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Feb 14 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Case No.: 2021-001400

IOS, LLC.,

Appellant-Respondent,

v.

Lander University,

Respondent-Appellant.

**APPELLANT-RESPONDENT’S REPLY TO RESPONDENT-
APPELLANT’S RETURN TO MOTION TO DISMISS CROSS-APPEAL**

IOS, LLC., respectfully submits this Reply to Respondent-Appellant’s Return to Appellant’s Motion to Dismiss the Cross-Appeal for failure to timely file their Notice of Appeal with the clerk of the lower court.

“A party intending to appeal **must serve and file** a notice of appeal...” [Emphasis Added]. Rule 203 SCACR. “The notice of appeal **shall be filed** with the clerk of the lower court **and** clerk of the appellate court within ten (10) days after the notice of appeal is served.” [Emphasis Added]. Rule 203(d)(1)(B) SCACR. These requirements are jurisdictional and may not be extended by the Court. See State v. Brown, 358 S.C. 382, 387, 596 S.E.2d 39, 41 (2004) (noting that failure to comply with the procedural requirements for an appeal divests the court of appellate jurisdiction). “If the notice of appeal is not timely filed..., the appeal shall be

dismissed....” Rule 203(d)(3) SCACR. Contrary to the assertion of Respondent-Appellant in their Return articulating prejudice is not a factor to be considered in the dismissal.

An appeal dismissed for failure Respondent-Appellant file their notice of appeal **shall not be reinstated except as provided by Rule 260.** [Emphasis Added] Rule 203(d)(3) SCACR. Rule 260 provides in pertinent part, “[a] case shall not be reinstated except by leave of the court, **upon good cause** shown.... [Emphasis Added]. Rule 260(a) SCACR. Respondent-Appellant makes no effort in their Return to articulate any measure of good cause as to why the filing of their notice of appeal was untimely.

Respondent-Appellant cites Rule 203(c) SCACR for the proposition that the notice of appeal for a cross-appeal is not required to be filed because it doesn’t say so and that they decided to file the notice late “out of an abundance of caution.” Respondent-Appellant’s reading of Rule 203(c) would also stand for the proposition that they would also not have to follow the other Rules governing the form and content of the notice as well as where and when to file. This interpretation of Rule 203(c) is wrong. Rule 203(c) provides the five (5) day service requirement of their “notice of appeal” as a cross-appeal but that same notice must most certainly follow the remaining requirements of Rule 203.

Respondent-Appellant served their notice of appeal on December 7, 2021, within the five (5) days required for cross-appeals in Rule 203(c) SCACR. Rule 203(d)(1)(B) SCACR requires the notice to be filed with the clerk of the lower court no later than December 17, 2021.

Respondent-Appellant filed their Notice of Appeal in the lower court on January 25, 2022.

The South Carolina Supreme Court upheld the dismissal of a probate court appeal for failing to file the notice holding, “for the statute is clear that the notice of appeal "must be filed" in the circuit court within the ten-day period. See Gary v. State, 347 S.C. 627, 629, 557 S.E.2d

662, 663 (2001) ("When a statute requires the filing of a paper or document, it is filed when delivered to and received by the proper officer."); see also State v. Brown, 358 S.C. 382, 387, 596 S.E.2d 39, 41 (2004) (noting that failure to comply with the procedural requirements for an appeal divests the court of appellate jurisdiction). In re Estate of Cretzmeyer, 615 S.E.2d 116, 365 S.C. 12 (S.C. 2005). The South Carolina Supreme Court when interpreting a much earlier version of a similar rule requiring a filing with the lower court dismissed an appeal for failing to file with the lower court. Barwick v Barwick, 59 S.C. 200, 37 S.E. 774 (1901).

Appellant-Respondent respectfully request the Court of Appeals to dismiss the Cross-Appeal filed by Respondent-Appellant for failing to perfect their appeal by timely filing their notice with the clerk of the lower court.

February 14, 2022

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Frank R. Addy, Jr., Circuit Court Judge

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IOS, LLC.,

Appellant-Respondent,

v.

Lander University,

Respondent-Appellant.

CERTIFICATE OF SERVICE

The undersigned attorney of James E. Smith Jr., P.A., counsel for the Appellant-Respondent IOS, LLC., does hereby certify that service of the **Appellant-Respondent's Reply to Respondent-Appellant's Return to Motion to Dismiss Cross-Appeal** in the above-captioned matter was made upon all counsel of record via email and first class us mail at the listed addresses below the 14th day of February 2022.

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