

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY

Roger M. Young, Circuit Court Judge

Case No. 2012-212331

Ron Orlosky in his capacity as Personal Representative of The Estate of Debora L. Orlosky and in his capacity as trustee of the Debora Laura Orlosky Revocable Trust

Respondent

RECEIVED

AUG 01 2013

v.

The Law Office of Jay A. Mullinax, LLC

Appellant

SC Court of Appeals

APPELLANT'S REPLY TO RESPONDENTS MOTION FOR CLARIFICATION AND
MEMORANDUM IN SUPPORT

Pursuant to South Carolina Appellate Court Rule 240, Appellant, The Law Office of Jay A. Mullinax, LLC, by and through undersigned counsel, hereby responds to the Respondent's Motion for Clarification and Memorandum in Support. The Appellant stands by its Motion to Remand to the Circuit Court which was filed in response to the Court of Appeals directive to the Appellant on June 6, 2013. This Appellant's Reply to Respondent's Motion for Clarification responds to the Respondent's statements and allegations concerning the incomplete trial transcript by including background facts omitted by Respondent in its Motion, and by rebutting the Respondent's misleading information regarding the Respondent's and Appellant's knowledge of the incomplete transcript, allegedly possessed by Mrs. Harriett Bennett.

MEMORANDUM IN SUPPORT

BACKGROUND

On July 29, 2010, Defendant filed a creditor's claim in the Beaufort County Probate Court for the outstanding balance Plaintiff owed Defendant, plus a statutory 8.75% interest rate. On August 20, 2010, three weeks after Defendant filed the creditor's claim against the Plaintiff, Plaintiff filed suit in the Beaufort County Circuit Court against Defendant for breach of contract seeking damages of \$29,751.68 (plus interest) and (\$89,253.00 treble damages) for unfair trade practices. Defendant's creditor's claim against Plaintiff filed on July 29, 2009 was subsequently removed to Circuit Court and the Defendant's claim and the Plaintiff's suit were essentially merged and resulted in a jury trial. The Court disallowed the claim for unfair trade practices.

On April 20, 2012, a Beaufort County Jury returned a verdict in favor of Respondent and against Appellant in the amount of \$80,000.00 actual damages. On April 26, 2012 Appellant filed post-trial motions for Directed Verdict, Relief from Judgment To Alter or Amend Judgment, and for a New Trial Absolute of New Trial Nisi Remittitur which were denied on May 17, 2012, but the Court stayed the judgment based on post-trial motions, pending Appeal.

Appellant filed the Notice of Appeal on June 18, 2012, and requested the transcript from the court reporter and from the Beaufort County Clerk of Court on June 25, 2012. On September 6, 2012 we sent correspondence to the Court and Ms. Deborah Everett stating that we have not received a response from Deborah Everett and to advise us on any further action the Court would like us to take to obtain the transcript **(Exhibit A)**. The Appellant did not receive correspondence from the Court regarding the September 6, 2012 correspondence until March 25, 2013 **(Exhibit B)**. Appellant complied with the request from the Court to respond with an update concerning the

transcript and the Appellant sent correspondence to the Court attached here to as **(Exhibit C)** dated March 29, 2013 stating we have not received a transcript or an extension notification from Ms. Deborah Everett. Appellant complied with all other post-trial Rules and the Respondent subsequently filed a Motion to Dismiss the Appeal alleging Appellant failed to comply with the Rules.

On June 6, 2013, The Court of Appeals dismissed the Respondent's Motion and advised the parties of two options: "(1) If the parties would like to proceed without the transcript, then written consent from all the parties must be provided to the Court and the Appellant's initial brief and designation of matter must be served and filed no more than thirty (30) days from the date of the Court of Appeal's letter dated June 06, 2013; or (2) If the parties would like the matter remanded back to the Circuit Court in order to reconstruct the record, then a motion must be filed no more than fifteen (15) days from the date of this the Court of Appeal's letter dated June 06, 2013" **(Exhibit D)**. Appellant responded by correspondence on June 18, 2013 **(Exhibit E)** to the Court of Appeal's directive and selected option 2 and requested that this matter be remanded back to the Circuit Court in order to reconstruct the record, or alternatively, for the Circuit Court to simply conclude that the record could not be reconstructed with the specificity to support meaningful appellate review.

On June 17, 2013, Appellant received a copy of correspondence dated June 14, 2013, from Respondent's counsel to a Mrs. Harriett Bennett, which is attached hereto as **Exhibit F**, stating that Mrs. Harriett Bennett may have some or all of the material in the case of Ron Orlosky v. The Law Office of Jay A. Mullinax, LLC. On June 20, 2013, Appellant received correspondence from Respondent's counsel dated June 18, 2013 attached hereto as **Exhibit G**, asserting that Mrs. Harriett Bennett does have possession of discs from the trial of Ron Orlosky

v. The Law Office of Jay A. Mullinax, LLC and that Mrs. Harriett Bennett has advised the Respondent that she has contacted the Appellant's office in regard to those discs.

On July 3, 2013, Appellant sent correspondence to Mrs. Harriett Bennett, attached as **Exhibit H**, declaring that The Law Office of Jay A. Mullinax has never had any communication with Mrs. Harriet Bennett and that prior to Respondent's correspondence dated June 14, 2013, Appellant was unaware of the existence of Mrs. Harriett Bennett or her possession of trial discs. Mrs. Harriett Bennett responded to Appellant's July 3, 2013 correspondence on July 5, 2013 which is attached as **Exhibit I**. In her correspondence to the Appellant, Mrs. Harriett Bennett stated that several months ago she was asked to let the Court Administration know what records could be produced from materials received from Deborah Everett. Mrs. Harriett stated that "At that time I called [the Appellant's] office" however, "I never received any reply from you but did have some communication from [Respondent] who learned I had this material". Mrs. Harriett Bennett expressed in her correspondence that she had called the Appellant's office, however, did not specify whether or not she talked to anyone or left a voicemail. Appellant's office never received any known calls or voicemails from Mrs. Harriett Bennett and, therefore, would not have responded to her alleged phone call.

Appellant sent correspondence to Mrs. Harriett Bennett dated July 8, 2013, attached as **Exhibit J**, stating again that The Law Office of Jay A. Mullinax has never communicated with Mrs. Harriett Bennett and was unaware of any discs or transcripts pertaining to the above reference trial. Appellant also noted that a Motion is pending in the South Carolina Court of Appeals and that any action taken prior to receiving a decision from the Court of Appeals would be presumptuous, inefficient and disrespectful to the Court of Appeals. Appellant received a copy of Respondent's correspondence to Mrs. Harriett Bennett, dated July 18, 2013, which is

attached as **Exhibit K**. In Respondent's correspondence, without the Court's approval or direction, and prior to the Court of Appeal's remanding the issue of reconstructing the record to the Circuit Court, Respondent requested that Mrs. Harriett Bennett transcribe the materials she possesses and provide him with a copy of the incomplete transcript. Appellant sequentially sent correspondence to Mrs. Harriett Bennett on July 19, 2013, attached hereto as **Exhibit L**, declaring that it would be disrespectful for Mrs. Harriett Bennett to produce and provide the Respondent with a partial transcript while a motion is pending in the Court of Appeals which will ultimately decide the custody, control and disposition of the incomplete transcript and the reconstruction of the record for Appeal.

DISCUSSION

Based on the Court of Appeal's letter dated June 06, 2013 (**Exhibit D**), the Court of Appeals granted the parties two options: "(1) If the parties would like to proceed without the transcript, then written consent from all the parties must be provided to the Court and the Appellant's initial brief and designation of matter must be served and filed no more than thirty (30) days from the date of the Court of Appeal's letter dated June 06, 2013; or (2) If the parties would like the matter remanded back to the Circuit Court in order to reconstruct the record, then a motion must be filed no more than fifteen (15) days from the date of this the Court of Appeal's letter dated June 06, 2013". The Appellant reviewed the options presented by the Court of Appeals and choose option 2 which was to remand the matter back to the Circuit Court in order to reconstruct the record, or alternatively, for the Circuit Court to simply conclude that the record could not be reconstructed with the specificity to support meaningful appellate review. Appellant's response to Court of Appeals letter is attached hereto as **Exhibit E**. As clearly stated in the Appellant's Motion to Remand to Circuit Court, the Appellant choose option 2 which was

to remand the matter back to the Circuit Court in order to reconstruct the record. Alternatively, the Appellant stated that under the circumstances of this case, if the reconstructed record lacks the completeness and reliability necessary for the court to produce a reconstructed record sufficient enough for meaningful review, then the Appellant requests a new trial. Under such a circumstance, if the Circuit Court concludes that it cannot reconstruct the record with the specificity to support meaningful appellate review, according to prior Court of Appeal's decisions, it must inform the Court of Appeals. It should be noted that South Carolina Courts have previously included an option to the Circuit Court to conclude that it cannot reconstruct the record with the specificity to support meaningful appellate review, and therefore, the Court of Appeals remanded for a new trial in similar situations. Clearly, the Court of Appeals is remanding the matter of the record back to the Circuit Court. Until such time, discussions of the record are a "wild herring" by the Respondent.

Nevertheless, the Appellant now responds to the Respondent's bogus allegation that the Appellant has failed to follow the Rules regarding the transcript. It is sufficient to note that such an allegation has already been dismissed by the Court of Appeals. However, the Appellant responds to the allegations in turn. According to Rule 207(a)(5), SCACR: If appellant has not received the transcript within the allotted time nor received notification of an extension within ten (10) days after the allotted time, Appellant shall notify the Office of Court Administration, the clerk of the Appellate Court, and the court reporter in writing. Within the allotted time, the Appellant followed the Rule and alerted the Court Administration on September 6, 2012 (**Exhibit A**) that the transcript was not received. Later, The Court of Appeals sent correspondence to Appellant dated March 25, 2013 (attached as **Exhibit B**) stating that "you must immediately notify the Court in writing of the date the transcript is received from the court

reporter so that appropriate timelines may be set for perfecting this appeal". Appellant complied with the request from the Court of Appeals. Specifically, since the Appellant never received the transcript, and existence of a transcript was unknown, the Appellant sent correspondence to the Court dated March 29, 2013 (attached as Exhibit C) confirming to the Court that the Appellant never received the transcript. Therefore, Appellant complied with Rule 207(a)(5), SCACR by notifying the Court that no transcript has been obtained.

Respondent states in its Motion for Clarification that Appellant is avoiding the duty pursuant to Rule 207(a)(1), SCACR to order the transcript. However, the Appellant has previously ordered the transcript, but it has since been determined that the Court of Appeals will direct the Circuit Court to reconstruct the record..... Rule 207(a)(1) states that "unless the parties otherwise agree in writing, appellant must order a transcript of the entire proceedings below." As Mrs. Harriett Bennett has expressed, she does not possess the entire transcript. The Appellant has not agreed in writing to the Respondent that less than the entire transcript can be ordered. The Appellant is opposed to the Respondent requesting the production of less than an entire transcript (which is unavailable) from Mrs. Harriett Bennett.

As the Respondent has stated multiple times in their Motion for Clarification, the Court of Appeal's letter dated June 06, 2013, the Court of Appeals established two options: (1) If the parties would like to proceed without the transcript... or (2) If the parties would like the matter remanded back to the Circuit Court in order to reconstruct the record. The Appellant drafted a Motion to Remand to Circuit Court, which requested the matter remanded back to the Circuit Court to reconstruct the record. The Appellant appropriately responded to the Court of Appeals letter by choosing an option that was offered by the Court but included an alternative request. Despite good faith efforts, an appropriate reconstructed record from a trial taken place over a

year ago seems questionable and could result in inaccurate records. The failure to recall any part of the trial in a reconstructed record could prejudice either of the parties. Therefore, the Appellant made it clear that the Motion requested that the matter be remanded back to Circuit Court; however, if the Circuit Court concludes that the record could not be reconstructed with the specificity to support meaningful appellate review, then a new trial would be requested.

According to Mrs. Harriett Bennett in her correspondence dated July 5, 2013 (**Exhibit I**), she “never received any reply from [Appellant] but did have some communication from [Respondent] who learned I had this material”. Mrs. Harriett Bennett states she had communication with the Respondent and that the Respondent knew about the material “several months ago”, however, Respondent failed to disclose that information to the Appellant until June, 2013. The Respondent wrote in a June 18, 2013 correspondence to the Appellant that “I [Respondent] am very surprised and disappointed that you [Appellant] did not advise me or the Court of the existence of this material.” Ironically, the Respondent is disappointed that the Appellant did not disclose information on an existing incomplete transcript, even though; the Appellant was unaware of its existence. It is particularly odd that the Respondent, according Mrs. Harriett Bennett on July 5, 2013, had communication with her and learned about the existence of the transcript “several months” prior to the June correspondence, but failed to disclose the information to the Appellant.

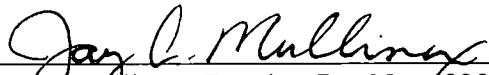
CONCLUSION

The Appellant responded to the June 6, 2013 letter from the Court of Appeals and properly and entirely followed the Court of Appeals request by choosing between option 1 and option 2. The Appellant chose option 2 - requesting that this matter be remanded back to the Circuit Court in order to reconstruct the record. The Appellant also stated that alternatively, if the

transcript is altogether inaccurate and no adequate record of what transpired at trial can be reconstructed, the Appellant requests that the court remands for a new trial. Appellant recognizes this procedure as the accepted practice in South Carolina Courts.

Despite the accusations of the Respondent, the Appellant had never heard of, received a message from, or spoken to a Mrs. Harriett Bennett until Respondent's correspondence addressed to Mrs. Harriett Bennett dated June 14, 2013 was received by the Appellant. According to Mrs. Harriett Bennett, the Respondent was well aware of the existence of the incomplete transcript, but failed to disclose the information to the Appellant until June, 2013, when the Respondent falsely accused the Appellant of being aware the transcript was possessed by Mrs. Harriet Bennett. The Appellant adamantly objects to the incomplete transcript being produced until the Court of Appeals remands that case to the Circuit Court to reconstruct the record, or to determine that the record cannot be reconstructed. Appellant is of the opinion that any act by Mrs. Harriett Bennett or the Respondent to produce the **incomplete** transcript of the trial would be prejudicial to the Appellant, and is more properly addressed by the Circuit Court, according to the Court of Appeal's own directive. Therefore, the Appellant reasserts its election of the Court of Appeal's option to remand the matter to the Circuit Court to reconstruct the record. Alternatively, in accordance with established South Carolina procedure, in the event such record cannot be reconstruct then the Appellant requests a new trial.

July 31st, 2013


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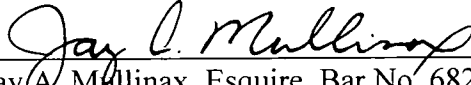
Appellant

SC Court of Appeals

CERTIFICATE OF SERVICE

I, Jay A. Mullinax, hereby certify that I have served one (1) copy of the Appellant's Reply to Respondent's Motion for Clarification and Memorandum in Support on Ron Orlosky's counsel of record by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record, John R. C. Bowen, Esquire, Laughlin & Bowen, P.C., P.O. Drawer 21119, Hilton Head Island, SC 29925, Attorney for Respondent.

July 31st, 2013


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July 31, 2013

VIA FEDERAL EXPRESS

Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: Ron Orlosky v. The Law Office of Jay Mullinax
Appellate Case No. 2012-212331

Dear Ms. Kitchings:

Enclosed please find an original and seven (7) copies of Appellant's Reply to Respondent's Motion for Clarification and Memorandum in Support and Certificate of Service. We would appreciate it if you could please file the original and return a clocked copy in the self-addressed, stamped envelope provided.

If you have any questions, please do not hesitate to contact our office. Thank you for your time and attention to this matter.

Very truly yours,

LAW OFFICE OF JAY A. MULLINAX, LLC

Jay A. Mullinax, Esquire

JAM:kem

Cc: Mr. John R.C. Bowen, Esquire
Mr. Stephen A. Spitz, Esquire

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