

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Beaufort County
Roger M. Young, Circuit Court Judge

Case No. 2010-CP-07-4146

SC Court of Appeals
AUG 19 2013
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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

v

The Law Office of Jay A. Mullinax, LLC,Appellant

**RESPONDENT’S REPLY TO APPELLANT’S MOTION TO MODIFY THIS
COURT’S PRIOR ORDER OF JULY 31, 2013**

This Court has previously ordered the Lower Court “to schedule such hearings as the Circuit Court Judge deems appropriate to accomplish the reconstruction.” See this Court’s Prior Order of July 31, 2013.

From the very beginning of this appellate process, Appellant has done everything in his power to seek a completely new trial (as he definitely appears not to like the verdict he received from a duly empaneled jury). His latest attempt for a completely new trial is to move to modify this Honorable’s Court Order July 31, 2013 to remand with new instructions to the Circuit Court to include “an option for that Court to determine that the record cannot be reconstructed with the specificity to support meaningful appellate

review.”

Typically, this motion to modify might possibly be viewed as an otherwise normal request. But, there is nothing at all normal about this case or this appeal or this motion for modification.

First, Appellant’s Motion violates the Rules of Appellate Procedure. Pursuant to Rules of Appellate Procedure, Rule 240 (c)(2), it is mandated that all motions “shall be in writing, shall state the grounds thereof” and shall “include a memorandum with citation of authorities in support of the motion.” In this case the Appellant’s Motion to Modify the Court’s prior Order does not contain even a single citation of authority. Accordingly, on its very face, it appears to squarely violate Appellate Rule 240 (c)(2) and on this ground alone should be denied.

Second, it is now known that there are tapes, still never transcribed because Appellant formally objects to having the actual evidence from the trial, now known to be available, to be used in any way in the reconstruction of the trial, and now appears in this newest Motion to Modify that the Lower Court should solely depend upon its own memory for a complete summary of all the evidence of the trial, when some unknown part of the trial actually awaits being transcribed. On its very face, this seems highly unusual. When there is **actual** evidence and real world testimony to aid the Lower Court in its reconstruction efforts, Respondent’s position is that it should be used.

Candidly, it is very unusual for an Appellant to complain about lack of evidence, when the Appellant knows where that evidence is located, and knows that it can be produced, and further is fully aware that it can be used to actually and faithfully

reconstruct much of the trial itself. Particularly in light of the general rule that Appellant has the burden of providing the Court with a sufficient record upon which to make a decision. Germain v. Nichol, 278 S.C. 508, 299 S.E.2d 335 (1983); Broom v. Southeastern Highway Contracting Co., 291 S.C. 93, 352 S.E.2d 302 (Ct. App. 1986) the Appellant's motion to modify, on its very face, appears to be without merit.

Third, and finally, the question of meaningful appellate review certainly appears to be a question for this Honorable Court and not for the Lower Court. The Lower Court is in the business of reconstructing the testimony and evidence to the best of its ability. It is then for this Court, on further appeal, to decide whether or not a meaningful appellate review can be had – or whether or not Appellant's own conduct has so delayed the effort to reconstruct that it should be addressed. See, in general, State v. Ladson, 644 S.E.2d 271, 273 (S.C.App. 2007) (Justice Kittredge writing the Court of Appeals opinion when he was still on that Court)

Before a defendant can establish that he is entitled to a new trial on the basis of an inadequate reconstructed record, he must identify a specific appellate claim that **this court** would be unable to review effectively using the reconstructed record." Harris v. Comm'r of Corr., 40 Conn App 250, 671 A.2d 359, 363 (1996). We believe our Supreme Court would follow a rule requiring the party challenging a reconstructed record on appeal to demonstrate prejudice flowing from an inadequate record. Emphasis Added.

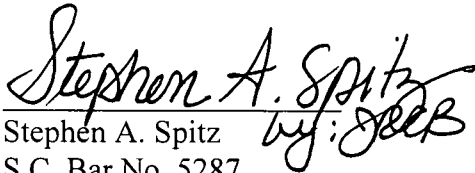
Summary & Conclusion

In brief summary and conclusion, there are three fundamental flaws with the Appellant's Motion for Modification. Any one of these is enough to deny the Motion.

First, Appellant's Motion on its very face is in violation of Appellate Rules, See Rule 240c(2). Second, Appellant's Motion ignores the tapes that are not transcribed due to Appellant's continuing objections. Respectfully, Respondent believes that those objections are not well founded and that the tapes should be promptly ordered by the Lower Court to have the tapes transcribed to aid in the reconstruction of the record. Third, the question of meaningful appellate review is for this Court to address in light of the reconstructed recorded.

For any and all of these reasons, the Respondent respectfully submit the Court's Order should stand precisely as it now written.

Very Respectfully Submitted,


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Hilton Head Island, South Carolina

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August 15, 2013

VIA U.S. MAIL

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
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Columbia, SC 29211

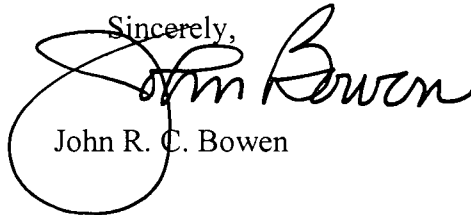
RE: Ron Orlosky v. The Law Office of Jay A. Mullinax, LLC
Appellate Case No.: 2012-212331

Dear Ms. Kitchings:

Enclosed please find an original and seven (7) copies of Respondent's Reply to Appellant's Motion to Modify Order and Memorandum in Support and Certificate. We would appreciate it if you could please file the originals and return a clocked copies to us in the enclosed self-addressed stamped envelope.

Please do not hesitate to contact us should you have any questions. In the meantime, and with kind regards, I am

Sincerely,



John R. C. Bowen

JRCB/sv

cc: Mr. Ronald Orlosky
Mr. Stephen A. Spitz, Esquire
Mr. Jay A. Mullinax, Esquire

RECEIVED
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THE STATE OF SOUTH CAROLINA
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APPELLANT'S MOTION TO DISMISS
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COURT OF APPEALS

Ron Orlosky in his capacity as Personal Representative of
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v

The Law Office of Jay A. Mullinax, LLC,Appellant

CERTIFICATE OF SERVICE

I, John Bowen, do hereby certify that I have this date served one (1) copy of the Respondent's Reply to Appellant's Motion to Modify this Court's Prior Order of July 31, 2013 upon the following counsel of record by causing said copy to be deposited with the United States Postal Service, first class postage prepaid and properly affixed thereto, and addressed as follows:

Jay A. Mullinax, Esquire
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August 15, 2013
Hilton Head Island, South Carolina