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Jun 30 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Robert Bonds, Circuit Court Judge

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Appellate Case No. 2021-000

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Shemuel Nahum Ben Yisrael,

Appellant,

v.

Law Offices of Darrell Thomas Johnson, Jr., LLC,  
Darrell Thomas Johnson, Jr., Attorney, Mills Morrison,  
Attorney, Town of Yemassee, Yemassee Police  
Department, Gregory Alexander, Police Chief, Joseph Loadholt,  
Police Officer, Samuel A. Watson, Jr., Police Officer,  
Leslie A. Jamison, Police Officer, M.W. Strauss,  
Police Officer, Beaufort Motor Sports, and State Fiscal  
Accountability Authority

Respondents.

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INITIAL BRIEF OF RESPONDENTS TOWN OF YEMASSEE, GREGORY ALEXANDER,  
JOSEPH LOADHOLT, SAMUEL A. WATSON, JR., LESLIE A. JAMISON, AND M.W.  
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June 30, 2022  
Beaufort, South Carolina

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## **STATEMENT OF ISSUES ON APPEAL**

- I. Did the trial court correctly dismiss the case?
- II. Was the denial of the Appellant's request to record the hearing reversible error?
- III. Was the denial of Appellant's request to use electronic equipment to present evidence reversible error?
- IV. Was denying Appellant's attempted appeal prior to hearing Defendant's motion to dismiss reversible error?
- V. Was the Appellant "barred" from the Motions Hearing?

## **STATEMENT OF THE CASE**

The Appellant filed the summons and complaint in this case on April 22, 2019. The Defendants filed their first motion to dismiss the Complaint on May 21, 2019. On November 25, 2019, Judge Dukes entered an order on the motion requiring the Plaintiff to amend the complaint to make more definite and certain his allegations within 15 days. The Appellant failed to file an amended complaint, and on January 14, 2020, the Respondents filed their second motion to dismiss on the grounds the Appellant failed to comply with the order. The second motion to dismiss was heard by Judge Bonds on August 10, 2021. This hearing took place nearly twenty-one months after the order requiring the Appellant to amend his complaint was entered. The Appellant never filed an amended complaint in this case.

At the hearing on the second motion to dismiss, the Plaintiff requested to record the hearing. Judge Bonds denied this request. After Judge Bonds denied the Plaintiff's request to record the hearing, Plaintiff handed the court a notice of appeal of "any and all rulings" and stated that the court no longer had jurisdiction over this case. Judge Bonds refused to allow the Plaintiff to file the appeal. At that point, the Plaintiff said he could not go forward with the hearing. The court instructed him several times that the hearing was going to proceed, and if he chose to leave,

he would not be allowed to re-enter the court room. The Plaintiff chose to leave anyway rather than attend the hearing, and the Respondents' motion to dismiss was granted. The Appellant then filed the instant appeal.

### **STATEMENT OF THE FACTS**

By way of background, the Appellant has a long history of filing frivolous lawsuits against the government.<sup>1</sup> The Plaintiff also has a history of suing judges and opposing counsel to attempt to avoid unfavorable rulings. In fact, the Appellant was enjoined from filing any lawsuits against any government entity, governmental employee, elected official, judge, or their counsel, unless he posted a \$50,000.00 bond or filed pleadings signed by counsel licensed and in good standing in the State of South Carolina.<sup>2</sup>

The Appellant filed the summons and complaint in this case on April 22, 2019. The Defendants filed their first motion to dismiss the Complaint on May 21, 2019. On November 25, 2019, Judge Dukes entered an order granting the first motion to dismiss as to Yemassee Police Department and denying it as to the remaining defendants. This order required the Appellant to amend the complaint. It held, "I... require the Plaintiff, within 15 days of this Order to make more definite and certain his allegations, by specifically listing his causes of action as they relate to each Defendant with specific dates of alleged occurrences." The Appellant failed to file an amended complaint, and on January 14, 2020, the Respondents filed their second motion to dismiss on the grounds the Appellant failed to comply with the order. The second motion to dismiss was heard by Judge Bonds on August 10, 2021. This hearing took place nearly twenty-one months after the

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<sup>1</sup> See Sanctions Order dated June 10, 2019 in case 2017-CP-07-1519. The Respondents request the court take judicial notice of this order pursuant to *Doe v. Bishop of Charleston*, 407 S.C. 128, 134 n. 2, 754 S.E.2d 494, 497 n. 2 (2014) (recognizing a circuit court may take judicial notice of previously entered, related court orders and consider them when ruling on a Rule 12(b)(6), SCRPC, motion to dismiss).

<sup>2</sup> See *Ibid*.

order requiring the Appellant to amend his complaint was entered. The hearing took place over a year and a half after the Defendants served the second motion to dismiss on the Appellant. The Appellant never filed an amended complaint in this case.

The Appellant did not file a brief opposing the second motion to dismiss, but he appeared at the hearing before the circuit court. At the start of the hearing, the Appellant asked to record the hearing, and the judge denied the Appellant's request (Circuit Court Order, P. 1-2). After the request was denied, the Appellant attempted to immediately appeal that ruling with a generic notice of appeal he prepared before the hearing appealing "any and all unfavorable rulings" (Circuit Court Order, P. 2). The judge refused to allow the appeal the grounds that the appeal was interlocutory; it was not procedurally appropriate pursuant to Rule 203, SCRAP because it came before the entry of a written order; and it violated Rule 11, SCRCP because it was solely for the purpose of delay (Circuit Court Order, P. 2-3). When the judge refused to allow the Appellant to appeal the denial of his request to record the proceedings, the Appellant chose to leave the hearing before oral arguments on the motion to dismiss (Circuit Court Order, P. 2-3). He was warned several times by the court that if he left before oral arguments, he would not be allowed back into the courtroom, but he chose to leave anyway (Circuit Court Order, P. 2). On August 12, 2022, the circuit court entered an order granting the Respondents' motion to dismiss on the grounds that the Appellant willfully failed to comply with Judge Dukes' previous order to amend his complaint (Circuit Court Order, P. 6-7).

### **STANDARD OF REVIEW**

In reviewing a motion to dismiss, this Court applies the same standard of review as the trial court. *Carolina Park Assocs., LLC v. Marino*, 400 S.C. 1, 732 S.E.2d 876 (2012) (citing to *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007)). However, rulings on the admission or

exclusion of evidence are subject to an abuse of discretion standard of review. *State v. Douglas*, 411 S.C. 307, 768 S.E.2d 232 (Ct. App. 2014) (citing to *State v. Adams*, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct.App.2003)) (“A court’s ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion....”). “An abuse of discretion occurs when the trial court’s ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.” *Id.* (citing to *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 166–67 (2007)). To constitute error, a ruling to admit or exclude evidence must affect a substantial right. Rule 103(a), SCRE; *State v. Johnson*, 363 S.C. 53, 60, 609 S.E.2d 520, 524 (2005). However, error is harmless where it could not reasonably have affected the trial’s outcome. *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). *State v. Curry*, 370 S.C. 674, 680, 636 S.E.2d 649, 652 (Ct. App. 2006).

## **ARGUMENT**

### **I. THE TRIAL COURT’S ORDER OF DISMISSAL SHOULD BE AFFIRMED**

#### **A. The trial court correctly granted Respondent’s motion to dismiss**

The trial court correctly dismissed the case on the grounds that the Appellant failed to comply with the judge’s previous order to amend his complaint. The Appellant is no stranger to the legal system; as mentioned above, he has filed numerous complaints against governmental entities, judges, government employees, and their counsel over the last 21 years. In this case, the Appellant demonstrated a knowledge of the legal system when he handed up a pre-drafted notice of appeal at the hearing and argued that the court was divested of jurisdiction to hear the motion to dismiss. (Tr. at 6:2-4). Thus, there is no legitimate argument to be made that the Appellant did not understand the Court’s order to clarify his complaint. The order was plain and unambiguous on its face and specific as to what must be clarified. The order clearly stated that the Plaintiff **must**

make his allegations more definite and certain **within 15** days. The Plaintiff failed to do so at any point prior to the hearing nearly two years later. Pursuant to Rule 12(e), SCRCP, if a complaint is vague and ambiguous, the Court may order a plaintiff to amend his complaint to more clearly state the grounds therein. “[I]f the order of the Court is not obeyed within 15 days after notice of the order... the Court may strike the pleading to which the motion was directed....” Rule 12(e), SCRCP. “It is well settled that a motion to strike is addressed to the sound discretion of the trial court.” *Totaro v. Turner*, 273 S.C. 134, 135, 254 S.E.2d 800, 801 (1979). “When a court orders a sanction that results in default or dismissal, “the end result is harsh medicine that should not be administered lightly.” *QZO, Inc. v. Moyer*, 358 S.C. 246, 256, 594 S.E.2d 541, 547 (Ct. App. 2004) (internal citations omitted). However, “in some circumstances, if a party fails or refuses to file an amended and simplified pleading or does not exercise good faith in purporting to do so, the severe sanction of a dismissal on the merits may be warranted.” Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1217 (3d ed.2015). “[W]hen a sanction would be tantamount to granting a judgment by default, the moving party must show bad faith, willful disobedience or gross indifference to its rights to justify the sanction.” *QZO, Inc. v. Moyer*, 358 S.C. 246, 257, 594 S.E.2d 541, 547 (Ct. App. 2004) (internal citations omitted).

In this case, the Appellant did not amend the complaint for nearly two years. Given the Plaintiff’s long history of filing frivolous suits and suing judges and opposing counsel, and given that the Plaintiff attempted to prevent the hearing on the motion to dismiss from going forward by attempting to appeal any and all rulings of the court, there is ample evidence that the Plaintiff was willfully refusing to obey the court’s order in bad faith. In light of this, the trial court correctly dismissed the Appellant’s motion to dismiss on the grounds that the Appellant willfully failed to comply with the judge’s previous order to amend his complaint.

B. The Appellant failed to preserve any argument on this issue for appellate review

Because the Appellant failed to present any argument opposing the motion to dismiss, he also failed to preserve any argument against it for appeal. See *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.”) Any argument the Appellant raises now will be raised for the first time on appeal. As this is not allowed, the Appellant’s motion must be dismissed because there were no preserved issues to him to appeal regarding the order dismissing the case.

II. THE DENIAL OF THE APPELLANT’S REQUEST TO RECORD THE HEARING

A. The trial judge correctly denied the Appellant’s request to record the hearing

The denial of the Appellant’s request to record the hearing was proper. First, there is a general prohibition against recording proceedings. See Rule 605(b), SCRPC. Further, the decision on whether to allow recording devices in the courtroom is in the discretion of the trial judge, and the trial judge did not abuse his discretion here. See *State v. Hill*, 331 S.C. 94, 501 S.E.2d 122 (1998). In this case, Appellant Yisrael requested to record the motions hearing with a tape recorder. (Tr. at 3:14-15). Immediately, the presiding judge denied this request, and informed the Appellant that there was an official recording, which he would be permitted to request after the hearing. (Tr. at 4:5-6). After a brief conversation, the presiding judge explicitly informed the Appellant that “...it is completely within my discretion whether I allow someone else to record the proceeding...”. (Tr. at 4:16-18). Pursuant to *Hill* and SCRPC 605(b)-(c), the judge was within his discretion to deny the use of electronic equipment to record the hearing.

B. The denial of Appellant’s request to record the hearing cannot constitute reversible error

More importantly, the denial of the Appellant's attempt to record the hearing has nothing to do with the merits of dismissing the Appellant's case for failing to amend his complaint. "To constitute error, a ruling to admit or exclude evidence must affect a substantial right." *State v. Curry*, 370 S.C. 674, 680, 636 S.E.2d 649, 652 (Ct. App. 2006) (citing Rule 103(a) SCRE; *State v. Johnson*, 363 S.C. 53, 60, 609 S.E.2d 520, 524 (2005)). "However, error is harmless where it could not reasonably have affected the trial's outcome." *Id.* (citing *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985)). There is no substantial right to record a hearing, as the South Carolina Rules of Civil Procedure generally prohibit this. Rule 605(b) SCRPC. More importantly, not being allowed to record the hearing could not have affected the outcome. The Appellant could have presented the exact same arguments against the motion to dismiss whether or not he was recording the proceeding. Therefore, this issue cannot constitute reversible error.

### III. USE OF ELECTRONIC EQUIPMENT TO PRESENT EVIDENCE

#### A. Appellant failed to preserve argument for appeal

At the hearing, the Appellant initially stated that he needed his laptop and his tape recorders to present evidence against the cops (Tr. 3:5-7). He and the judge then discussed that the Plaintiff wanted to record the hearing, and the judge denied the request to record the hearing (Tr. 3:11-5:5). Once that discussion was over, the judge asked the Appellant about other devices the Plaintiff needed to proceed. (Tr. 5:6-6:10). Instead of going back to the issue of needing to present recorded evidence at the hearing, the Plaintiff handed up his notice of appeal, and the remainder of the time the Appellant was at the hearing was spend addressing the attempted appeal (Tr. 6:11-9:24). The Plaintiff failed to ever obtain a ruling on his request to present evidence electronically. As the Appellant failed to get a ruling from the judge on this issue, he failed to preserve any argument on this issue for appeal. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It

is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to **and ruled upon by the trial judge** to be preserved for appellate review”) (emphasis added). As the Appellant failed to preserve issues regarding the use of electronic equipment to produce evidence, this issue should be dismissed.

B. The denial of the Appellant’s request to present evidence electronically cannot constitute reversible error

To the extent the Appellant was denied the ability to present recorded evidence at the hearing, which is denied, this cannot possibly constitute reversible error. The Respondents’ motion to dismiss hinged on a procedural issue: the Plaintiff’s failure to comply the court’s order to amend his complaint. No evidence the Appellant could have presented at the hearing could possibly change the fact that he failed to amend his complaint as ordered. Therefore, even if he was prevented from entering evidence, which is denied, this could not have prejudiced the outcome of the motion to dismiss.

IV. THE DENIAL OF THE APPELLANT’S ATTEMPTED APPEAL BEFORE THE MOTION TO DISMISS WAS HEARD WAS NOT REVERSIBLE ERROR

After the request to record the hearing was denied, the Appellant attempted to immediately appeal the ruling with a generic written motion he prepared before the hearing appealing “any and all rulings” (Circuit Court Order, P. 2, Tr. 6:11-9:24). The judge refused to allow the appeal the on grounds that the appeal was interlocutory, the plaintiff was acting in bad faith, and it was not procedurally appropriate because the Appellant was attempting to appeal before the entry of a written order (Circuit Court Order, P. 2-3). This was the correct ruling. The denial of the Plaintiff’s request to record the hearing is an interlocutory order not subject to immediate appeal. *See* SC Code Ann. §14-3-330; *Ex parte Wilson*, 367 S.C. 7, 12-14, 625 S.E.2d 205, 207-8 (2005). The Plaintiff argues the denial of his request to record the hearing affected a substantial right and is

therefore immediately appealable. This argument is contrary to South Carolina law. *See Id.* (“Orders affecting a substantial right discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense.”) The denial of the Plaintiff’s request to record the hearing did not discontinue the case, prevent an appeal, grant a new trial, or strike the action. Therefore, it did not affect a substantial right and is not immediately appealable.

Pursuant to Rule 11, SCRCF, by signing a “pleading, motion, or other paper,” a party is certifying that the document is not “interposed for delay,” and “when a pleading, motion or other paper...does not comply with this Rule, it shall be stricken....” Based on the Plaintiff’s history of filing frivolous suits and suing judges to prevent unfavorable rulings, substantial evidence existed that the Plaintiff was attempting to appeal the denial of his request to record the hearing solely for the improper purposes of delaying the hearing on the Respondents’ motion to dismiss and avoiding an unfavorable ruling. Thus, the trial judge did not abuse his discretion in denying the Appellant’s attempted appeal pursuant to Rule 11, SCRCF.

The right to appeal does not arise until there is a final order pursuant to Rule 201, SCRAP. An oral ruling is not a final order as a matter of law. “It is well settled that a judge is not bound by a prior oral ruling and may issue a written order which is in conflict with the oral ruling.” *Corbin v. Kohler Co.*, 351 S.C. 613, 621, 571 S.E.2d 92, 97 (Ct. App. 2002) (citing *Badeaux v. Davis*, 337 S.C. 195, 204, 522 S.E.2d 835, 839 (Ct.App.1999)). “The written order is the trial judge’s final order and as such constitutes the final judgment of the court. The final written order contains the binding instructions which are to be followed by the parties.” *Id.* (citing *Ford v. State Ethics Comm’n*, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001) (citing Rule 58, SCRCF)). Thus, the attempted appeal was improper.

V. THE APPELLANT WAS NOT BARRED FROM ATTENDING THE HEARING

The Appellant was not barred from hearing the motions hearing—rather, he willfully left the hearing on his own volition. (Tr., 14:10-13). The Appellant initially attended the motions hearing. After his oral motion to record the hearing was denied, the Appellant attempted to appeal that ruling. (Tr., 5, 6). After the appeal was denied, the Appellant made a conscious decision to leave the hearing (Tr., 6:21-22). The presiding judge informed the Appellant that he was free to go, but the motions hearing would continue in his absence, and once he left, he would be prevented from returning to the courtroom. (Tr., 7:3-10, 9:20-23). With this information, the Appellant willfully left the hearing. (Tr. at 9:20-23). The Plaintiff was not “barred” from attending the hearing.

**CONCLUSION**

For the reasons stated, the decision by the trial court granting the Defendant’s motion to dismiss, and should be affirmed, and the Plaintiff’s appeal should be denied.

DATED this 30<sup>th</sup> day of June, 2022, at Beaufort South Carolina, and

Respectfully submitted,

*/S/: Worth Liipfert*

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Law Offices of Darrell Thomas Johnson, Jr.,  
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Gregory Alexander, Police Chief, Joseph Loadholt,  
Police Officer, Samuel A. Watson, Jr., Police Officer,  
Leslie A. Jamison, Police Officer, M.W. Strauss,  
Police Officer, Beaufort Motor Sports, and State Fiscal  
Accountability Authority

Respondents.

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PROOF OF SERVICE

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I certify that on June 30, 2022, I served *Respondent's Initial Brief and Designation of Matter to Be Included in the Record on Appeal* by depositing them in the United States Mail with postage prepaid and addressed as follows:

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*/S/: Worth Liipfert*

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June 30, 2022  
Beaufort, South Carolina

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