

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM THE GREENVILLE COUNTY  
Court of Common Pleas  
Edward W. Miller, Circuit Court Judge

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Case No.: 2015-001932

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Benjamin L. Anderson, ..... Appellant,

v.

DaVita Upstate Dialysis Center, ..... Respondent

**RECEIVED**  
FEB 09 2016  
SC Court of Appeals

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**RESPONDENT'S REPLY TO APPELLANT'S RETURN TO MOTION**

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The Respondent, DaVita Upstate Dialysis Center, pursuant to Rule 240, SCACR, Replies to Appellant's Return on Motion, and in support of the motion, the Respondent shows the following to the Court:

**I. Appellant's Return to the Motion to Dismiss Is Untimely.**

Rule 240(e), SCAR requires that "[a]ny party opposition a motion or petition shall have ten (10) days from the date of service thereof to file an original and six (6) copies of his return with the clerk of court and serve on all parties a copy of the return . . . . [f]ailure of a party to timely file a return may be deemed a consent by that party to the relief sought in the motion or petition."

Respondent filed its Motion to Dismiss on January 15, 2016. Respondent's served Appellant with its Motion to Dismiss on January 15, 2016 by placing the Motion to Dismiss in

the mail. Appellant filed his Return to the Motion on January 28, 2016- thirteen (13) days after the date of service. Because Appellant's Return to the Motion is untimely, it may be deemed that he consented to Respondent's Motion to Dismiss.

**II. Appellant Failed to Address His Failure to Comply with Rule 203(d)(1)(B)'s Requirement that he file the Notice of Appeal with the Greenville County Clerk of Court.**

"The notice of appeal shall be filed with the clerk of the lower court and the clerk of the appellate court within ten (10) days after the notice of appeal is served." Rule 203(d)(1)(B), SCACR.

There is no evidence whatsoever that Appellant filed his notice of appeal with the Greenville County Clerk of Court within ten days after serving his notice of appeal. There is nothing in the Greenville County Clerk of Court's office proving that Appellant filed his notice of appeal with the Greenville County Clerk of Court, and Appellant has provided no documentation that he has, in fact, filed his notice of appeal with the Greenville County Clerk of Court within the ten (10) days required by Rule 203(d)(1)(B), SCAR.

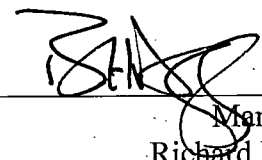
**III. Appellant Ordered the Wrong Transcript from the Court Reporter**

Appellant was appealing from an Order dated September 11, 2015 signed by Edward W. Miller, Presiding Judge Thirteenth Judicial Circuit granting Respondent's Motion for Summary Judgment. The hearing referenced in the Order was August 4, 2015.

The transcript filed on February 1, 2016 by Appellant, presumably in response to Respondent's Motion to Dismiss, was for a hearing before James R. Barber, III on a Motion to Dismiss filed by Respondent, that was denied in part and granted in part, and that occurred well before August 5, 2015. Now, we are 138 days after Appellant filed his Notice of Appeal with no

end in sight for when the correct transcript will be ordered. Because Appellant has again failed to file the transcript for the proceeding from which he was appealing, Respondent's Motion to Dismiss should be granted.

WHEREFORE, the Respondent respectfully requests that the Notice of Appeal be dismissed and for such other and further relief as the court deems just and appropriate.

*for* 

Martin S. Driggers, Jr.  
Richard E. McLawhorn, Jr.  
115 Cargill Way, Suite B  
Hartsville, SC 29550  
Phone: (843) 878-0398

**ATTORNEYS FOR RESPONDENT**

Hartsville, South Carolina  
February 8, 2016

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF GREENVILLE )  
 )  
Benjamin L. Anderson, )  
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 )  
Plaintiff, )  
 )  
v. )  
 )  
DaVita Upstate Dialysis Center, )  
 )  
 )  
Defendant. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
FOR THE THIRTEENTH JUDICIAL CIRCUIT  
CASE NO.: 2014-CP-23-06070

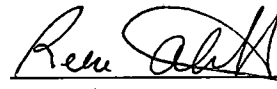
**CERTIFICATE OF SERVICE**

I, the undersigned, legal assistant at Sweeny, Wingate & Barrow, P.A., do hereby certify that the document hereinbelow specified has this day been served upon opposing counsel and all interested parties in this action by depositing same in the United States mail, postage prepaid, this 9<sup>th</sup> day of February, 2016, addressed as follows:

**DOCUMENTS:** Respondent's Reply to Appellant's Return to Motion

**COPY TO:** Benjamin Anderson  
445 W. Rebound Road  
Lancaster, South Carolina 29720

*Pro Se Plaintiff*

  
\_\_\_\_\_  
Reese Abbott

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SC Court of Appeals

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SWEENEY WINGATE & BARROW P.A.

February 8, 2016

Reply to: Pee Dee Office

Martin S. Driggers, Jr.  
(843) 878-0390 x7181  
msd@swblaw.com

**VIA HAND DELIVERY**

The Honorable Jenny Abbott Kitchings  
South Carolina Court of Appeals  
1015 Sumter Street  
Columbia, South Carolina 29201

RE: Anderson v. Davita Upstate Dialysis Center  
Civil Action No.: 2014-CP-23-06070  
Our File: 3245-9481

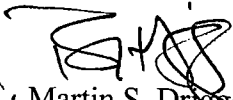
Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of Respondent's Reply to Appellant's Return to Motion along with the original and one (1) copy of the Proof of Service in the above-referenced matter. I would appreciate your filing the original Reply and returning a clocked to me along with a copy of the Proof of Service with the courier.

Should you have any questions, please do not hesitate to contact me.

Yours truly,

SWEENEY, WINGATE & BARROW, P.A.

  
for Martin S. Driggers, Jr.

MSD/mha  
Enclosures

cc: All counsel of record