

**IN THE COURT OF APPEALS OF IOWA**

No. 2-1114 / 11-2094  
Filed July 24, 2013

**D.D., A.D., and DAVID C.  
ROSTON,**  
Plaintiffs-Appellants,

**vs.**

**DAVENPORT COMMUNITY  
SCHOOL DISTRICT and  
JULIO ALMANZA, Superintendent,**  
Defendants-Appellees.

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Appeal from the Iowa District Court for Scott County, Nancy Tabor, Judge.

D.D., A.D., and attorney David C. Roston (hereinafter "Plaintiffs") appeal the district court's denial of their motion for attorney's fees in an open records case. **APPEAL DISMISSED, CROSS-APPEAL AFFIRMED.**

David C. Roston, Coralville, for appellants and appellant pro se.

Mikkie Rae Schiltz of Lane & Waterman, L.L.P., Davenport, for appellees.

Heard by Eisenhauer, C.J., and Danilson and Bower, JJ.

**BOWER, J.**

D.D., A.D., and attorney David C. Roston (hereinafter “Plaintiffs”) appeal the district court’s denial of their motion for attorney’s fees in an open records case. Plaintiffs presented several arguments concerning the district court’s denial of their motion for sanctions. Defendants, Davenport Community School District and Julio Almanza, Superintendent, cross-appeal a prior award of attorney’s fees as well as the district court’s refusal to levy sanctions against Roston. Because the issue of attorney fees is untimely, it is dismissed, and the cross-appeal lacks merit, we affirm.

**I. Background Facts and Proceedings**

Plaintiffs filed a petition pursuant to the Iowa Open Records Act on October 14, 2010. In the petition the plaintiffs claim to have sent a letter to the Davenport Community School District requesting certain documents under chapter 22 (2009) of the Iowa Code<sup>1</sup> and asking the court to compel compliance by the defendants. Defendants did not initially file an answer. Plaintiffs filed a motion for summary judgment on December 13, 2010, requesting the court find the defendants in default, issue an injunction requiring compliance with the open records request, award attorney fees, and require the payment of court costs. The defendants’ answer was filed after the motion for summary judgment was filed. A flurry of filings resulted, including a motion to strike, a resistance, and a reply to the resistance.

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<sup>1</sup> Chapter 22 of the Iowa Code provides for open access to and examination of certain public records. It will be referred to as the “Open Records Act” for purposes of this opinion.

On March 18, 2011, the district court ruled on the motion for summary judgment. The court found the defendants had violated the Open Records Act, though it denied their request for damages and injunctive relief. The court further found the plaintiffs were entitled to attorney fees, to be determined upon submission of a proper affidavit. Significant confusion occurred following the summary judgment ruling. The plaintiffs believed the district court's denial of their request for an injunction meant the underlying issue would proceed to trial. The defendants understood the district court's ruling on the issue of the injunction to be a final order concluding all litigation. In replying to the plaintiffs' certification of fees, the defendants requested a clarification from the court on the meaning and effect of the summary judgment ruling.

On June 17, 2011, the district court clarified the summary judgment ruling. In the ruling, the court noted an error on the issue of injunctive relief. Correcting the error, the district court revised the earlier summary judgment ruling and granted the requested injunction, awarding plaintiffs the "full relief requested in their petition," including attorney's fees in the amount of \$9,692.46. An injunction was filed ten days later. No appeal was taken from the June 17, 2011, ruling.

On June 30, 2011, the plaintiffs filed a motion requesting additional attorney fees for the period from March 18, 2011, the date of the original summary judgment ruling, through June 28, 2011. The district court denied the request on August 8, 2011. The plaintiffs then filed a motion to reconsider, which was resisted by the defendants. In their resistance defendants also requested the imposition of sanctions. The motion to reconsider was denied on September

13, 2011; however, the clerk of court failed to notify the parties of the ruling. Three months later, on December 13, 2011, the court entered an order finding there were no further issues for the court to decide. It was at this time the parties became aware of the September 13, 2011 ruling.

Plaintiffs filed a motion to extend the time for filing a notice of appeal under Iowa Rule of Appellate Procedure 6.101(5). On January 19, 2012 our supreme court granted the motion, providing the plaintiffs with ten days to file their notice of appeal. The plaintiffs filed their appeal on February 1, 2012, and the defendants filed their cross-motion of appeal on February 6, 2012.

## **II. Discussion**

The date of the filing of this appeal is significant. Due to the clerk's failure to advise the parties of the September ruling, the plaintiffs were required to seek permission from our supreme court before they could properly appeal the September 13, 2011 order. The extension of time in which to file an appeal was granted on January 19, 2012. In doing so, the order stated "[w]ithin ten days from the filing date of this order, the plaintiffs shall file a notice of appeal with the clerk of district court if they desire to take an appeal from the ruling denying their request for additional attorney fees in this case." Plaintiffs filed their notice of appeal with the Scott County District Court on February 1, 2012.<sup>2</sup> The notice is dated January 30, 2012. The ten-day period granted by our supreme court ended on January 29, 2012. The notice was both mailed and filed outside of the required period and is untimely, stripping this court of jurisdiction to hear the

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<sup>2</sup> Notice of appeal was filed with the Clerk of the Iowa Supreme Court on the same day.

appeal. *In re Marriage of Mantz*, 266 N.W.2d 758, 759 (Iowa 1978) (It is fundamental that compliance with requirements regarding the time to file an appeal is jurisdictional and mandatory.). “Where an appellant is late in filing, by as little as one day, we are without jurisdiction to consider the appeal.” *Mantz*, 266 N.W.2d at 759.

Our rules of appellate procedure provide a limited set of circumstances where the time period for filing a notice of appeal may be extended. Rule 6.701(6) provides for a three-day extension of time in certain circumstances. The rule, however, expressly excludes circumstances where “the deadline runs from entry or filing of a judgment, order, decree, or opinion.” Iowa R. App. P. 6.701(6) (2012). In the present matter plaintiffs are unable to avail themselves of this extension. The appeal is from an order of the district court, and taken after permission was granted by an order of our supreme court. In either instance, the three-day extension does not apply.

Our rules also provide for tolling the time to file an appeal when service is accomplished within the required time period, so long as the actual filing follows within a reasonable time. Iowa R. App. P. 6.101(4); see *State v. Tolsdorf*, 574 N.W.2d 290 (Iowa 1998) (allowing appeal where notice was served within the required period and filing was accomplished shortly thereafter). This rule, however, applies to appeals taken as a matter of right under rule 6.101. The present appeal was not taken as a matter of right under the rules of appellate procedure but pursuant to an order issued by our supreme court. The court

specifically required the filing, not service, of appeal within a ten-day period.<sup>3</sup> Appeals are perfected by filing, not by service. See *George v. Keokuk County Bd. of Supervisors*, 644 N.W.2d 307, 309 (Iowa 2002) (“This mailed notice is not the means of perfecting an appeal to our court; in fact, we have held that mailed service of notice to other parties is not even jurisdictional.”) Having failed to file the notice of appeal within the required ten-day period, we are without jurisdiction to hear the appeal.

The cross-appeal was filed within the required time following plaintiffs’ notice of appeal. See Iowa R. App. P. 6.101(2)(b). Having reviewed the cross-appeal, however, we find it to be without merit.

**APPEAL DISMISSED; AFFIRMED ON CROSS-APPEAL.**

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<sup>3</sup> During oral arguments the plaintiffs informed the court they had spoken to the Iowa Supreme Court Clerk of Court and inquired as to whether mailing notice was sufficient to perfect their appeal, and then acted upon the information received. We note the mailing and notice were dated outside the ten-day period. We also remind plaintiffs that their attorney, as a member of the bar, is charged with knowing the proper procedure for filing notice of appeal and is not justified in relying upon the advice of a member of the clerk’s office. While it has been long held that a client should not always be held responsible when a diligent attorney commits a mistake due to a misunderstanding, this is not such a case. See *Clarke v. Smith*, 192 N.W. 136 (Iowa 1923). In the present matter, the attorney/plaintiff had access to the rules of appellate procedure and the order of our supreme court clearly set forth the appropriate time period for filing notice of appeal. Diligence required the attorney to comply with the time constraints clearly and unambiguously set out in the order and our rules of appellate procedure. Attorneys may not always rely upon the clerk of court for advice on such matters. See *Weitzel v. Lieuwen*, 162 N.W. 833 (Iowa 1917) (attorney not excused for failing to appear for trial where clerk misled the status of a court calendar).