

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM Horry COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh

Appellate Case. No. 2018-001724
C/A No: 2014-CP-26-50328

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SC Court of Appeals

Captain's Harbour and Racquet Club Homeowners' Association, Inc., Respondent,

v.

Jerald W. Jones, Appellant,

MOTION TO DISMISS APPEAL

Respondent Caption's Harbour and Racquet Club Homeowners' Association, Inc. ("Respondent") hereby moves to dismiss the above-captioned appeal pursuant to Rule 203 and Rule 240, SCACR, on the ground that Appellant Jerald W. Jones's ("Appellant") Notice of Appeal is not timely.

Appellant served his Notice of Appeal on September 21, 2018. The Appeal seeks this Court's review of an Order granting Respondent's Motion for Summary Judgment. A brief review of the timing of the issues on appeal reveals Appellant's Notice of Appeal is improper and should be dismissed. On February 17, 2016, Judge McIntosh heard oral arguments on Respondent's Motion for Summary Judgment and Petitioner's Motion for Summary Judgment. Judge McIntosh granted Respondent's Motion for Summary Judgment and denied Petitioner's Motion for Summary Judgment, which is reflected in a formal Order filed on April 12, 2016.

Prior to the filing of this Order, former counsel for Petitioner filed a Motion to Reconsider with the Circuit Court. On September 16, 2016, Judge McIntosh filed a Form 4 Order denying Petitioner's Motion to Reconsider. The Form 4 Order indicated the undersigned, as counsel for Respondent, was to prepare a formal Order denying Petitioner's Motion to Reconsider because it did not present any new or alternative arguments not previously considered by the Court. On November 17, 2016, the undersigned counsel submitted a formal Order denying Petitioner's Motion to Reconsider and in accordance with the instructions of Judge McIntosh. This proposed Order was submitted via email and regular mail, and Petitioner's former counsel was copied on the correspondence. Four days later, Judge McIntosh signed the proposed formal Order as submitted by the undersigned counsel. This Order was filed on November 28, 2016, and the Court stamped "Copies Mailed" on the executed Order. According to the Horry County Public Index, Judge McIntosh's executed Order was filed on November 28, 2016 at 8:29 AM, and the Clerk of Court mailed copies of the executed Order on November 29, 2016.

In November 2016, but before the filed Order formally denying Petitioner's Motion to Reconsider, Petitioner filed a Notice of Appeal with this Court. This Notice of Appeal was assigned Appellate Case No. 2016-0002299. In the following months, this Court, through the Honorable Jenny Abbott Kitchings, and Petitioner's counsel exchanged various letters regarding the status of Judge McIntosh's Formal Order Denying Petitioner's Motion to Reconsider. This correspondence ultimately resulted in this Court ordering the appeal be dismissed without prejudice and issuing a remittitur pursuant to Rule 221(b), SCACR. This Order was filed on April 19, 2017, and mailed to The Honorable Renee Elvis, Horry County Clerk of Court, on May 16, 2017 with a copy to Petitioner's current counsel.

Now, approximately eighteen months later, and nearly two years since the filing of Judge McIntosh's Formal Order Denying Petitioner's Motion to Reconsider, Petitioner seeks appellate review by this Court. In doing so, Petitioner contends the Notice of Appeal is proper and timely because service of the Final Order was never perfected. This position, however, ignores the plain language of Rule 203, SCACR, which simply requires receipt – not perfected service – of written notice of entry of the order or judgment. As early as November 2016, when he was copied on the proposed Formal Order the undersigned counsel submitted to Judge McIntosh, Petitioner knew a formal Order denying the Motion to Reconsider was forthcoming. The Horry County Public Index confirms the formal Order was entered and filed on November 28, 2016 with a copy of the Order mailed to Petitioner the following day. There is no indication this mailing was returned to the Clerk of Court as undeliverable, which had occurred on prior occasions and was noted in the Public Index on such occasions. Finally, Petitioner is aware of Respondent's attempt to recover the relief granted by Judge McIntosh Order granting Respondent's Motion for Summary Judgment. On August 3, 2018, Respondent filed a Writ of Execution seeking recovery of the judgment entered by Judge McIntosh and as confirmed by his denial of Petitioner's Motion to Reconsider. It is not until almost two months after Respondent filed a Writ of Execution that Petitioner now contends he is aware of the Order filed by Judge McIntosh in November 2016 he seeks to appeal.

Simply stated, Petitioner has been aware of the Court's ruling it now seeks to appeal for almost two years. Petitioner should not be afforded the opportunity to appeal an unfavorable Order simply because he claims – despite evidence to the contrary – service of the formal Order has not been perfected. This is not only incorrect under the clear language of Rule 203, SCACR,

but is prejudicial to Respondent's attempts to execute on a judgment from April 2016. Accordingly, this Court should dismiss Petitioner's Notice of Appeal as untimely.

This the 2 day of November, 2018.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'W-F', is written over a horizontal line.

Douglas W. MacKelcar, Esq.
William J. Farley III, Esq.
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40 Calhoun Street, Suite 400
Charleston, South Carolina 29401
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Attorneys for Respondent

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Captain's Harbour and Racquet Club Homeowners' Association, Inc., Respondent,

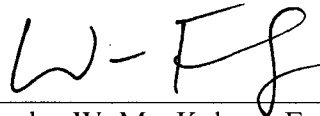
v.

Jerald W. Jones, Appellant,

PROOF OF SERVICE

I certify that I have served the Motion to Dismiss by depositing a copy in the United States Mail, postage prepaid, on this the 2 day of November, 2018, addressed Appellant's counsel of record as follows:

John M. Leiter, Esq.
Law Offices of John M. Leiter, PA
1203 48th Ave. North, Suite 109
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SC Court of Appeals

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REPLY TO SC OFFICE

November 2, 2018

VIA US MAIL

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

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Re: Captain's Harbour and Racquet Club Homeowners Association, Inc., Respondent
v. Jerald W. Jones, Appellant
Appellate Case No.: 2018-001724
CCS File No.: 4145-50328

Dear Ms. Kitchings:

Please find enclosed an original and seven (7) copies of Respondent Captain's Harbour and Racquet Club Homeowners Association, Inc.'s Motion to Dismiss the above-referenced appeal. Please return a filed stamped copy in the self-addressed stamped envelope. Please also find enclosed the appropriate filing fee for this Motion.

By copy of this letter, I am serving the same on Appellant's counsel. Should you have any questions or concerns, please let me know.

Sincerely yours,



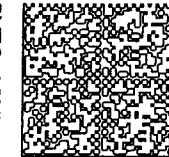
FOR DOUGLAS W. MACKELCAN

DWM:amt

Enclosures

cc: John Leiter, Esq.

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**CARLOCK
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The Honorable Jenny Abbott Kitchings
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