

**SHANNIE DAIGREPONT AND
LONNIE STOGNER**

*

NO. 2004-CA-1021

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COURT OF APPEAL

VERSUS

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FOURTH CIRCUIT

**ALLEN HALL, CANAL
CARTAGE COMPANY, AND
CALIBER ONE INSURANCE
COMPANY**

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STATE OF LOUISIANA

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NOT DESIGNATED FOR PUBLICATION

APPEAL FROM
FIRST CITY COURT OF NEW ORLEANS
NO. 2000-55123, SECTION "C"
Honorable Sonja M. Spears, Judge

Judge Terri F. Love

(Court composed of Judge Charles R. Jones, Judge Terri F. Love, Judge
David S. Gorbaty)

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APPEAL

DISMISSED

This case arises out of an automobile accident. Plaintiff, Lonnie Stogner (appellant), as owner of the vehicle involved in the accident, sought property damages from the defendant's insurer, Caliber One Insurance Company (appellee). A settlement was reached between the parties in the amount of \$1,500.00. Appellant thereafter filed a supplemental petition demanding penalties as a result of the untimely payment of the settlement. In response, appellee filed a Motion for Summary Judgment.

The Motion for Summary Judgment was granted in favor of appellee on August 22, 2003. The Notice of Signing of Judgment was also issued on August 22, 2003. This appeal was filed on October 9, 2003. Before the merits of this appeal can be addressed, we must determine whether the appeal is timely. Appellee argues that the appeal is untimely.

The appeal delays are set forth in La. C.C.P. art. 5002, as follows:

A. An appeal from a judgment rendered by a city court or a parish court may be taken only within ten days from the date of the judgment or from the service of notice of judgment, when such notice is necessary.

B. When an application for new trial is timely filed, however, the delay for appeal commences on the day after the motion is denied, or from service of notice of the

order denying a new trial, when such notice is necessary.

In Myles v. Turner, 612 So.2d 32 (La.1993), the Louisiana Supreme Court held that the delay for an appeal from a city court pursuant to article 5002 commences upon *receipt* of notice of judgment, rather than upon mere mailing of notice. (Emphasis added).

In the present case, thirty-nine days elapsed from the issuance of the notice of judgment to the filing of the appeal. The record does not demonstrate when appellant received the notice of judgment, nor has appellant provided the date upon which he received the judgment. Counsel for appellee, on the other hand, submitted an affidavit stating that he received notice on September 25, 2003, after said notice was first sent to a prior office address, then forwarded to his current office address. We note that even if appellant received notice on the same day as appellee, the appeal is still untimely.

In a similar case, First Nat. Bank of Commerce v. Boydell, 03-0613 (La. App. 4 Cir.9/24/03), 857 So.2d 1115, the notice of judgment from the First City Court was issued on January 9, 2003; and the appeal was filed on January 27, 2003. Because it could not be ascertained from the record when the appellant received notice of the judgment, this court issued a show cause order requesting an explanation as to whether or not the appeal should be

dismissed as untimely pursuant to La. C.C.P. art. 5002. The appellant failed to present a sufficient explanation for his delay, and the appeal was dismissed.

Based on the record in this case, the appeal is untimely. Accordingly, the appeal is dismissed.

APPEAL DISMISSED