

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

**SC Court of Appeals**

Walton J. McLeod, Circuit Judge

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Appellate Case 2021-000033  
Case No. 2018-CP-32-04329

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John Deere Construction & Forestry Company,  
Plaintiff-Respondent,

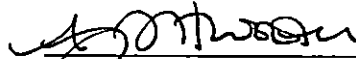
v.

North Edisto Logging, Inc. and Paul Gunter,  
Defendants-Appellants.

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MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S MOTION TO  
DISMISS APPEAL

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NOW COMES Plaintiff-Respondent John Deere Construction & Forestry Company ("Respondent"), by and through its undersigned attorneys, and hereby submits this Memorandum of Law in Support of Motion to Dismiss Appeal ("Motion to Dismiss").

**STATEMENT OF THE FACTS**

On December 20, 2018, Respondent filed a Complaint against Appellants in the County of Lexington, Court of Common Pleas of the Eleventh Judicial Circuit, bearing Case No. 2018-CP-32-04329 ("State Court Action"), in which Respondent asserted claims for Breach of Contract and Possession. On March 19, 2019, Defendants-Appellants North Edisto Logging, Inc. and Paul Gunter (collectively, "Appellants") filed an Answer and Counterclaims. Appellant's Counterclaims asserted claims for Breach of Contract and Negligent Supervision, and sought certification of a class action.

On October 27, 2020, a hearing was held before the Honorable Walton J. McLeod, Circuit Court Judge Presiding, on Respondent's Motion for Summary Judgment in the State Court Action. On December 8, 2020, the Honorable Walton J. McLeod, Circuit Court Judge Presiding, entered an Order granting Respondent's Motion for Summary Judgment ("Order"), dismissing Appellant's Counterclaims and granting Respondent the relief sought in its Complaint. A copy of the Court's Order is attached to the Motion to Dismiss and incorporated herein by reference as "Exhibit A."

On January 8, 2021, Appellants filed their Notice of Appeal from the Order ("Notice of Appeal"). A copy of Appellants' Notice of Appeal is attached to the Motion to Dismiss and incorporated herein by reference as "Exhibit B."

Pursuant to the South Carolina Appellate Court Rules (the "Rules"), on January 15, 2021, Appellants ordered a copy of the transcript of the October 27, 2020 proceedings (the "Transcript") from the South Carolina Court Administration Court Reporter (the "Court Reporter"). A copy of Appellants' Transcript request is attached to the Motion to Dismiss and incorporated herein by reference as "Exhibit C." On February 9, 2021, the Court Reporter delivered a copy of the Transcript to Appellants. A copy of the Court Reporter's confirmation of the delivery date is attached to the Motion to Dismiss and incorporated herein by reference as "Exhibit D."

Thirty-one (31) days after delivery of the Transcript to the Appellants, on March 12, 2021, Appellants filed and served their Initial Brief of Appellants ("Initial Brief"). A copy of Appellants' Initial Brief is attached to the Motion to Dismiss and incorporated herein by reference as "Exhibit E."

Prior to filing and serving their Initial Brief, Appellants did not serve on Respondent a copy of the Transcript or the correspondence from the Court Reporter, if any, accompanying the delivery of the Transcript to Appellants.

Also on March 12, 2021, thirty-one (31) days after delivery of the Transcript, Appellants filed and served their Designation of Matter to be Included in the Record on Appeal ("Designation"). A copy of Appellants' Designation is attached to the Motion to Dismiss and incorporated herein by reference as "Exhibit F."

On March 22, 2021, Respondent requested a copy of the Transcript of the October 27, 2020, proceeding from Appellants, but no response has been forthcoming. Following Appellants' non-response, Respondent ordered a separate copy of the transcript from the Court Reporter. On or about March 29, 2021, Respondent received a copy of the Transcript from the Court Reporter. Copies of Respondent's request to Appellant and request to the Court Reporter are attached to the Motion to Dismiss and are incorporated herein by reference as "Exhibit G" and "Exhibit H," respectively.

### ARGUMENT

Rule 208(a)(1) of the Rules requires the issuance of an order of dismissal of the instant appeal due to the Appellants' failure to timely file their Initial Brief within thirty (30) days after receiving the Transcript.

Pursuant to Rule 208(a)(1) of the Rules, the appellant shall "serve one copy of his brief on all parties to the appeal, and file with the clerk of appellate court one copy of the brief with proof of service" within "thirty (30) days after receiving the transcript or, if no transcript is ordered, within thirty (30) days after serving the notice of appeal." Rule 208(a)(1), SCACR. Pursuant to Rule 208(a)(4) of the Rules, "[u]pon the failure of the appellant to file and serve his brief within the time prescribed, the clerk of the appellate court shall sign an order dismissing the appeal." Rule 208(a)(4), SCACR (emphasis added).

The Rules also require that the appellant shall "contemporaneously furnish all parties, the Office of Court Administration, and the clerk of the appellate court with copies of all correspondence with the court reporter." Rule 207(a), SCACR.

When a party serves its initial brief, it must also serve a copy of a "Designation of Matter to be Included in the Record on Appeal which shall set forth with specificity those parts of the transcript, pleadings, orders, exhibits, or other materials which he proposes to include in the record on appeal." Rule 209(a), SCACR. The computing of time under the Rules begins on the day after the act or event and includes the last day in which the period runs, and "[n]o additional time shall be allowed after service by mail." Rule 263, SCACR.

Importantly, when an appellant has failed to comply with the requirements of the Rules, "the clerk shall issue an order of dismissal, which shall have the same force and effect as an order of the appellate court." Rule 260(a), SCACR (emphasis added); see also Roberts v. LaConey, 375 S.C. 97, 100, 650 S.E.2d 474, 475 (2007) (dismissing the appellant's exceptions because the appellant failed to file a brief as required by Rule 208(a)(4)). Finally, the filing of a motion to dismiss an appeal shall "automatically stay the time limits for perfecting the appeal until the motion is decided." Rule 240(b), SCACR.

Here, Appellants were required to file their Initial Brief within thirty (30) days after receiving the Transcript. Rule 208(a)(1), SCACR. According to the Court Reporter, the Transcript was prepared and delivered to Appellants on February 9, 2021. As such, Appellants were required to file and serve their Initial

Brief no later than Thursday, March 11, 2021, which was thirty (30) days after receipt of the Transcript. See Rule 263, SCACR. However, Appellants did not file and serve their Initial Brief until March 12, 2021, and as such, the filing of the Appellant's Initial Brief was not timely and the appeal must be dismissed. Rule 208(a)(1) and (4), SCACR.

In Roberts v. LaConey, the Supreme Court of South Carolina relied on Rule 208(a) of the Rules when it dismissed an appeal for the appellant's failure to file a brief. Roberts, 375 S.C. at 100, 650 S.E.2d at 475. In interpreting the Rules, the Court specifically stated that where the appellant fails to file a brief, "the appeal will be dismissed." Id. (emphasis added).

The Supreme Court of South Carolina also considered the dismissal of an appeal in Henning v. Kaye, where the appellant failed to comply with the Rules when filing his initial brief. Henning v. Kaye, 307 S.C. 436, 415 S.E.2d 794 (1992). In Henning, the Court found that there were several deficiencies in the appellant's initial brief, including incorrect organization, incorrect headings, table of authorities not being alphabetized, omission/inclusion of improper information in the statement of case, and incorrect citations. Henning, 307 S.C. at 437, 415 S.E.2d at 794. The Court agreed with the appellant that the deficiencies were "inadvertent technical errors and minor discrepancies," and rather than dismissing the case, allowed the appellant the opportunity to amend the initial brief and correct the errors. Id.

Our case is dissimilar from Henning, in that there is no way to correct Appellants' disregard for the filing deadlines outlined in the Rules. The Rules are

clear that in the event an appellant fails to timely file its Initial Brief, the Court "shall sign an order dismissing the appeal." Rule 208(a)(4), SCACR (emphasis added). The late filed Initial Brief is not a mere technical error that can be excused and corrected like the deficiencies in issue in Henning; rather, a missed deadline cannot be "unmissed." Rule 208(a)(4) , SCACR; see also Roberts, 375 S.C. at 100, 650 S.E.2d at 475 (dismissing an appeal because the party failed to file and serve a brief in accordance with the Rules).

Moreover, the appellant in Henning failed to comply with Rule 207 of the Rules (which is now known as Rule 208(b)). Henning, 307 S.C. at 437, 415 S.E.2d at 794. Unlike Rule 208(a), Rule 208(b) does not contain any language specifically requiring the immediate dismissal of an appeal the way that Rule 208(a) does at subsection (4). Rule 208(b), SCACR. Despite that difference, the Court in Henning nonetheless made it clear that it would have been "completely justified in dismissing the appeal based on appellant's numerous violations of the Rules." Henning, 307 S.C. at 437-38, 415 S.E.2d at 794. A critical component of Rule 208(a), which is directly applicable to our facts, is subsection (a)(4), which provides that when an appellant fails to file and serve a brief within the time prescribed, the clerk "shall sign an order dismissing the appeal." Rule 208(a)(4), SCACR.

In addition, the Appellants were required to provide Respondent and this Court with all correspondence with the Court Reporter. Rule 207(a), SCACR. Upon request of Respondent, Appellants provided a copy of their initial correspondence with the Court Reporter requesting the Transcript, but failed to

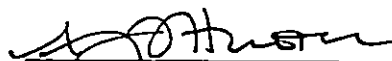
furnish a copy of the Transcript or copies of the correspondence with the Court Reporter accompanying the delivery of the Transcript to the Appellants by the Court Reporter.

Finally, the Appellants were also required to set forth with specificity in their Designation of Matter, those parts of the transcript, pleadings, orders, exhibits, or other materials which he proposes to include in the record on appeal." Rule 209(a), SCACR. However, Appellants have also failed to designate with specificity, any part of the transcript, pleadings, orders, exhibits, or other materials included in Appellant's Designation of Matter.

Based on the foregoing, Appellants' failure to comply with the Rules requires dismissal of their appeal.

### CONCLUSION

Because Appellants have failed to comply with the South Carolina Appellate Court Rules, this Court should grant Respondent's Motion to Dismiss Appeal.



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*Attorneys for Respondent-Plaintiff*

Raleigh, North Carolina  
April 7, 2021.

CERTIFICATE OF SERVICE

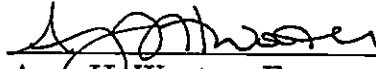
I hereby certify that on April 7, 2021 the foregoing MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS APPEAL as served on the following person by depositing a copy thereof in an envelope bearing sufficient postage in the United States mail, addressed to the following person at the following address which is the last addresses known to me:

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Fleming & Witt, P.A.  
344 Blossom View Court  
West Columbia, SC 29170  
*Counsel for Appellants-Defendants*

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**SC Court of Appeals**

  
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ND: 4830-9837-8468, v. 1

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April 7, 2021

VIA OVERNIGHT DELIVERY

Ms. Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
1220 Senate Street  
Columbia, South Carolina 29201

**RECEIVED**  
APR 08 2021  
SC Court of Appeals

RE: John Deere Construction & Forestry Company / North Edisto Logging, Inc. and  
Paul D. Gunter  
Appellate Case: 2021-000033  
Appeal From Lexington County Court File: 2018-CP-32-04329  
Our File 070644-00226

Dear Ms. Kitchings:

Enclosed are the original and six copies each of the following documents:

- 1) Respondent's Notice of Filing of Order Admitting Counsel *Pro Hac Vice*;
- 2) Respondent's Motion to Dismiss Appeal;
- 3) Affidavit of Amy H. Wooten in Support of Respondent's Motion to Dismiss Appeal;  
and
- 4) Memorandum of Law in Support of Respondent's Motion to Dismiss Appeal.

Please file the original, stamp the copies with the necessary filing information and then return the firm's copy of each document to me in the enclosed self-addressed, postage prepaid envelope that I have provided for your convenience. By copy of this letter, I am sending a copy of these documents to opposing counsel.

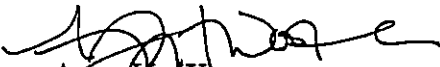
In addition, enclosed is our firm's check in the amount of \$50.00 representing the filing fee as established by the Supreme Court, in connection with the Motion to Dismiss.

WARD AND SMITH, P.A.

Ms. Jenny Abbott Kitchings  
April 7, 2021  
Page 2

Many thanks for your attention to this matter.




Yours truly,

  
Amy H. Wooten

ND: 4813-4575-9460, v. 1

Enclosures

cc: D. Randolph Whitt, Esq. (w/encs.)

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SHIP TO: CLERK OF COURT MS. JENNY ADDOTT KITCHINGS 1220 SENATE STREET SOUTH CAROLINA COURT OF APPEALS COLUMBIA SC 29201-3769		
	<b>SC 292 9-01</b> 	
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