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Feb 21 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Hon. William P. Keesley, Circuit Court Judge

Appellate Case No. 2022-001749

James John Todd Kincannon,

Appellant,

v.

Ashely Suzanne Griffith,

Respondent.

**APPELLANT'S RETURN TO RESPONDENT'S MOTION TO
COMPEL APPELLANT TO AMEND RECORD ON APPEAL AND TO
PERMIT RESPONDENT TO FILE AN AMENDED FINAL BRIEF**

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**APPELLANT’S RETURN TO RESPONDENT’S MOTION TO
COMPEL APPELLANT TO AMEND RECORD ON APPEAL AND TO
PERMIT RESPONDENT TO FILE AN AMENDED FINAL BRIEF**

The Court must deny Respondent’s motion to compel Appellant to add documents to the Record on Appeal because the documents Respondent seeks to add are not part of the record below. Rule 210(c), SCACR states “The Record shall not . . . include any matter which was not presented to the lower court or tribunal.” The documents Respondent seeks to add were never presented to the trial court in any way. They were never filed with the clerk of the trial court, nor were they presented to the trial court judge during a hearing or in any other manner. Accordingly, Rule 210(c), SCACR prohibits Respondent from seeking to include these documents in the Record on Appeal.

Appellant’s Preparation of the Record on Appeal

Appellant properly prepared the Record on Appeal in this matter. Appellant’s Designation of Matter accompanying Appellant’s Initial Brief designated all material in the trial court record for inclusion in the record on appeal: “Appellant proposes that the entire record below be included in the Record on Appeal: all filings below plus the full transcript dated November 19, 2019, from the only hearing below.” See Appellant’s Designation of Matter dated June 21, 2023. Appellant properly prepared the Record on Appeal by including in the Record on Appeal all filings with the trial court clerk plus the full transcript dated November 19, 2019, from the only hearing held before the trial court.

Accordingly, the Record on Appeal currently contains 100% of the material that properly could be included per Rule 210(c), SCACR. The Record on Appeal contains every single document in the trial court clerk’s casefile plus the transcript from the only hearing in the case.

Nothing else can be added to the Record on Appeal per Rule 210(c), SCACR, as it contains 100% of the trial court record.

Respondent's motion seeks to add material to the Record on Appeal that was not presented to the trial court and, therefore, cannot be included in the Record on Appeal per Rule 210(c), SCACR.

Respondent's Exhibit C to the Motion to Compel: The Email of May 22, 2023

The first document Respondent seeks to add to the Record on Appeal is an authentic email from Appellant to Respondent's counsel dated May 22, 2023 which is attached as Exhibit C to the Respondent's Motion to Compel. As indicated by the absence of file-stamp markings, this document was never presented to the trial court and was never filed with the clerk of the trial court. It did not even come into existence prior to the termination of proceedings before the trial court, which occurred in December of 2022. See Notice of Appeal dated December 13, 2022.

Accordingly, the Email of May 22, 2023 cannot be included in the Record on Appeal per Rule 210(c), SCACR, and the Court must deny that part of Respondent's motion to compel.

Respondent's Exhibit D to the Motion to Compel:

(1) An Alleged Service Letter dated December 16, 2019 and Three Enclosures:

(2) The Order filed December 13, 2019;

(3) The NEF generated December 13, 2019; and

(4) an Alleged Certificate of Service dated December 16, 2019

The second document Respondent seeks to add to the Record on Appeal is a Service Letter purporting to serve the trial court's Order filed December 13, 2019 on Appellant together with three enclosures: a copy of the order, the NEF generated upon the order's filing, and a Certificate of Service from the legal assistant of Respondent's counsel purporting to serve the order on Appellant.

The Order filed December 13, 2019 and the NEF are already part of the Record on Appeal, appearing at pages 1 and 169 respectively. The Service Letter and the Certificate of Service were not included in the Record on Appeal because neither were ever filed with the clerk of the trial court or presented to the trial court at a hearing or in any other manner, and Appellant had literally never seen either the Service Letter or the Certificate of Service until receiving Respondent's Motion to Compel dated February 1, 2024.

Rule 210(c), SCRCP does not permit the inclusion of the Service Letter (the first page of Exhibit D of Respondent's Motion to Compel) or the Certificate of Service (the last page of Exhibit D of Respondent's Motion to Compel). Neither were filed with the clerk of the trial court or presented to the trial court in any way, and Rule 210(c), SCRCP requires the Court exclude them from the Record on Appeal as a result.

The Authenticity of the Service Letter and Certificate of Service

Appellant disputes the authenticity of the Service Letter and the Certificate of Service that Respondent seeks to have included in the Record on Appeal, the first and last pages of Exhibit D to Respondent's Motion to Compel. Appellant does not believe such documents were created on December 16, 2019 but were instead improperly created by Respondent's counsel after the fact with the intention of defeating Appellant's claim—which was accepted by the trial court without contest by Respondent—that Appellant did not receive written notice of entry of the trial court's order filed December 13, 2019 until November 11, 2020. See Record on Appeal at 130 n.1. Respondent did not challenge Appellant's contention regarding notice in the trial court, and the trial court judge accepted Appellant's truthful representation that he did not receive written notice of entry of the order until November 11, 2020. See Record on Appeal at 16.

If Respondent's counsel had been in possession of the Service Letter and the Certificate of Service in 2020, he would no doubt have submitted them to the trial court in opposition to Appellant's Motion to Reconsider as part of an argument that the Motion to Reconsider was untimely. Respondent's counsel failed to do that. See generally Record on Appeal. Now such documents have magically come into existence, and Respondent's counsel is asking the Court to violate Rule 210(c), SCRCF and admit them into the Record on Appeal despite the fact that they were never filed with the trial court and, despite being dated December 16, 2019, there is no evidence before the Court that they existed prior to February 1, 2024 when Respondent included them as exhibits to the Motion to Compel.

Appellant would ask the Court reject this fairly transparent attempt by Respondent's counsel to admit false evidence into this proceeding, particularly where the false evidence is already barred from being part of the Record on Appeal even if it is not false by Rule 210(c), SCRCF since Respondent never presented the material to the trial court in any form or fashion.

**Appellant's Request for the Court to Take Judicial Notice that the Email of
May 22, 2023, the Service Letter, and the Certificate of Service—which Respondent
Proposes to be Added to the Record on Appeal—are Not Among the Documents
Filed with the Lexington County Clerk of Court in the Litigation Below**

To eliminate any controversy as to whether or not the Email of May 22, 2023, the Service Letter, or the Certificate of Service were filed by Respondent with the trial court clerk, Appellant respectfully requests the Court take judicial notice that none of these documents were filed with the trial court clerk. Appellant respectfully requests the Court review the online Lexington County Public Index at <https://publicindex.sccourts.org/lexington/publicindex/> and confirm that none of these three documents appear in the documents listed as part of the casefile in Kincannon v. Griffith, Civil Action No. 2019-CP-32-02268.

Appellant's Request to Submit a Supplemental Brief and Supplemental Record Material if the Court Grants Respondent's Motion to Compel and Permits Respondent to Include Material in the Record on Appeal that Was Never Presented to the Trial Court in Any Form or Fashion

Should the Court grant Respondent's Motion to Compel in whole or in part and allow the addition of material outside the record below into the Record on Appeal, Appellant requests the Court also grant Appellant the opportunity to submit a Supplemental Brief addressing the added materials and present whatever responsive material is appropriate in a Supplemental Record. The basis for Appellant's request is that Appellant has been unfairly surprised by Respondent's attempt to include outside-the-record material in the Record on Appeal. Appellant designated all record material as part of the Record on Appeal in Appellant's Designation of Matter submitted along with Appellant's Initial Brief, and Appellant had no idea that Respondent was attempting to include outside-the-record material in the Record on Appeal until after Respondent had already completed the Appellant's Initial Brief and Appellant's Initial Reply Brief. It would be patently unfair to deny Appellant an opportunity to brief the Court on the affect of these outside-the-record materials since Appellant was unfairly surprised by Respondent's improper efforts to include them in the Record on Appeal in violation of Rule 210(c), SCACR.

The surprise in this matter is unfair because Rule 210(c), SCACR plainly states that parties cannot attempt to designate outside-the-record material for inclusion in the Record on Appeal. No party to an appeal should ever expect, or be on guard, that an opponent might try to do such a thing by slipping in outside-the-record material in a Designation of Matter, which is what Respondent has done. This practice is highly improper, but if the Court allows it, Appellant must be given a full and fair opportunity to address the matter in full by way of a Supplemental Brief or by way of submitting amended Principal and Reply Briefs. Respondent should not be

able to slip in material in a sneaky and underhanded fashion without Appellant having a full and fair opportunity to respond with supplemental filings. Due process requires no less.

**Appellant's Request for Discovery Regarding the
Authenticity of the Service Letter and Certificate of Service**

In the event the Court is inclined to allow Respondent to add the Service Letter and Certificate of Service to the Record on Appeal, Appellant respectfully requests and demands discovery on the authenticity of those documents. Appellant has probable cause to believe they are not genuine and has explained why above. Appellant requests that before the Court allow them to be added to the Record on Appeal, that Appellant be given an opportunity to conduct discovery on their authenticity by way of requests for production, interrogatories, requests for admission, and depositions if necessary. Respondent is attempting to submit new evidence to the Court of Appeals which is wholly untested and which Respondent has a good faith basis to believe is fraudulent. Due process requires that Appellant be given the same opportunity to test this evidence before its acceptance by the Court of Appeals that Appellant would have in the trial court. This Court may wish to remand the matter, on this limited issue, to enable this inquiry.

CONCLUSION

Respondent has asked the Court to include three documents in the Record on Appeal which are not part of the trial court record. They were never filed with the clerk of court or presented to the trial court in any way. Rule 210(c), SCRCP makes clear that the Court must deny this motion. The Record on Appeal simply cannot contain material outside the record below. Rule 210(c) could not be clearer on this point.

However, should the Court be inclined to allow the inclusion of some or all of this outside-the-record material, Appellant requests that he be granted an opportunity for submission

of a Supplemental Brief, or amended main brief and reply brief, and submission of supplemental materials in a Supplemental Record responsive to Respondent's newly submitted materials.

Appellant also requests that the Court grant Appellant discovery as to the authenticity of the Service Letter and Certificate of Service dated December 16, 2019 in the event the Court is inclined to allow their inclusion in the Record on Appeal. Appellant has a good faith basis to believe these documents are fraudulent and were created after the fact in order to work a fraud on the Court as to when Appellant received written notice of the entry of the December 13, 2019 trial court order so as to make it appear that Appellant's motion for reconsideration was untimely even though it was, in fact, timely. But if the Court denies Respondent's motion, no such discovery will be necessary.

Appellant respectfully reserves the right to seek sanctions against Respondent and Respondent's counsel for submission of fraudulent evidence by way of a separate motion to be filed in the near future.

Respectfully submitted,

February 21, 2024

s/James John Todd Kincannon
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CERTIFICATE OF SERVICE

The undersigned Appellant hereby certifies that he has, on the date below, properly served the foregoing on opposing counsel at the address submitted by opposing counsel to the Court for service in this case.

February 21, 2024

s/James John Todd Kincannon
James John Todd Kincannon
Appellant Pro Se