

NOTICE

Decision filed 03/13/15. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2015 IL App (5th) 140285-U

NO. 5-14-0285

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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FOUNDERS INSURANCE COMPANY,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Franklin County.
	)	
v.	)	No. 13-CH-27
	)	
TONI LYNN WARD, Individually and as	)	
Mother and Next Best Friend of Draven J.	)	
Taylor and Kadenz S. Taylor, Minors,	)	
and Shannon Cleer,	)	
	)	
Defendants-Appellants	)	
	)	
(Michael J. Melvin, Glenda S. Karnes,	)	
Individually and as Mother and Next Best	)	
Friend of Brian M. Karnes, a Minor, and as	)	
Special Administrator of the Estate of Brian	)	
M. Karnes, a Minor, and as Special	)	
Administrator of the Estate of Brianna M.	)	Honorable
Karnes, Deceased, a Minor, and Zane T.	)	Eric J. Dirnbeck,
Moore, Defendants).	)	Judge, presiding.

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JUSTICE GOLDENHERSH delivered the judgment of the court.  
Presiding Justice Cates and Justice Chapman concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendants' appeal is dismissed for lack of jurisdiction where defendants failed to show timely filing of their notice of appeal, which the clerk's office received after the 30-day deadline.

¶ 2

## BACKGROUND

¶ 3 Defendant Shannon Cleer was the named insured on a policy of automobile insurance written and issued by plaintiff, Founders Insurance Company, under policy number OAF118369 (insurance policy). Defendant Toni Ward was a named driver under the insurance policy. On February 20, 2012, plaintiff mailed an "Installment Notice, Cancellation Alert" to Cleer, advising Cleer that his premium payment to continue the insurance policy was due by March 11, 2012, and the failure to make the requisite premium payment by that date would result in the cancellation of the insurance policy on March 12, 2012, at 12:01 a.m.

¶ 4 Cleer failed to make the requisite payment by the March 11, 2012, due date, and the insurance policy was subsequently cancelled effective March 12, 2012, at 12:01 a.m. On the evening of March 13, 2012, Cleer and Ward were involved in a motor vehicle accident with defendant Michael J. Melvin in Franklin County, Illinois. The vehicle involved in the accident had been covered under the insurance policy prior to the cancellation.

¶ 5 On March 14, 2012, Cleer made a premium payment to his insurance agent, Greater Midstates Insurance, Inc., which was received by plaintiff on March 15, 2012, and reinstated effective the same day.

¶ 6 On November 13, 2013, plaintiff filed a motion for summary judgment requesting that the circuit court enter an order declaring there was no coverage under the policy at the time of the motor vehicle accident on March 13, 2012. Defendants then filed a cross-motion for summary judgment. On January 21, 2014, the circuit court denied both

parties' motions for summary judgment, noting there were factual issues in dispute.

¶ 7 Plaintiff filed a motion to reconsider and an affidavit in support thereof on March 19, 2014. Defendants filed a response to plaintiff's motion to reconsider on April 3, 2014. On April 10, 2014, plaintiff replied in support of its motion for reconsideration. Upon review of plaintiff's motion to reconsider and affidavit in support thereof, the circuit court granted summary judgment in favor of plaintiff on May 16, 2014, finding no genuine issue of fact and that plaintiff's cancellation notice complied with the insurance code. Defendants' notice of appeal was filed on June 20, 2014.

¶ 8 On October 27, 2014, plaintiff filed a motion to dismiss defendants' appeal for lack of jurisdiction, arguing defendants' appeal was not timely filed under Illinois Supreme Court Rule 303 (eff. June 4, 2008). Defendants filed a response to plaintiff's motion to dismiss for lack of jurisdiction on November 6, 2014, asserting any defect in the timely filing of their appeal was harmless error. On November 17, 2014, plaintiff's motion to dismiss for lack of jurisdiction and defendants' response were ordered to be taken with the case.

#### ¶ 9 ANALYSIS

¶ 10 On appeal, defendants assert plaintiff's notice to Cleer cancelling his automobile insurance policy was improper, and the trial court's decision to grant plaintiff's motion for summary judgment and deny defendants' cross-motion for summary judgment was error. Plaintiff contends the trial court's granting of summary judgment in its favor should be affirmed because the cancellation notice complied with all requirements of the Illinois Insurance Code and automobile insurance policy. Plaintiff argues Illinois law permits

sending a cancellation notice prior to nonpayment, and the reference to late fees in the cancellation notice does not create an ambiguity that renders the notice ineffective.

¶ 11 Plaintiff contends defendants are not entitled to coverage under the insurance policy because the cancellation notice was effective, and defendants' insurance policy was cancelled prior to the motor vehicle accident. Plaintiff also argues defendants' appeal should be dismissed for lack of jurisdiction because defendants' filing of their appeal did not comply with the requirements of Rule 303. For the following reasons, this court lacks jurisdiction to hear defendants' appeal, as defendants have failed to meet the statutory requirements concerning the timely filing and mailing of their notice of appeal.

¶ 12 Appellate review is initiated by the filing of a notice of appeal. When timely filed, a notice of appeal "divests the trial court of jurisdiction and confers jurisdiction upon the appellate court." (Internal quotation marks omitted.) *Huber v. American Accounting Ass'n*, 2014 IL 117293, ¶ 8, 21 N.E.3d 433. "No other step is jurisdictional." (Internal quotation marks omitted.) *Huber*, 2014 IL 117293, ¶ 8, 21 N.E.3d 433. When a notice of appeal is improperly filed, the appellate court lacks jurisdiction and must dismiss the appeal. *Huber*, 2014 IL 117293, 21 N.E.3d 433.

¶ 13 Illinois Supreme Court Rule 303 governs the process for filing an appeal. Rule 303 states that "[t]he notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from," or "within 30 days after the entry of the order disposing of the last pending postjudgment motion." Ill. S. Ct. R. 303(a)(1) (eff. June 4, 2008); *Huber*, 2014 IL 117293, ¶ 10, 21 N.E.3d 433.

¶ 14 In the instant case, the trial court granted summary judgment in favor of plaintiff

on May 16, 2014. Defendants did not file a postjudgment motion. Therefore, defendants were required to file their notice of appeal within 30 days of May 16, 2014, or no later than June 15, 2014. The record clearly indicates defendants' notice of appeal was received by the circuit clerk on June 20, 2014. While defendants' notice of appeal was received by the circuit clerk after the 30-day deadline, this fact alone does not determine whether defendants' notice was timely. *Huber*, 2014 IL 117293, ¶ 10, 21 N.E.3d 433.

¶ 15 Rule 373, which applies to a notice of appeal filed in the trial court, provides that "the time of mailing \*\*\* shall be deemed the time of filing" if a notice is received after the 30-day deadline. Ill. S. Ct. R. 373 (eff. Dec. 29, 2009); *Huber*, 2014 IL 117293, ¶ 11, 21 N.E.3d 433. Thus, if defendants mailed their notice of appeal on or prior to June 15, 2014, it would be considered timely filed even if the circuit clerk did not receive the notice until after June 15, 2014. Rule 373 states that "[p]roof of mailing \*\*\* shall be as provided in Rule 12(b)(3)." Ill. S. Ct. R. 373 (eff. Dec. 29, 2009); *Huber*, 2014 IL 117293, ¶ 11, 21 N.E.3d 433. Rule 12(b)(3) provides that service by mail is proved:

"[b]y certificate of the attorney, or affidavit of a person other than the attorney, who deposited the document in the mail \*\*\*, stating the time and place of mailing \*\*\*, the complete address which appeared on the envelope or package, and the fact that proper postage \*\*\* was prepaid[.]" Ill. S. Ct. R. 12(b)(3) (eff. Jan. 4, 2013).

*Huber*, 2014 IL 117293, ¶ 11, 21 N.E.3d 433.

¶ 16 Defendants failed to provide either an attorney certificate or an affidavit of a nonattorney, and thus failed to provide the proof of mailing required pursuant to Rule

12(b)(3). As such, defendants' notice of appeal was filed on the date it was received by the circuit clerk, June 20, 2014, which was past the 30-day deadline of June 15, 2014. Accordingly, because defendants' notice of appeal was untimely, we conclude this court lacks jurisdiction to address the merits of the case.

¶ 17 In their response to plaintiff's motion to dismiss for lack of jurisdiction, defendants indicate that proof of service was signed by a paralegal in defendants' law firm and certifies that the notice of appeal was sent on a specific date prior to the 30-day deadline. While defendants do not dispute that proof of service was defective because there was no attorney certificate or affidavit of a nonattorney, defendants contend this merely amounts to a harmless error that does not warrant dismissal. We disagree.

¶ 18 In support of its position, defendants cite to *Curtis v. Pekin Insurance Co.*, 105 Ill. App. 3d 561, 434 N.E.2d 555 (1982). In *Curtis*, a proof of service certificate signed by a nonattorney was submitted to the trial court. Although the proof of service did not conform to the requirements of Rule 12(b)(3), the court on appeal determined "the deficiency in the proof of service of which plaintiff complains had no substantial effect on the disposition of the case." *Curtis*, 105 Ill. App. 3d at 566, 434 N.E.2d at 559. The court found that the nonattorney signature on the proof of service certificate was a harmless error that did not mandate reversal of the order dismissing the plaintiff's suit.

¶ 19 The facts in *Curtis* are distinguishable from the facts of the instant case. *Curtis* involved a question concerning the certificate requirement of Rule 12(b)(3). The 30-day requirement under Rule 303 was not at issue. In the instant case, the record indicates defendants' notice of appeal was mailed prior to the 30-day deadline, but was mailed only

to opposing counsel and not the court. The court did not receive defendants' notice of appeal until after the 30-day deadline, and defendants failed to indicate their notice of appeal was mailed to the court prior to the 30-day deadling. Thus, even if defendants could establish that the signature of the paralegal on the proof of service certificate was harmless error that did not violate the certificate requirement of Rule 12(b)(3), defendants still failed to meet the 30-day requirement under Rule 303 for filing a notice of appeal with the clerk of the circuit court.

¶ 20 Defendants' notice of appeal was filed more than 30 days after the trial court granted summary judgment in favor of plaintiff. Accordingly, this court is deprived of jurisdiction.

¶ 21 CONCLUSION

¶ 22 For the reasons stated herein, we dismiss this case for lack of jurisdiction.

¶ 23 Appeal dismissed.