

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

69508

RECEIVED

AUG 22 2013

SC Court of Appeals

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

APPELLANT'S AMENDED MOTION AND REPLY

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 Reply to the Appellant's Motion to Modify Order and Memorandum in Support.

MEMORANDUM IN SUPPORT

BACKGROUND

The Respondent filed a Motion to Dismiss on April 5, 2013. The Court of Appeals dismissed the Respondent's Motion on June 6, 2013 and directed the parties, *inter alia*, to either consent to moving forward without a transcript or to file a motion to remand the matter back to

the Circuit Court in order to reconstruct the record (See Court of Appeal's letter dated June 06, 2013 attached as **Exhibit A**). At the direction of the Court of Appeals, the Appellant filed a Motion on June 18, 2013 (**Exhibit B**) to the Court of Appeals 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.

The Court of Appeals granted Appellant's Motion and remanded this case to the Circuit Court to reconstruct the record. The Court of Appeal's order provided no option for the Circuit Court to conclude that the record could not be reconstructed with specificity to support meaningful appellate review.

Appellant subsequently filed a Motion for the Court of Appeals to modify its order to provide an option for the Circuit Court to simply conclude that the record could not be reconstructed with the specificity to support meaningful appellate review. Respondent subsequently filed its Reply to Appellant's Motion to Modify Order and Memorandum in Support on August 15, 2013

DISCUSSION

In response to the Court of Appeals directive letter dated June 06, 2013, the Appellant choose to file a Motion 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. On July 31, 2013 (**Exhibit C**), the Court of Appeals granted the Appellant's Motion to remand this matter to the Circuit Court to reconstruct the record. The Court of Appeal's order provided no option for the

Circuit Court to conclude that the record could not be reconstructed with specificity to support meaningful appellate review. Therefore, the Appellant filed the pending Motion for the purpose of the Court of Appeals amending its order to allow the Circuit Court this option. The Respondent subsequently filed a Reply to Appellant's Motion to Modify this Court's Prior Order of July 31, 2013 on August 15, 2013.

In the Respondent's Reply to Appellant's Motion to Modify this Court's Prior Order of July 31, 2013, the Respondent presents unsubstantiated allegations without any substance or support in fact or law. Although the Appellant categorically denies all of these false allegations, the Appellant will not address those allegations here. Let it suffice to say, the Appellant has met its every obligation and made no effort to delay this process in any way, and there is no evidence to the contrary. The Appellant timely requested the transcript and timely followed up with the Court Reporter's failure to produce the transcript. The Court Reporter's failure to produce a full and accurate transcript of the three day trial that occurred approximately sixteen months ago is not the fault of the Appellant.

The Respondent alleges that the Appellant's Motion violates the Rules of Appellate Procedure, in that it does not include a memorandum with citation of authorities in support of the Motion. The Appellant originally filed its Motion to Remand the Case to the Circuit Court in response to the Court of Appeals directive dated June 6, 2013. The Appellant listed the Court of Appeal's directive as the citation for the Motion which was directed by the Court of Appeals. The Appellate did not cite any other source in its Motion in order to comply with the Court of Appeal's directive. Nevertheless, the Court of Appeals granted the Appellant's earlier Motion – without citation.

At the time the Appellant filed its earlier Motion in response to the Court of Appeals directive, the Appellant fully anticipated that the Court of Appeals would provide the Circuit Court an option to declare that the task of reconstructing the record for appellate review impossible. As recently as 2007, the Court of Appeals has expressed regret when it did not provide the Circuit Court the option to conclude that the record could not be reconstructed with the specificity to support meaningful review. Specifically, the Court of Appeals stated in State v. Ladson, 644 S.E.2d 271, 273 (S.C.App. 2007), that “We too, must accept our share of the blame, for the remand order of this court [Court of Appeals] required the trial court to reconstruct the record, with no option given to simply conclude that the record could not be reconstructed with the specificity to support meaningful appellate review”. Citing, among others, Whitehead, 32 S.C. a 221, 574 S.E.2d at 203 (remanding matter to circuit court for reconstruction hearing and instructing, “If the circuit court judge determines that reconstruction is not possible, he shall notify this Court...”)

The Court of Appeals granted its order for the reconstruction of the record approximately sixteen months after the original trial took place on April 18-20, 2012. With such a significant time lapse between the actual trial and the reconstruction of the trial, the insufficiency of a reconstructed record must be considered since it is reasonable to believe that the testimonies and evidence of a three day trial will only be recalled in summary fashion. Despite good faith efforts, it may be unrealistic for a record to be properly reconstructed by any judge and counsel with the sixteen month lapse presented here.

Additionally, the Respondent alleges that there are available tapes from the trial, but Respondent fails to mention that according to the Respondent’s own allegations, the Court (or Court Reporter) has none of Respondent’s evidence presented at trial. The Appellant believes

that a partial production from the alleged tapes, made out of context, may be irreparable prejudicial to the Appellant. In fact, based on the Respondent's allegations, the production of the alleged partial transcript will provide irreparable harm and prejudice to the Appellant -- even if a new trial is granted. Additionally, the Respondent fails to mention that according to all known rumors, the alleged tapes provide little to no evidence of the specific matters on appeal. Nevertheless, at present, the Court of Appeals has remanded this issue to the Circuit Court and these specific arguments along with others, according to the Court of Appeal's Order, are not ripe for the Court of Appeal review until such time as the Circuit Court considers these matters.

Furthermore, the Respondent also alleges that the question of meaningful appellate review appears to be a question for this Honorable Court and not for the Lower Court. If such a decision were left exclusively to the Court of Appeals, then the Court of Appeals would circumvent any judgment of the Circuit Court (the "court of record") and its role to reconstruct the record. Certainly, once the Circuit Court considers the specific matters on this case and either declares the task of reconstructing the record impossible, or declares that the record is complete, the Court of Appeals will consider the conclusions. Until such time that the Circuit Court issues its conclusions, the Respondent's arguments are moot.

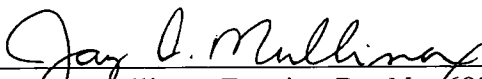
CONCLUSION

The Respondent's argument concerning the absolute necessity of specific citations about a common Appellate Court procedure is without merit. The Appellant originally provided no "citation" in its original Motion to the Court of Appeals directive, and the Court of Appeals granted the Appellant's Motion. The Appellant subsequently modified its Motion, herein, and provided citation of the Court of Appeal's recent procedure in dealing with these matters, specifically, the Court of Appeal's procedure allowing the Circuit Court to declare the task of

reconstructing the record for appeal to be impossible. The Court of Appeals has now ordered that the Circuit Court, the “court of record”, deal with matters concerning the reconstruction of the record. Thus, the Respondent’s bemoaning to the Court of Appeals over a matter before the Circuit Court is not ripe for review by the Court of Appeals. Lastly, the Respondent alleges that the Circuit Court, the “court of record” should not play a role in determining the legitimacy of the “reconstructed record”. Effectively, the Respondent prefers to put the “cart before the horse”. The Court of Appeals has ordered that matters concerning the production of the record is before the Circuit Court. Therefore, the Respondent’s arguments concerning such matters are not properly argued before the Court of Appeals.

Therefore, the Appellant reaffirms its Motion for the Court of Appeals to modify its Order dated July 31, 2013, as amended herein with citations, to allow the Circuit Court the option to conclude that the record could not be reconstructed with the specificity to support meaningful appellate review.

August 21st, 2013


Jay A. Mullinax, Esquire, Bar No. 68293
Law Office of Jay A. Mullinax, LLC
2 Park Lane, Suite 303
Hilton Head Island, SC 29928
(843) 785-6101

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

CERTIFICATE OF SERVICE

I, Jay A. Mullinax, hereby certify that I have served one (1) copy of the Appellant's Amended Motion and Reply 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.

August 21st, 2013

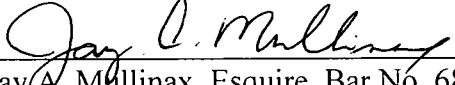

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EXHIBIT " A "

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
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June 06, 2013

Mr. Jay Anthony Mullinax
2 Park Lane, Ste. 303
Hilton Head Island SC 29928

Mr. John R.C. Bowen
PO Drawer 21119
Hilton Head Island SC 29925-1119

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

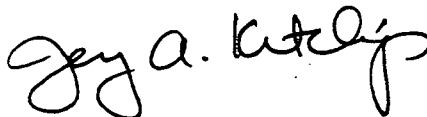
Dear Counsel:

Please see the attached order regarding the motion to dismiss. All parties are advised that this matter is no longer held in abeyance.

If the parties would like to proceed without the transcript, then written consent from all the parties must be provided to this 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 this letter.

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 letter.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jey A. Kalyan". The signature is fluid and cursive, with the first name "Jey" and last name "Kalyan" clearly distinguishable.

CLERK

cc: South Carolina Court Administration

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

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JUN 21 2013

SC Court of Appeals

Respondent

v.

The Law Office of Jay A. Mullinax, LLC

Appellant

APPELLANT'S MOTION TO REMAND TO CIRCUIT COURT 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 South Carolina Court of Appeal's letter dated June 06, 2013 and requests that the matter of Ron Orlosky v. The Law Office of Jay Mullinax, identified as Case No.: 2012-212331 be remanded back to the circuit court in order to reconstruct the record.

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. The transcript was unattainable. Appellant complied with all other post-trial Rules and the Respondent filed a Motion to Dismiss the Appeal alleging Appellant failed to comply with the Rules. 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. Appellant files this motion to remand the case to the Circuit Court to reconstruct the record, one of the two options provided by the court.

DISCUSSION

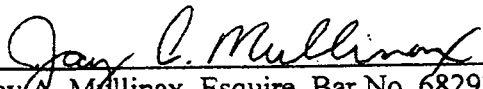
Based on the Court of Appeal's letter dated June 06, 2013, the Court of Appeals granted two options: (1) If the parties would like to proceed without the transcript, then written consent from all the parties must be provided to the Court and the Appellant's initial brief and designation of matter must 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 and chooses the option 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.

CONCLUSION

The Appellant requests 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. If a

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.

June 18th, 2013


Jay A. Mullinax, Esquire, Bar No. 68293
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2 Park Lane, Suite 303
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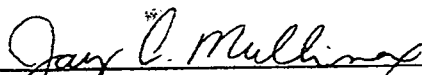
The Law Office of Jay A. Mullinax, LLC

Appellant

CERTIFICATE OF SERVICES

I certify that I have served the Appellant's Motion to Remand to Circuit Court and Memorandum in Support on Ron Orlosky 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.

June 18th, 2013


Jay A. Mullinax, Esquire, Bar No. 68293
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Hilton Head Island, SC 29928
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The South Carolina Court of Appeals

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

v.

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

Appellate Case No. 2012-212331

ORDER

Appellant has filed a motion to remand to the circuit court for reconstruction of the record. The motion is granted and this case is remanded to the Beaufort County Court of Common Pleas. Counsel for Appellant is ordered to contact counsel for Respondent and the circuit court judge, the Honorable Roger M. Young, within ten days of this order to schedule such hearings as the circuit court judge deems appropriate to accomplish the reconstruction. Counsel for Appellant shall provide an update to the clerk of this court no later than fifteen days from the date of this order, with a copy to counsel for Respondent.


FOR THE COURT

Columbia, South Carolina

cc:

Jay Anthony Mullinax

John R.C. Bowen

Judge Roger M. Young

FILED

11-31-13



Law Office of Jay A. Mullinax, LLC

2 PARK LANE, SUITE 303
HILTON HEAD ISLAND, SC 29928

August 21, 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 Amended Motion and Reply and Certificate of Service. Also enclosed, please find a check in the amount of Twenty-Five Dollars (\$25.00) for the filing fee. 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: The Honorable Roger M. Young
Mr. John R.C. Bowen, Esquire
Mr. Stephen A. Spitz, Esquire

RECEIVED

AUG 22 2013

SC Court of Appeals