

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

The Honorable Mikell R. Scarborough  
Circuit Court Case No.: 2015-CP-10-7000

Appellate Case No. 2020-000955

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**RECEIVED**

**Jul 07 2020**

**SC Court of Appeals**

Thelma Smalls David, Bernard Brown, Benjamin Smalls, Edward Brown, Nicolette James, Robert Brown, Thomas Brown, and Debra Commodore,

Appellants,

vs.

Donna Lee Cox, Robert R. Cox, Jr., Shawn Thackeray, and Lowcountry Highlanders Farm, LLC,

and

Bohicket Farms, LLC,

Respondents.

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**RESPONDENTS' RETURN IN OPPOSITION TO APPELLANTS' MOTION  
FOR EXTENSION OF TIME TO FILE NOTICE OF APPEAL  
AND RESPONDENTS' MOTION TO DISMISS APPEAL**

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Donna Lee Cox and Robert R. Cox, Jr., by and through their undersigned attorneys, hereby respond to the Appellants' Motion for an Extension of Time to File Notice of Appeal. For the reasons set forth below, this Court should deny the Appellants' Motion and dismiss the appeal for lack of jurisdiction.

**A. The plaintiffs/appellants delayed more than 120 days before requesting an extension in which to file their Notice of Appeal.**

The Notice of Appeal is a jurisdictional device, which is necessary to vest this Court with appellate jurisdiction over an appeal. Rule 203 of the South Carolina Appellate Court Rules governs the service and filing of an appellant's notice of appeal. The rule's mandatory language states that a "party intending to appeal *must* serve and file a notice of appeal and otherwise comply with these Rules." Rule 203(a), SCACR (emphasis added). The Rule requires that the notice of appeal "*shall* be filed with the . . . Clerk of the Court of Appeals." Rule 203(d), SCACR (emphasis added). The Rule gives the appealing party ten (10) days, from the date of service, in which to file the notice of appeal. Rule 203(d)(B), SCACR (the notice of appeal "*shall* be filed . . . within ten days (10) after the notice of appeal is served.").<sup>1</sup>

In this instance, the plaintiffs served their Notice of Appeal on the defendants on February 28, 2020. Pursuant to Rule 203, their Notice should therefore have been filed with the Court of Appeals no later than March 9, 2020. However, the plaintiffs did not file the present Motion for Extension to File Notice of Appeal until more than 120 days later. Because the plaintiffs failed to properly invoke this Court's appellate jurisdiction, their appeal should be dismissed.

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<sup>1</sup> Guidance on this situation may found within the Supreme Court's unpublished opinion, *Deas v. Giles (in re Estate of Giles)*, Memorandum Opinion No. 2015-MO-049 (2015) (in similar circumstances, dismissing appeal for failure to timely file the Notice of Appeal and finding appellate court was deprived of jurisdiction by failure to file).

Importantly, although the plaintiffs claim that the coronavirus emergency affected their late filing, the Supreme Court specifically excludes the dates on which plaintiffs failed to file their Notice of Appeal (i.e., by March 9, 2020) from its period for the forgiveness of procedural defects, which runs from March 13 through March 20, and which furthermore specifically excludes the jurisdictional requirements of the Notice of Appeal. *Order of the Supreme Court regarding the Operation of the Appellate Courts During the Coronavirus Emergency (As Amended May 29, 2020)*, ¶ (1)(3).<sup>2</sup>

The length of time during which the plaintiffs failed to recognize their error goes beyond mere mistake. In fact, under the South Carolina Appellate Court Rules, their brief was due in the midst of that delay . . . but they did not file that, either.

**B. Plaintiffs improperly failed to file their initial brief, which was due to this Court at least 40 days before they filed their present Motion for an Extension.**

An appellant “shall contemporaneously furnish all counsel of record . . . and the clerk of the appellate court with copies of all correspondence with the court reporter.”

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<sup>2</sup> The Order states:

**(2) Automatic Extension.** The due dates for all Appellate Court filings due during the period of March 20, 2020, thru June 8, 2020, are automatically extended for twenty (20) days.<sup>4</sup> Lawyers and litigants are warned that this automatic extension does not extend the time to serve a notice of appeal under Rules 203, 243, and 247, SCACR. This automatic extension is inapplicable to due dates after June 8, 2020.

**(3) Forgiveness of Procedural Defaults From March 13, 2020 to March 20, 2020.** In the event a party to a case or other matter pending before an Appellate Court was required to take certain action on or after March 13, 2020, but failed to do so, that procedural default was forgiven, and the required action was required to be taken by April 9, 2020. If a dismissal order was issued based on this default, the clerk of the Appellate Court shall rescind that dismissal order. This forgiveness does not apply to the failure of a party to timely serve the notice of appeal under Rules 203, 243, and 247, SCACR.

Rule 207, SCACR. In this instance, the undersigned counsel was copied on the plaintiffs' initial correspondence to the court reporter, dated March 5, 2020, in which plaintiffs ordered a transcript for a proceeding that is not the subject of this appeal.<sup>3</sup> The plaintiffs received a copy of that transcript on March 31, 2020. (Exhibit 1, correspondence with court reporter Christine Smith, dated July 6, 2020). Plaintiffs had previously received a copy of the trial transcript on January 7, 2020. (Exhibit 2, correspondence with court reporter C. Smith, dated July 6, 2020).

Upon receiving the requested transcript—in violation of the Rules—the plaintiffs failed to contemporaneously provide this Court and all counsel of record with a copy of their correspondence with the court reporter. Rule 207(a)(1), SCACR. This Court and the undersigned counsel should have been notified that the transcript had been received, which triggered the timeline for the plaintiffs to file their initial brief on appeal.

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<sup>3</sup> The transcript that the plaintiffs ordered was that of a hearing on defendants' motion for attorney's fees. No final order has been issued by the Court as to that motion, and so it is not properly the subject of an appeal.

Pursuant to the Rules, plaintiffs' initial brief to this Court was due 50<sup>4</sup> days after receipt of the transcript on March 31, 2020.<sup>5</sup> Rule 208, SCACR. **In other words, at the latest, the plaintiffs' brief to this Court was due on May 21, 2020.** Plaintiffs compounded their error by improperly failing to file their brief—an issue which they do not address in their Motion for Extension of Time in which to File Notice of Appeal. In other words, plaintiffs did not simply forget to file a Notice of Appeal; they repeatedly disregarded this Court's mandatory rules, each step of the way.

Rule 208(4), SCACR, requires that the Court dismiss an appeal for failure of the appellant to file the initial brief within the time prescribed. *See also* Rule 260(a), SCACR ("Whenever it appears that an appellant or 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.").

Taken together, the plaintiffs'/appellants' numerous errors are prejudicial to the respondents, in disregard of this Court's mandatory Rules, and they should be fatal to this appeal.

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<sup>4</sup> The rules were modified by the Supreme Court's Order on the Operation of the Appellate Court during the Coronavirus Emergency, so as to provide an automatic 20-day extension for filings during the period in which plaintiff's initial brief would have been due (see footnote 2, *supra*).

<sup>5</sup> This is giving the plaintiffs the benefit of the doubt, since actually the time should have started running 10 days after service of the Notice of Appeal, since the trial transcript had been received by the plaintiffs in January, and the order on appeal is the trial order (*see* Exhibit A to plaintiffs' Motion for Extension, which is the Notice of Appeal, indicating that the order on appeal is Judge Scarborough's Final Order, i.e. the trial order) (*see also* footnote 3, *supra*). If the plaintiffs are not given the benefit of the doubt—because they were already in possession of the trial transcript at the time they purported to appeal the trial court order—then their initial brief should have been due no later than April 28, 2020 pursuant to Rule 208(a)(1) (more than 60 days before the filing of this motion).

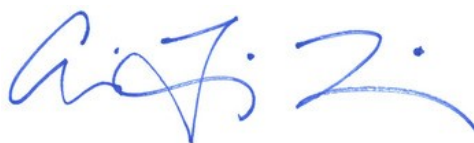
## CONCLUSION

In this case, the plaintiffs/appellants have repeatedly disregarded this Court's mandatory Rules. Their failure goes well beyond the critical requirement of filing a Notice of Appeal. They also have failed to comply with (*inter alia*) Rule 207(a)(1) and Rule 208(a)(1). When finally turning to this matter, plaintiffs/appellants predictably blame the coronavirus. However, the dates and compounded errors show that excuse to be specious. The excuse also is arguably disrespectful to the many litigants, lawyers, and judges who *have* complied with the Court's Rules under the current difficulties.

In sum, neglect is not good cause. This Court should deny plaintiffs'/appellants' Motion for an Extension and dismiss this appeal pursuant to the Appellate Court Rules and the law of South Carolina.

Respectfully submitted,

FORD WALLACE THOMSON LLC



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Ainsley F. Tillman, S.C. Bar No. 70551  
Ian S. Ford, S.C. Bar No. 12463  
715 King St., Charleston, South Carolina 29403  
(843) 277-2011  
*Attorneys for Respondents*  
*Donna Lee Cox and Robert R. Cox, Jr.*

July 7, 2020  
Charleston, South Carolina

**RE: David v. Cox**

Christine A. Smith &lt;CASmith@charlestoncounty.org&gt;

Mon 7/6/2020 9:43 AM

To: Ainsley Tillman &lt;Ainsley.Tillman@fordwallace.com&gt;; cecilesq@aol.com &lt;cecilesq@aol.com&gt;

Ms. Tillman,

Hoping you had a good 4<sup>th</sup> as well. We really enjoyed our vacation. Nice to get away and not think about anything for a while! ☺

I emailed the transcript to Mr. McFarland's office on 3/31/20. It was the same day I contacted you to see if you needed a copy. This is regarding the transcript from 2/13/20.

Is that the correct information you were looking for?

Christine

---

**From:** Ainsley Tillman <Ainsley.Tillman@fordwallace.com>
**Sent:** Friday, July 03, 2020 10:40 AM**To:** Christine A. Smith <CASmith@charlestoncounty.org>**Subject:** Re: David v. Cox

**CAUTION:** This email originated outside of Charleston County. Do not click links or open attachments from unknown senders or suspicious emails. If you are not sure, please contact IT helpdesk.

Thanks so much, Christine. I hope you enjoy your vacation and have a Happy Fourth of July!

**Ainsley Fisher Tillman**

Ford Wallace Thomson LLC

[715 King Street](#)[Charleston, S.C. 29403](#)

T. 843.266.1289

E. [Ainsley.Tillman@FordWallace.com](mailto:Ainsley.Tillman@FordWallace.com)W. [www.FordWallace.com](http://www.FordWallace.com)


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**From:** Christine A. Smith <[CASmith@charlestoncounty.org](mailto:CASmith@charlestoncounty.org)>
**Sent:** Thursday, July 2, 2020 6:30 PM**To:** Ainsley Tillman <[Ainsley.Tillman@fordwallace.com](mailto:Ainsley.Tillman@fordwallace.com)>**Cc:** Arthur Mcfarland <[cecilesq@aol.com](mailto:cecilesq@aol.com)>; [rileybradham@att.net](mailto:rileybradham@att.net) <[rileybradham@att.net](mailto:rileybradham@att.net)>; Ian Ford <[ian.ford@fordwallace.com](mailto:ian.ford@fordwallace.com)>**Subject:** Re: David v. Cox

I can let you know on Monday. I'm on vacation this week.

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**From:** Ainsley Tillman <[Ainsley.Tillman@fordwallace.com](mailto:Ainsley.Tillman@fordwallace.com)>  
**Sent:** Wednesday, July 1, 2020 4:06:46 PM  
**To:** Christine A. Smith <[CASmith@charlestoncounty.org](mailto:CASmith@charlestoncounty.org)>  
**Cc:** Arthur Mcfarland <[cecilesq@aol.com](mailto:cecilesq@aol.com)>; [rileybradham@att.net](mailto:rileybradham@att.net) <[rileybradham@att.net](mailto:rileybradham@att.net)>; Ian Ford <[ian.ford@fordwallace.com](mailto:ian.ford@fordwallace.com)>  
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I do appreciate your help!

Sincerely,  
Ainsley

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**From:** Christine A. Smith <[CASmith@charlestoncounty.org](mailto:CASmith@charlestoncounty.org)>  
**Sent:** Tuesday, March 31, 2020 12:40 PM  
**To:** Ainsley Tillman <[ainsley.tillman@fordwallace.com](mailto:ainsley.tillman@fordwallace.com)>  
**Subject:** David v. Cox

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Hope you are doing well.

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Tel: (843) 958-5071  
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Cc: Ian Ford <ian.ford@fordwallace.com>; Riley Bradham <rileybradham@att.net>; cecilesq@aol.com <cecilesq@aol.com>

They did order the trial transcript. It was sent out 1/7/20.

Thank you,  
Chrstitine

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**From:** Ainsley Tillman <Ainsley.Tillman@fordwallace.com>  
**Sent:** Monday, July 06, 2020 10:59 AM  
**To:** Christine A. Smith <CASmith@charlestoncounty.org>  
**Cc:** Ian Ford <ian.ford@fordwallace.com>; Riley Bradham <rileybradham@att.net>; cecilesq@aol.com  
**Subject:** Re: David v. Cox

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Good morning, Christine, and happy Monday.

Yes, that is the information I was seeking. Could you tell me also whether the trial transcript was ordered by the Plaintiffs, and on what date they received that transcript?

I appreciate your help,  
Ainsley

**Ainsley Fisher Tillman**

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[Charleston, S.C. 29403](#)

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THE STATE OF SOUTH CAROLINA  
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Bohicket Farms, LLC,  
Respondents.

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**PROOF OF SERVICE**

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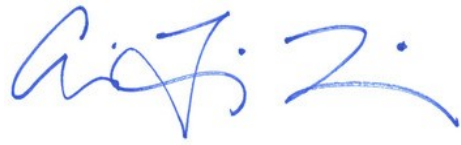
I hereby certify that I served the within *Respondents' Opposition to Appellants' Motion for an Extension of Time and Respondents' Motion to Dismiss* on counsel for the Appellants by emailing it to their attorneys' AIS address of record on July 7, 2020:

[cecilesq@aol.com](mailto:cecilesq@aol.com)

[edbrownlawfirm@att.net](mailto:edbrownlawfirm@att.net)

[signature appears on following page]

Respectfully submitted,



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Ainsley F. Tillman  
715 King St., Charleston, South Carolina 29403  
(843) 277-2011  
*Attorney for Respondents*  
*Donna Lee Cox and Robert R. Cox, Jr.*