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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Walton J. McLeod, Circuit Judge

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

John Deere Construction & Forestry Company,
Plaintiff-Respondent,

v.

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

RESPONDENT'S REPLY IN SUPPORT OF MOTION TO DISMISS APPEAL

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Attorneys for Respondent-Plaintiff

NOW COMES Plaintiff-Respondent John Deere Construction & Forestry Company ("Respondent"), by and through its undersigned attorneys, and submits this Reply pursuant to Rule 240(f) of the South Carolina Appellate Court Rules ("SCACR") in opposition to Defendants-Appellants North Edisto Logging, Inc. and Paul Gunter's (collectively, "Appellants") Return to Motion to Dismiss served on counsel for Respondent on April 16, 2021 ("Return") and in support of its Motion to Dismiss Appeal filed with this Court on April 8, 2021 ("Motion to Dismiss"). In support of this Reply, Respondent shows unto the Court as follows:

ARGUMENT

The Appellants' argument that they timely filed their initial brief,¹ does not warrant a denial of the Motion to Dismiss where, as here, the Appellants failed

¹ Concerning the timeliness of the Appellants' Initial Brief, the Appellants' Return represents that the Appellants received the transcript of the October 27, 2020 proceedings ("Transcript") on February 10, 2021, and therefore, timely submitted their Initial Brief. By way of background and as evidenced by Exhibit G of Respondent's Motion to Dismiss, counsel for Respondent inquired of Appellants concerning the Appellants' receipt of the Transcript. Respondent's inquiry was made after Respondent received a copy of Appellants' Initial Brief and prior to Respondents being provided with: a copy of the Transcript, a copy of the correspondence from the Court Reporter required by Rules 207(a)(1) and 607(b), SCACR, acknowledging the Appellants' request for the Transcript, and a copy of any transmittal correspondence of the Transcript to the Appellants. In response to Respondent's inquiry, Appellants did not confirm the date they received the Transcript, nor did they respond in any fashion to Respondent's request for a copy of the Transcript. Accordingly, Respondent reached out to the Court Reporter to request a copy of the Transcript along with copies of any correspondence showing when the Transcript was sent to Appellants. (Motion to Dismiss, Exhibit D). The Court Reporter informed Respondent that the transcript was delivered on February 9, 2021, (*id.*), and that she was unable to give the Respondent a copy of the requested correspondence. A copy of Respondent's follow up request to the Court Reporter and the Court Reporter's response is attached hereto and incorporated herein by reference as "**Exhibit A.**" Despite its inquiries, Respondent was unaware of the date Appellants received the Transcript until

to comply with the requirements of Rules 207, 607, and 209, SCACR, requiring dismissal of the appeal pursuant to Rule 260(a), SCACR.

I. THE APPELLANTS' FAILURE TO COMPLY WITH THE REQUIREMENTS OF RULES 207 AND 607 REQUIRES DISMISSAL OF THE APPEAL.

Appellants' argument in its Return that it was not obligated to provide or make arrangement for Respondent to receive a copy of the Transcript is without merit and defies the plain language of Rules 207 and 607, with which the Appellants have failed to comply, requiring dismissal of the appeal pursuant to Rule 260(a), SCACR.

Rule 207(a)(1) imposes on the Appellants – not Respondent – the obligation to order the Transcript. Specifically, Rule 207(a)(1) requires the Appellants to "make satisfactory arrangements (*including agreement regarding payment for the transcript*), in writing with the court reporter for *furnishing* the transcript." Rule 207(a)(1), SCACR (emphasis added). The Rule further requires the Appellants to "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," and requires the Court Reporter to "acknowledge receipt of the request by responding to the appellant within five business days." *Id.* (emphasis added); *see also* Rule 607(b) ("The court reporter must acknowledge receipt of the request by responding to the person making the request within five business days, *and* provide a copy to the Office

Respondent received the Appellants' Return, which identified for the first time the date Appellants had received the Transcript.

of Court Administration as specified in Rule 207(a)(7) and by Order of the Supreme Court") (emphasis added).

Rule 207(a)(1) also requires the Appellants to order a transcript of the entire proceeding below unless the parties agree otherwise in writing, and it provides on its face a framework for handling a scenario in which a party to the appeal refuses without justification to agree to ordering less than the entire transcript. Specifically, the Rule provides in that situation that an "appellant may move to be awarded costs for having unnecessary portions transcribed." Rule 207(a)(1), SCACR.

Rule 607(b), which also applies to transcripts ordered for an appeal, requires the Appellants to include on the request for the Transcript, the "names and addresses of all persons who are to be served with a copy" of the Transcript. Rule 607(b), SCACR.

In their Return, the Appellants narrowly construe and limit Rule 207's requirements of them to the disclosure of emails or letters between them and the Court Reporter. They read out of Rule 207 their obligation to make satisfactory arrangements for the furnishing of and the payment of the Transcript, suggesting they are somehow immune or otherwise above the requirements of the plain language of Rule 207(a)(1) and by extension, Rule 607(b), SCACR. The Appellants claim they are not obligated to meet those requirements to protect the Court Reporter from losing a fee.

Reading Rules 207(a)(1) and 607(b) in their entirety makes clear that the Appellants were required to make arrangements for the furnishing of the Transcript.

If the Appellants were not so required, there would be no reason for Rule 607(b), SCACR, to require the Appellants to include in their request for the Transcript "[t]he names *and* addresses of all persons who are to be served with a copy" of the Transcript," which the Appellants failed to do. Rule 607(b), SCACR (emphasis added); (*see also* Motion to Dismiss, Exhibit C).

The Rules also make clear that the Appellants were required to arrange for payment for the Transcript, and that those arrangements should have included the Court Reporter's fee for preparing the necessary copies of the Transcript. If, as Appellants' argue, each party was separately responsible for coordinating payment with the Court Reporter, how then is the Rule's language that states "including agreement regarding payment for the transcript" and its framework for resolving disputes of fees not rendered superfluous?

Had the Appellants met their obligations under Rules 207 and 607, there would be no concern of the Court Reporter losing a fee or of the Respondent not being furnished a copy of the Transcript. Because the Appellants failed to meet their obligations under those Rules, a copy of the Transcript was not furnished to the Respondent until March 29, 2021 – 47 days after Appellants had received the Transcript and 17 days after service of Appellants' Initial Brief – and only after the Respondent separately remitted payment for the Transcript to the Court Reporter. The Appellants' failure to comply with the requirements of Rules 207 and 607 requires dismissal of the appeal pursuant to Rule 260(a), SCACR.

II. THE APPELLANTS' FAILURE TO COMPLY WITH THE REQUIREMENTS OF RULE 209 REQUIRES DISMISSAL OF THE APPEAL.

The Appellants' Designation of Matter to be Included in the Record on Appeal ("Designation") does not comply with the Requirements of Rule 209, SCACR, requiring dismissal of the appeal pursuant to Rule 260(a), SCACR.

Rule 209 requires a party's Designation to "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 (emphasis added). The Rule restricts a party from including "any matter in his Designation which is not relevant to the appeal." Rule 209(b), SCACR.

In Appellant's Designation, Appellants broadly identify 17 different items they propose to include in the Record on Appeal. In doing so, Appellants have failed to identify with *any specificity* which parts of those documents they propose to include in the Record on Appeal. Instead, Appellants argue "[i]t is unclear how the pleadings could be irrelevant." (Return, pg. 3). But even a cursory examination of the Appellants' Initial Brief makes clear that there are a number of items identified in the Appellants' Designation that Appellants apparently did not deem relevant to the appeal, including by way of example the Proposed Order submitted by Appellants (# 15 in the Designation) and the Proposed Order submitted by Respondents (# 16 in the Designation), neither of which are cited to or referred to in the Appellants' Initial Brief and neither of which were filed by the parties with the trial court. In addition, Appellants include and cite to in their Initial Brief materials that they have not

identified in their Designation. By way of example, the Appellants' Initial Brief references the Deposition Transcript of Paula Gunter, which is not identified in the Designation.

In short, the Appellants have failed to comply with the requirements of Rule 209, SCACR, requiring dismissal of the appeal pursuant to Rule 260(a), SCACR.

CONCLUSION

Appellants' failures to comply with the requirements of the SCACR requires dismissal of the appeal pursuant to Rule 260(a), SCACR, and Respondent's Motion to Dismiss should be granted.



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Raleigh, North Carolina
April 21, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2021 the foregoing RESPONDENT'S REPLY IN SUPPORT OF MOTION TO DISMISS APPEAL was served on the following person via e-mail, and 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:

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



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Raleigh, North Carolina
April 21, 2021.

ND: 4815-9794-0710, v. 2

EXHIBIT

A

-----Original Message-----

From: Fisher, Bobbi <bfisher@sccourts.org>

Sent: Thursday, March 25, 2021 1:39 PM

To: Michelle C. Howard <MCHoward@wardandsmith.com>

Subject: Re: John Deere v. North Edisto / Case No. 2018-CP-32-04329

I have been advised by my supervisor that it would be inappropriate for me to forward any such correspondence so I am unable to give that to you.

Bobbi J. Fisher, RPR

South Carolina Official Court Reporter III

NCRA (Stenotype) Registered Professional Reporter (RPR)

Certified SC Digital Court Reporter

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From: Michelle C. Howard <MCHoward@wardandsmith.com>

Sent: Thursday, March 25, 2021 12:31 PM

To: Fisher, Bobbi

Subject: RE: John Deere v. North Edisto / Case No. 2018-CP-32-04329

*** EXTERNAL EMAIL: This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***

Hi Bobbi,

I received the USPS Priority mail notice for this transcript. Thanks for sending that along.

Will what you are sending us include the correspondence to Mr. Whitt sending him the transcript? If not, can we please get a copy of that correspondence?

Thanks again,

~Michelle

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North Carolina Law Firm - Ward and Smith,

P.A.<[https://urldefense.com/v3/_http://www.wardandsmith.com_!!JHVHxrUang!EafiY1bwWfwptklj1eutmfj_6RaEgnYwJSyupfvBdoMmtMgjJscTMsUUOa6qPxQG\\$](https://urldefense.com/v3/_http://www.wardandsmith.com_!!JHVHxrUang!EafiY1bwWfwptklj1eutmfj_6RaEgnYwJSyupfvBdoMmtMgjJscTMsUUOa6qPxQG$)>

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in this email by a licensed attorney employed by Ward and Smith, P.A. Thank you.

Michelle C. Howard

From: Michelle C. Howard
Sent: Wednesday, April 21, 2021 3:12 PM
To: 'dwhitt2001@aol.com'
Cc: Amy H. Wooten; Paul A. Fanning
Subject: John Deere v. North Edisto / Appellate Case 2021-000033
Attachments: Ltr to OC Encl Respondent's Reply ISO Motion to Dismiss Appeal.pdf; 2021.04.21 John Deere's Reply Brief.pdf; Exhibit A to Reply Brief.pdf

Mr. Whitt,

Please see attached documents in the above-entitled matter. Hard copy will follow via regular US mail.

Kind Regards,

~Michelle