

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

RECEIVED
OCT 24 2016
SC Court of Appeals

Case No.: 2015-001932

Benjamin L. Anderson, Appellant,

v.

DaVita Upstate Dialysis Center, Respondent

RESPONDENT'S REPLY TO APPELLANT'S MOTION TO RECALL REMITTITUR

The Respondent, DaVita Upstate Dialysis Center, pursuant to Rule 240, SCACR, Replies to Appellant's Motion to Recall Remittitur and Reinstate Appeal and shows the following to the Court:

FACTS

On September 4, 2015, Appellant filed his Notice of Appeal. This initial Notice of Appeal was deficient in that it did not include a signed copy of the order of Edward W. Miller granting Respondent's Motion for Summary Judgement which was granted at a hearing held on August 4, 2015. On September 23, 2015, Appellant filed an amended Notice of Appeal that corrected the deficiency noted in the September 4, 2015 Notice of Appeal. The date of service for the September 23, 2015 Notice of Appeal was September 21, 2015.

On October 12, 2015, the Court wrote Appellant informing him that the deadline had passed for ordering the transcript of the hearing at which the motion for summary judgement had been entered. On October 21, 2015, Appellant filed a motion to order the transcript outside the time period prescribed in SCAR 207. This October 21, 2015 motion did not include the required fee, a deficiency that the Appellant corrected on November 5, 2015. On November 6, 2015, the Clerk granted Appellant's Motion to order the transcript outside the deadlines set in SCAR 207.

Two months later, Appellant still had not ordered the transcript. On January 6, 2016, the Court wrote Appellant requesting an update as to the status of ordering the transcript because no transcript or statement stating the transcript had been ordered had been filed. On January 11, 2016, Appellant filed a letter he received from the court reporter dated December 7, 2015 requesting payment for the ordering of the transcript along with a receipt for a money order to the court reporter dated December 10, 2015.

On January 15, 2016, Respondent filed a Motion to Dismiss on the grounds Appellant failed to order a transcript of the hearing and because Appellant failed to file the Notice of Appeal with the Greenville County Clerk of Common Pleas. On February 1, 2016, Appellant filed a copy of the transcript he ordered with the Court. The transcript ordered was not the transcript from the August 4, 2015 hearing before Edward W. Miller where Respondent's motion for summary judgement was granted, but a transcript from a prior hearing on January 26, 2015, where Respondent's motion to dismiss was denied. In effect, Appellant ordered the wrong transcript.

On March 29, 2016, the Court denied Respondent's Motion to Dismiss, but required Appellant to provide proof that he had ordered a copy of the transcript from the correct hearing within ten (10) days of the date of the order. The March 29, 2016 order stated "Failure of

Appellant to comply may result in the dismissal of this appeal.” On April 5, 2016, Respondent again filed a copy of the transcript from the January 26, 2015 hearing. No additional attempts to comply with the March 29, 2016 order were made. On May 4, 2016, the Clerk entered an order dismissing Appellant’s appeal for failing to comply with the March 29, 2016 Order.

On May 22, 2016, Appellant filed his Initial Brief, Designation of Matter, and another copy of the January 26, 2015 hearing. In his designation of matter, Appellant designated pages 4-17 of the January 26, 2015 hearing as the matter from which he was appealing. It should be noted the January 26, 2015 hearing did not end the case, but was a denial of Respondent’s to dismiss.

On May 24, 2016, the Clerk for the Appellate Court sent the Remittitur to the Greenville County Clerk of Common Pleas.

ARGUMENT

I. This Court Lacks Jurisdiction to Hear Appellant’s Motion Because There Is No Evidence of Mistake, Error, or Inadvertence of the Court.

When the remittitur has been properly sent, the appellate court no longer has jurisdiction over the matter and no motion can be heard thereafter. Mickle v. Blackmon, 255 S.C. 136, 177 S.E.2d 548 (1970); Thomas v. Lynch, 87 S.C. 44, 68 S.E. 817 (1910); Carpenter v. Lewis, 65 S.C. 400, 43 S.E. 881 (1903); State v. Keels, 39 S.C. 553, 17 S.E. 802 (1893). The only exception to this rule is when the remittitur is sent down by mistake, error or inadvertence of the **Court. Keels**, at 553, 17 S.E. 802 (emphasis added). There is no evidence that the remittitur was issued by mistake, error, or inadvertence of the court. Rather, the only inadvertence, mistake, and error in the present case was that of the Appellant in his refusal to comply with Rule 207 and the March 29, 2016 Order.

a. Appellant Failed to Timely Order a Copy of the Transcript of the Hearing He was Appealing.

Rule 207(a)(1) requires an appellant appealing from a decision of the court of common pleas to order a transcript of the hearing being appealed within ten (10) days of the date of service of the notice of appeal. Appellant failed to comply with this requirement.

Appellant should have ordered the transcript from the August 4, 2015 hearing by October 1, 2015. Appellant failed to do so. Appellant was given nearly two hundred (200) days to order the transcript from the August 4, 2015 hearing. He failed to do so again. In fact, Appellant still has not ordered the transcript from the August 4, 2015 hearing in which Respondent's Motion for Summary Judgement was granted.

Appellant's refusal to order the transcript from the August 4, 2015 hearing by October 1, 2015 would perhaps be understandable if it were just a mistake. It is less understandable after Respondent raised the failure to order the correct transcript in its February 9, 2016 Reply to Return to Respondent's Motion to Dismiss. There can be no understanding Respondent's failure to order the August 5, 2015 transcript within ten (10) days of the March 29, 2016 Order. The Court clearly instructed Respondent to Order the August 4, 2015 transcript, yet it still has not been ordered. In fact, in his Motion to Recall Remittitur and Reinstate Appeal filed on October 17, 2016, Respondent stated he "obtained transcript from Judge Barbour to more gives [sic] light most favorable to the non-moving party", indicating he **intentionally failed to order the August 4, 2015 transcript.**

b. The Court Properly Dismissed Appellant's Appeal for Failing to Comply with Rule 207.

Rule 260(a), SCAR states "Whenever it appears that an appellant or a petitioner has failed to comply with the requirements of these Rules, the clerk shall issue an order of dismissal,

which shall have the same force and effect as an order of the appellate court. [] The clerk shall remit the case to the lower court or administrative tribunal in accordance with Rule 221 unless a motion to reinstate the appeal has been actually received by the court within fifteen (15) days of filing of the order of dismissal (the day of filing being excluded).” Rule 221 states “[t]he remittitur shall contain a copy of the judgment of the appellate court, shall be sealed with the seal and signed by the clerk of the court, and unless otherwise ordered by the court shall not be sent to the lower court or administrative tribunal until fifteen (15) days have elapsed (the day of filing being excluded) since the filing of the opinion, order, judgment, or decree of the court finally disposing of the appeal. If a petition for rehearing is received before the remittitur is sent, the remittitur shall not be sent pending disposition of the petition by the court.”

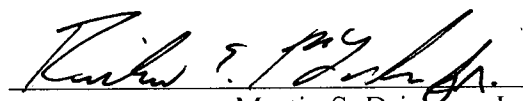
As noted *supra*, the Order dismissing Appellant’s appeal was entered on May 4, 2016. No motion to reconsider was filed within the fifteen (15) day window required by Rule 260 SCAR. In fact, the next motion filed by Appellant was nearly five months after the entering of the order dismissing the Appellant’s appeal.

Respondent further has not made any allegation of insufficiency with regard to the May 11, 2016 Remittitur. In his October 17, 2016 Motion, Appellant merely requests the Remittitur be withdrawn and his appeal be reinstated because he obtained the wrong transcript in violation of the March 29, 2016 Order so he could have the transcript from the hearing that gave the most favorable light to himself and because the Court allegedly knew he had ordered the wrong transcript. Neither is sufficient to withdraw a Remittitur.

There are no more options available for Appellant with regard to this appeal. Respondent requests the Court require Appellant to receive leave of Court before filing any additional motions with regard to this appeal and require Appellant to pay Respondent its costs for any

motions which are denied as any future motions with regard to this case can only be an attempt to harass Respondent.

WHEREFORE, the Respondent respectfully requests that Appellant's Motion to Withdraw Remittitur and Reinstate Appeal be denied and for such other and further relief as the court deems just and appropriate.



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ATTORNEYS FOR RESPONDENT

Hartsville, South Carolina
October 24, 2016

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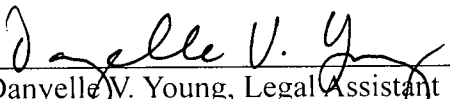
DaVita Upstate Dialysis Center, Respondent

CERTIFICATE OF SERVICE

I, the undersigned, legal assistant of the offices of 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 the same in the United States mail, postage prepaid, this 24, day of October, 2016, addressed as follows:

DOCUMENT: Respondent's Reply to Appellant's Return to Motion

MAILED TO: Benjamin Anderson
3452 Whieldon Drive
Perris, California 92571
Pro Se Plaintiff


Danyelle V. Young, Legal Assistant