

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2012-212686

Marsha Temples,

Appellant,

v.

Neil O. Plush,

Respondent.

**RESPONDENT'S RETURN TO APPELLANT'S
MOTION TO AMEND DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL**

RECEIVED
JUL 15 2013
SC Court of Appeals

In response to Respondent's Motion to Strike Nos. 6 and 7 of Appellant's Designation of Matter to be Included in the Record on Appeal, Appellant now concedes that the correspondence in question does not constitute part of the record in this case. In her Motion to Amend (served on July 2, 2013), Appellant nonetheless asserts that "the subpoenas referenced in the letter clearly under Rule 45 are part of the record." (Motion to Amend at 2.) Although Appellant's Motion does not elaborate on her argument, Appellant's position presumably coincides with that which is set forth in her June 21, 2013 Return to Respondent's Motion to Strike. Therein, Appellant briefly explains her reasoning: Subpoenas "are in fact issued by the court although under current practice they are allowed to be signed by attorneys" and, according to Appellant, "the fact remains

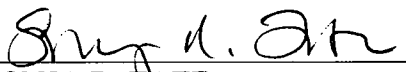
that a subpoena is a matter of record and considered to be a document issued by the Court of Common Pleas where the action is pending.” (Appellant’s Return to Respondent’s Motion to Strike at 1-2.)

Respondent welcomes Appellant’s recent concession that the attorney correspondence she references in her Designation of Matter to be Included in the Record on Appeal is not part of the record. As for Appellant’s position that the subpoenas in issue—served prior to the date Appellant actually moved to restore the case to the docket—should be included in the record on appeal, Respondent respectfully disagrees for the reasons set out in his Reply in Support of his Motion to Strike (served on June 27, 2013). Briefly, because she failed to restore her action as required by Rule 40(j), SCRCPP, the subpoenas Appellant references were not issued in a *pending action*—undermining her contention that the subpoenas are necessarily encompassed within the record of the case. Further, it is undisputed that the subpoenas were neither presented to nor filed with the trial court. In this regard, Rule 210(c), SCACR, states in plain and unequivocal terms that the appellate court record “shall not, however, include matter which was not presented to the lower court or tribunal.” Because the subpoenas were not presented to the lower court or tribunal, they do not constitute part of the record on appeal.

Also, although Appellant’s proposed Amended Designation of Matter to be Included in the Record on Appeal substitutes “Subpoenas issued on February 26, 2009 by the Aiken Court of Common Pleas” in place of “Cover Letters to subpoenas”—corresponding to No. 7 of Appellant’s Amended Designation and initial Designation, respectively—Appellant’s proposed Amended Designation continues to reference

attorney correspondence which was not filed in the lower court record and which Appellant now acknowledges does not constitute part of the record in this matter. See Amended Designation of Matter to be Included in the Record on Appeal, No. 6 (referencing "Letter dated February 26, 2009"). Both parties recognize that attorney correspondence which was not filed below does not constitute part of the record on appeal; consequently, Appellant's proposed Amended Designation improperly references material which falls beyond the scope of the appellate court record.

For the reasons set forth above, Respondent respectfully submits that Appellant's Motion to Amend should be denied.


SONJA R. PATE
South Carolina Bar No: 16206
MICHAEL N. LOEBL
South Carolina Bar No.: 73900
Attorneys for Respondent

OF COUNSEL:
FULCHER HAGLER LLP
One 10th Street, Suite 700
P.O. Box 1477
Augusta, GA 30903-1477
(706) 724-0171

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2012-212686

Marsha Temples,

Appellant,

v.

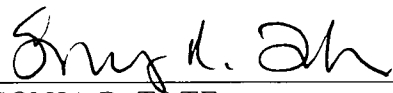
Neil O. Plush,

Respondent

PROOF OF SERVICE

I certify that I have served Respondent's Return to Appellant's Motion to Amend Designation of Matter to be Included in the Record on Appeal by depositing a copy of it in the United States Mail, postage prepaid, on July 11, 2013, addressed to her attorney of record, John W. Carrigg, 137 E. Butler Street, Suite 6, Lexington, South Carolina 29072.

July 11, 2013.



SONJA R. TATE
South Carolina Bar No: 16206
MICHAEL N. LOEBL
South Carolina Bar No.: 73900
Attorneys for Respondent

OF COUNSEL:
FULCHER HAGLER LLP
One 10th Street, Suite 700
P.O. Box 1477
Augusta, GA 30903-1477
(706) 724-0171

Fulcher Hagler LLP
ATTORNEYS AT LAW SINCE 1946

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
Post Office Box 1477 • Augusta, Georgia 30903-1477
One 10th Street, Suite 700 • Augusta, Georgia 30901
Telephone: (706) 724-0171

Sonja R. Tate

Direct Fax No: (706) 396-3625

E-mail Address: State@fulcherlaw.com

Admitted in Georgia and South Carolina

July 11, 2013

Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Marsha L. Temples and Douglas Temples, Jr. v. Neal O. Plush
Appellate Case No. 2012-212686
Claim No: 0198296360101030
Our File No.: 47-676

Dear Ms. Kitchings:

Enclosed for filing in the above-entitled action are the original and seven copies of each of Respondent's Return to Appellant's Motion to Amend Designation of Matter to be Included in the Record on Appeal and Proof of Service. Once the originals have been filed, please date stamp the copies and return them to me in the envelope provided.

Thank you for your assistance. If you have any questions or need anything further from me, please do not hesitate to contact me.

Sincerely,



Sonja R. Tate
For the Firm

SRT/gc

Enclosures

cc: John W. Carrigg, Jr. (w/encs.)

RECEIVED

JUL 15 2013

SC Court of Appeals