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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master in Equity

Appellate Case No. 2022-001165

Michael D. Royal

Appellant,

v.

Free Kindergarten Association
of Charleston, Respondent,

Respondent,

The Attorney General of the
State of South Carolina and
The Charleston County School
District,

Respondents.

**RESPONDENT, THE CHARLESTON COUNTY SCHOOL
DISTRICT'S, REPLY TO APPELLANT'S RETURN TO
INTERVENOR/RESPONDENT THE CHARLESTON COUNTY
SCHOOL DISTRICT'S MOTION TO EXCLUDE AND STRIKE
AND TO COMPEL AND MEMORANDUM IN SUPPORT**

Pursuant to Rules 208 and 240, SCACR, and the Order of the South Carolina Court of Appeals, dated November 22, 2022, the Respondent, The Charleston County School District, by and through its undersigned counsel, hereby files its Reply to Appellant's Return to Intervenor/Respondent The Charleston County School District's Motion to Exclude and

Strike and to Compel and Memorandum in Support.

FACTS/PROCEDURAL HISTORY

The Appellant commenced the instant appeal on August 17, 2022, appealing multiple Orders of the Honorable Mikell R. Scarborough issued in the Charleston County Circuit Court Case No. 2018-CP-10-5739. On September 28, 2022, the Appellant filed Appellant's Motion to Exceed Page Limit for Initial Brief and Memorandum in Support ("Appellant's Motion"). The South Carolina Court of Appeals denied Appellant's Motion by its Order, dated November 22, 2022.

On December 2, 2022, the Appellant served and filed the Initial Brief of Appellant in this appeal. The Initial Brief of Appellant failed to comply with the SCACR and this Court's Order of November 22, 2023. In response, the Respondent Charleston County School District filed its Motion to Exclude and Strike and to Compel on December 28, 2022.¹

LAW/ANALYSIS

A. Respondent CCSD Acted In Good Faith And Properly Moved To Strike And Compel Appellant's Compliance With The SCACR And The Order Of The Court Of Appeals Dated November 22, 2022.

Appellant states that "CCSD's motion appears to be an ill-conceived ploy to gain additional time to prepare its initial brief, force Appellant to expend additional resources on this appeal, and to eliminate Royal's arguments directed toward CCSD." Appellant further makes an indirect admonition stating "Royal believes CCSD's motion is frivolous or taken

¹ Appellant complains that "CCSD errantly refers to itself as Respondent, rather than Intervenor/Respondent" despite this Court's Order of November 22, 2022 naming CCSD as a Respondent in the caption. Thus the court's order indicates CCSD's designation as respondent is proper. Appellant further complains of CCSD's scrivener's error including a trial court case number in the caption of its motion. CCSD has deleted the trial court case number thus correcting this scrivener's error.

solely for purposes of delay, and thus sanctionable under Rule 269, SCACR, but, as a courtesy to the attorneys and parties in this action, has decided not to pursue such a motion at this time and leaves the matter to the Court's discretion."

Appellant's statements are pure conjecture and speculation. More importantly, Appellant's statements blatantly misrepresent the purpose of Respondent CCSD's Motion to Strike. Respondent CCSD filed its motion in good faith based upon the simple and express requirements of the South Carolina Appellate Court Rules and this Court's Order denying Appellant's Motion to Exceed Page Limit for Initial Brief.

Respondent CCSD would have much preferred for Appellant to have simply submitted an Initial Brief that complied with the SCACR. Appellant's submission of a compliant Initial Brief would have facilitated the fair appellate review of all parties' briefs under the just and uniform application of the SCACR to all parties to this appeal. In addition, Respondent CCSD would not have had to expend the time, resources and expense required to seek Appellant's compliance with the SCACR and this Court's Order of November 22, 2022.

However, when Appellant submitted its non-compliant initial brief exceeding the express fifty (50) page briefing requirement, Respondent CCSD was faced with the conundrum of either; (a) submitting an equally non-compliant Initial Brief in excess of fifty (50) pages, (b) submitting a compliant Initial Brief of no more than fifty (50) pages in response to Appellant's non-compliant brief of fifty-seven (57) pages, thus gaining Appellant an additional seven pages of briefing over and above that allowed to the Respondents in this appeal, or (c) moving to strike Appellant's non-complying brief (or portions thereof) and compelling Appellant's submission of a brief in compliance with the SCACR and this

Court's Order of November 22, 2022.

Under these circumstances, Respondent CCSD acted in good faith and properly moved to strike and compel Appellant's compliance with the SCACR and this Court's Order. *Henning v. Kaye*, 415 S.E.2d 794, 307 S.C. 436 (S.C. 1992); Rules 208 and 240, SCRCR.

B. The Initial Brief Of Appellant Exceeds Fifty (50) Pages And Therefore Violates Rule 208, SCACR And The Order Of The Court Of Appeals Dated November 22, 2022.

Appellant acknowledges the Rule 208, SCACR page limitation but argues that his Initial Brief does not exceed fifty (50) pages in length. Appellant bases this argument on his contention that the Table of Contents, Table of Authorities, and Signature Block are not included in the Initial Brief's page count for purposes of determining compliance with Rule 208(b)(5), SCACR. Appellant makes this argument without citation to a single legal authority in support of his position. The lack of citation to such authority belies the fallacy of Appellant's argument on this issue.

Contrary to Appellant's unsupported argument, Rule 208 (b)(5), SCACR clearly and precisely states that "principal briefs shall not exceed fifty (50) pages..." Rule 208 **does not** state that principal briefs shall not exceed fifty (50) pages, exclusive of the Table of Contents, Table of Authorities, and Signature Block. Likewise, Rule 208(b)(5) **does not** state that principal briefs shall not exceed fifty (50) pages, exclusive of pages being numbered with romanettes.

Furthermore, SCACR 208(b)(1) is equally clear and precise. SCACR 208(b)(1) expressly describes the Brief of Appellant, which is designated a principal brief under the SCACR, as containing a Table of Contents and Cases, Statement of Issues on Appeal,

Statement of the Case, Argument and Conclusion. Thus, these are the sections that constitute a principal brief and SCACR mandates that the total of these sections cannot exceed fifty (50) pages.

The Initial Brief of Appellant exceeds fifty (50) pages and, therefore, violates SCACR 208. *Respondent, The Charleston County School District's Motion to Exclude and Strike and to Compel.*

C. The Appellant's Reference To A Generic Telephone Conference With The Clerk's Office Of The Court Of Appeals Neither Cures Nor Serves As A Valid Basis For Appellant's Violation of the Clear And Concise Mandatory Page Limitation For Principal Briefs, including Appellant's Initial Brief Under Rule 208, SCACR And The Order Of The Court Of Appeals Dated November 22, 2022.

Appellant relies upon a generic reference to a telephone conference with the "Clerk's Office of the Court of Appeals" as grounds for submission of his Initial Brief exceeding fifty (50) pages. Specifically, Appellant's Return states that "[o]n the afternoon of December 2, 2022, prior to filing Royal's initial brief, [Royal's] counsel conferred with the Clerk's Office of the Court of Appeals via telephone on the specific issue of calculating the brief's length."

Appellant's statement raises numerous questions and concerns and fails to cure Appellant's non-compliance with Rule 208, SCACR for the following reasons:

(1): Appellant's initial brief was due to be filed on December 2, 2022. It is inexplicable that Appellant, acting through legal counsel, would wait until the afternoon of the last day of the period allowed for Appellant to file his Initial Brief to inquire with the Clerk's Office as to the calculation of the length of Appellant's brief. It is equally inconceivable that Appellant would, for all intents and purposes, prepare his entire Initial Brief prior to conferring with the Clerk's Office as to the proper page calculation literally on

the last day of and just a few hours before expiration of the deadline for filing Appellant's Initial Brief. Nonetheless, this appears to be the essence of Appellant's statement regarding the aforementioned telephone conference.

(2): Appellant asserts that Respondent CCSD's challenge to Appellant's initial brief is frivolous and sanctionable, yet by his own statement indicates he and his legal counsel questioned the page count issue enough to allegedly contact the Clerk's Office of the Court of Appeals to seek clarification on the matter.

(3): Appellant's statement is unsworn and lacks any documentary support in the record. The lack of documentary support includes the lack of affidavits, emails, and/or correspondence from either Appellant's counsel's office and/or the Clerk's Office of the Court of Appeals confirming this telephone conference and the advice allegedly given therein.

(4): Appellant's statement refers generically to a telephone conference with the "Clerk's Office of the Court of Appeals". Appellant's statement fails to identify the Clerk's Office personnel or the authority upon which that person had and/or was relying upon to advise Appellant's counsel as to the calculation of Appellant's "brief's length".

(5): The referenced generic telephone conference with unidentified personnel at the Clerk's Office of the Court of Appeals does not supplant or otherwise supersede the clear and concise mandatory page limitation requirements for principal briefs, including Appellant's initial brief, under the SCACR.

D. The Appellant's Reliance On The Court's Brief Of Appellant Form 13 Is Misplaced And Does Not Cure Appellant's Non-Compliant Initial Brief Nor Appellant's Violations Of Rule 208, SCACR And The Order Of The Court Of Appeals Dated November 22, 2022.

Appellant contends that the Court's Brief of Appellant form (Form 13, App. C, Part II, SCACR) shows the Table of Contents and Table of Authorities pages as being numbered with romanettes, and thus not included in the page total of the brief itself. Appellant's argument is misplaced and fails to cure Appellant's non-compliant initial brief.

First, the Table of Contents and Table of Authorities are not separate from Appellant's initial brief. *See* Rule 208(b)(1), SCACR. In fact, these two Tables are part and parcel of Appellant's initial brief. *Id.*

Second, Form 13 illustrates an Initial Brief of Appellant that consists of a one page Table of Contents (un-numbered), a one page Table of Authorities (numbered ii), a single page containing the Statement of Issues on Appeal, Statement of the Case and Facts (numbered 1) a single page containing the Arguments (numbered 2) and a single page containing the Conclusion (numbered 3). Counsel's signature block is included as part of the one (1) page numbered Conclusion.

Comparing the illustration in Form 13 to Appellant's initial brief is apples and oranges. Form 13 illustrates an Initial Brief of Appellant totaling five (5) pages, including pages numbered with romanettes. Form 13 does not state or indicate in any way that pages numbered with romanettes are not included in the page total of the initial brief.

In short, Form 13 does not in any way indicate or illustrate that the total pages of Appellant's initial brief, including pages numbered with romanettes, may exceed fifty (50) pages in derogation of the clear and concise page count limitations set forth in Rule

208(b)(5), SCACR.

E. The Table Of Authorities Contained In The Initial Brief Of Appellant Fails To Provide References To The Pages Of The Brief Where Certain Legal Authorities Are Cited And, Therefore Violates Rule 208, SCACR.

Appellant argues that his use of the citation signal “*passim*” is not prohibited under Rule 268, SCACR under authority of *The Bluebook, A Uniform System of Citation*, published by the Harvard Law Review Association. Specifically, the Appellant asserts Rule 268, SCACR directs parties to *The Bluebook* for additional guidance on citation of authority and that *The Bluebook* supports the use of “*passim*” for referencing authorities cited on multiple pages.

However, while Rule 268, SCACR states that “[a]dditional **guidance** on citation of authority **may** be found in [*The Bluebook*]” such guidance is not mandatory. (Emphasis added). Furthermore, *The Bluebook* does not take into account, supplant nor supersede the mandatory requirements of the SCACR.

On the other hand, SCACR 208(b)(1)(A) is mandatory and requires that initial briefs shall contain “[a] table of contents, with page references, and a table of cases (alphabetically arranged), statutes, and other authorities cited, **with references to the pages of the brief where they are cited.**” (Emphasis added).

Should Appellant’s Table of Authorities have included page references for all legal authorities cited in Appellant’s initial brief as required by SCACR 208(b)(1), this in turn would have caused Appellant’s initial brief as submitted to the Court in its current form to likely exceed the fifty (50) page count limit mandated by SCACR 208(b)(5) by more than seven (7) pages.

In short, the Table of Authorities contained in the Initial Brief of Appellant violates the mandatory citation of authorities requirements of Rule 208, SCRPC.

F. The Respondent CCSD's Request For Relief Is Fair And Reasonable, Is Necessary To Eliminate Unfair Prejudice To The Respondents, Allows Appellant The Opportunity To Cure The Violations And Defects Contained In Appellant's Non-Compliant Initial Brief, And Is Supported By South Carolina Law.

Appellant complains of the relief CCSD seeks in its Motion to Strike on several grounds. Appellant's grounds are set forth below and lack merit for the following reasons:

(1): Appellant asserts that CCSD's Motion to Strike alleges non-compliance with mere "formatting requirements [which] could be termed technical in nature if they had any basis or support under this Court's rules."

(2): Appellant complains as to CCSD's request for relief excluding and striking the Initial Brief of Appellant and/or excluding the final seven (7) pages of Appellant's Initial Brief (not including the conclusion and signature) be excluded and stricken." Appellant further asserts that such requested relief contravenes *Henning v. Kaye*, 45 S.E.2d 794, 307 S.C. 436 (1992), the South Carolina case cited by CCSD in its motion.

(4): Appellant argues that CCSD's request for this Court's intervention and imposition of what it asserts as 'excessively punitive relief over three (3) citations of authority is not only "outlandish" but unsupported by its proffered case law.

Respondent CCSD's response to Appellants arguments is simple.

"[T]he South Carolina Appellate Court Rules are not mere technicalities but provide the parties and the appellate courts with an orderly mechanism through which to guide appeals in this State." *Henning v. Kaye*, 415 S.E.2d 794, 794, 307 S.C. 436, 437 (S.C.

1992). The fifty (50) page briefing limitation in Rule 208(b)(5), SCACR applies to all parties and requires express permission of the appellate court to exceed the page limitations. Appellant sought permission to exceed those page limitations, which permission was expressly denied by this Court in its Order of November 22, 2022.

Appellant's violation of Rule 208(b)(5) and submission of a fifty-seven (57) page Initial Brief allows Appellant to circumvent this Court's order and gain unfair advantage over the other parties to this appeal. Specifically, by allowing Appellant's non-compliance with the Rules and seven additional pages of substantive briefing, Respondents would be held to a higher standard of compliance with the Rules, denied an equal opportunity to respond to Appellant's additional seven pages of arguments and unfairly prejudiced in their preparation of initial briefs in this appeal.

In addition, Respondent CCSD's alternative request for relief is fair and reasonable and provides Appellant the opportunity to cure the violations and defects in his Initial Brief. The initial and preferred relief requested by Respondent CCSD strikes Appellant's entire non-compliant and defective brief and grants Appellant an additional fifteen (15) days to serve and file an initial brief that fully complies with the SCACR and the Order of the Court of Appeals, dated November 22, 2022. This is consistent with and supported by the *Henning* Court's remedy for briefing violations in the *Henning* case. *Id.*

A reasonable alternative remedy for consideration would be to strike the non-compliant portions of Appellant's Initial Brief and removing the last seven pages of the brief, exclusive of the conclusion and signature page. The conclusion and signature page would necessarily be kept as proof of submission to the Court of this brief as Appellant's Initial Brief). The remaining seven (7) pages would be stricken inasmuch as those are the pages

(exclusive of the conclusion and signature pages) that exceed the fifty (50) page requirement of Rule 208, SCACR.

Appellant complains that these final seven (7) pages contain Appellant's arguments regarding the granting of Respondent CCSD's intervention in this case and the trial court's exclusion of the transcript of the deposition of CCSD's Rule 30(b)(6), SCRCF, witness and insinuates some ulterior motive attached to Respondent CCSD's selection of these final seven (7) pages for striking under its Motion to Strike. However, Respondent CCSD had no involvement in or control over Appellant's selection of the structure of his Initial Brief, including the order of his arguments contained therein. As such, Appellant's insinuation lacks merit and the proposed striking of these last seven (7) pages is based simply and solely on these seven pages as being the pages which exceed the fifty (50) page requirement of Rule 208, SCACR.

Accordingly, Respondent CCSD presents its request for relief for consideration in the court's discretion. It is incumbent that Appellant "provide material that complies with the Rules and facilities appellate review." *Id.*

Respondent CCSD's request for relief is fair and reasonable, necessary to eliminate prejudice to the Respondents, allows Appellant an opportunity to cure the violations and defects contained Appellant's non-compliant Initial Brief, and is supported by South Carolina law.

CONCLUSION

Based on the foregoing, the Respondent The Charleston County School District is entitled to an Order:

(1): Excluding and striking the Initial Brief of Appellant and/or excluding the final seven (7) pages of Appellant’s Initial Brief (irrespective of its conclusion and signature); and

(2): Excluding and striking the Table of Authorities contained in the Initial Brief of Appellant ; and

(3): Compelling Appellant, within fifteen (15) days of this Court’s Order on Respondent The Charleston County School District’s Motion to Exclude and Strike and to Exclude, to serve and file an initial brief that does fully comply with Rule 208 and this Court’s Order, dated November 22, 2022.

Insomuch as the outcome of this motion affects the initial brief of all respondents, The Charleston County School District requests that the appeal be stayed and/or placed in abeyance until a decision has been issued. Further for the reasons stated herein, the Appellant, The Charleston County School District, hereby respectfully requests that its Motion to Exclude and Strike and to Compel be granted.

SIGNATURE PAGE FOLLOWS

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January 13, 2023

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SC Court of Appeals

VIA EMAIL

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RE: Michael D. Royal v. Free Kindergarten Association of Charleston, *et al.*
Appellate Case No. 2022-001165

Dear Ms. Kitchings;

Enclosed, please find for filing, on behalf of Respondent Charleston County School District, the following documents in the above captioned appeal:

1. Respondent, The Charleston County School District's Reply to Appellant's Return to Intervenor/Respondent The Charleston County School District's Motion to Exclude and Strike and to Compel and Memorandum in Support; and
2. Proof of Service of Respondent, The Charleston County School District's Reply to Appellant's Return to Intervenor/Respondent The Charleston County School District's Motion to Exclude and Strike and to Compel and Memorandum in Support.

Please return a stamped copy of same to me for my records.

Additionally, insomuch as the outcome of this motion affects the initial brief of all respondents, Respondent Charleston County School District again requests that the appeal be stayed and/or placed in abeyance until a decision has been issued.

By copy of this letter, I am serving all counsel of record with same.

With kindest regards, I am

Sincerely yours,

s/A. Bright Ariail
A. Bright Ariail

Enclosures

cc: All Counsel (via email only)