.com

January 8, 2015

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Herbert McDowell v. Alissa R. Collins and David Tatarsky
Appellate Case No.: 2014-002669
Our File No.: 181-744

Dear Ms. Kitchings:

As counsel for the Respondent David Tatarsky, General Counsel for the South Carolina Department of Corrections, I have enclosed for filing an original and seven (7) Copies of the Motion to Dismiss on Behalf of Defendant David Tatarsky in the above referenced matter, along with our original Certificate of Service. I have also enclosed one additional copy of our Motion and would request that it be file stamped and returned to our courier.

We are this day serving a copy of our Respondent's Motion on all counsel of record.

Thank you for your assistance in this matter.

Sincerely,


Drew Hamilton Butler
SC Bar # 70363

DHB/jgh
Enclosure
cc: Counsel of Record
Herbert McDowell

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