

STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM Horry COUNTY
Court of Common Pleas
The Honorable Benjamin H. Culbertson, Circuit Court Judge

Appellate No.: 2013-001478
Civil Action No.: 2012-CP-26-3589

Thomas RickersonAppellant

vs.

John Karl, M.D. and Virginia Bell, CS, FNP.Respondents

MEMORANDUM IN SUPPORT OF RESPONDENTS' MOTION TO STRIKE

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August 30, 2013

INTRODUCTION

In the instant appeal, Appellant has set forth his "Initial Brief of Appellant" (hereinafter, "Initial brief") and his Designation of Matter to be Included in the Record on Appeal (hereinafter, "Designation of Matter"). Appellant's Initial Brief and Designation of Matter contain materials which are in violation of the South Carolina Appellate Court Rules ("SCACR"). Accordingly, Respondents John Karl, M.D. and Virginia Bell, CS, FNP, (collectively, "Respondents") respectfully move this honorable Court for an order striking the particular matters from the Designation of Matter thereby prohibiting their inclusion in the Record on Appeal and striking all references to those matters in the Initial Brief and similarly prohibiting their inclusion in Appellant's Final Brief.

RELEVANT BACKGROUND

This appeal arises from the dismissal of a Notice of Intent to File Suit ("Notice of Intent") in an alleged medical malpractice case. On May 15, 2012, Appellant filed a Notice of Intent alleging that an antibiotic prescribed by Respondents interacted with his other medication, allegedly resulting in hospitalization. Pre-suit mediation, as required by S.C. Code Ann. § 15-79-125, did not occur within the statutorily mandated time-frame; accordingly, Respondents filed a Motion to Dismiss. After a hearing, the Honorable Benjamin Culbertson granted the Motion to Dismiss. Upon reconsideration, Judge Culbertson maintained his original decision to dismiss the Notice of Intent. Thereafter, Appellant filed the instant appeal. Subsequent to the filing of the appeal, Judge Culbertson *sua sponte* contacted the parties via email expressing his thoughts on the case. It is portions of this email exchange, sent after the Notice of Appeal had been filed, that are the basis of this motion.

ARGUMENT

I. **Items 21 and 22 in Appellant's Designation of Matter should be stricken and prevented from inclusion in the Record on Appeal because they are not proper matter related to this appeal.**

On August 26, 2013, Appellant served and filed his Initial Brief and Designation of Matter. Inclusive in the Designation of Matter list as Item 21 is an email from Judge Culbertson dated June 27, 2013. This email was sent to the parties after Appellant filed his Notice of Appeal and, therefore, after Judge Culbertson no longer had any jurisdiction over the matter.¹ Additionally, the Designation of Matter lists as Item 22 an email from Respondent's counsel, Marian Scalise, dated July 3, 2013, replying to Item 21. These items are improper for inclusion in the Record on Appeal because they are in contravention of SCACR 205, 209, and 210.

Rule 209, SCACR, provides the Designation of Matter should propose only those materials which are properly included in the Record on Appeal. See Rule 209, SCACR. Rule 210, SCACR, provides the record *shall* not include matter which was not before the lower court. See Rule 210, SCACR. (emphasis added). Additionally, Rule 209(C), SCACR, provides the Designation of Matter must include a certification that the Designation of Matter contains no matter which is irrelevant to the appeal. Items 21 and 22 were not "before the lower court" during this matter and are therefore irrelevant to this appeal.

Items 21 and 22 were not "before" the trial judge in this matter because they occurred after Judge Culbertson issued final judgment as to this matter. See Rule 55, SCRCR ("Judgment" as used in these rules includes any decree or order which dismisses

¹ Although Judge Culbertson's email was sent the same day as the Notice of Appeal, it was nonetheless sent after the Notice of Appeal had been filed and after Judge Culbertson's notification as to its filing.

the action as to any party or *finally* determines the rights of any party.”) (emphasis added). The entry of judgment in this matter concluded the proceedings related to this matter and finally decided the rights of the parties. Judge Culbertson’s post-judgment comments are not proper matters to be included in the Record on Appeal because they are not considerations or actions which occurred while the matter was pending. Therefore, Items 21 and 22 were not “before” the trial judge.

Additionally, these emails occurred after the serving of the Notice of Appeal. Rule 205, SCACR, provides that upon service of the Notice of Appeal, the appellate court has exclusive jurisdiction over the appealed matters. Once Appellant served and filed his Notice of Appeal, the appealed matters were no longer “before” Judge Culbertson and within his purview. Therefore, any communications or thoughts with regard to the appealed matters cannot be relevant to the appeal. As a consequence, Judge Culbertson’s comments and counsel’s subsequent responses are not properly inclusive in the Record for this appeal because Judge Culbertson was without jurisdiction to further act in relation to this matter.

Finally, because the items involve communication with the trial judge after his final ruling, which is the subject of this appeal, and after he was divested of jurisdiction over this matter, Items 21 and 22 are irrelevant to the appeal. These items are irrelevant to the appeal because they came after the judge’s final ruling on the motion to dismiss and his final ruling on the motion for reconsideration—this matter was over.

Because Items 21 and 22 were not before the trial judge and are irrelevant, the items should be stricken from the Designation of Matter and thusly prohibited from

inclusion in the Record on Appeal because they violate Rules 205, 209, and 210, SCACR.

II. Any references to Items 21 and 22 should be stricken from Appellant's Initial Brief and precluded from inclusion in Appellant's Final Brief.

Any portions of Appellant's brief which reference this improper matter should also be stricken. Having established Items 21 and 22 are not properly included in the Record on Appeal, Respondents respectfully request an order striking any reference, including and in addition to Footnote 3 in the Initial Brief, from Appellant's Initial Brief and preclusion of same in Appellant's Final Brief. Rule 208(b)(4) provides that the Initial Brief may only contain references to those materials which are properly included in the Record on Appeal. Accordingly, any and all references to Items 21 and 22 in Appellant's brief must be stricken.

CONCLUSION

For the foregoing reasons, Respondents respectfully move before the Court of Appeals for an Order striking Items 21 and 22 from Appellant's Designation of Matter to be Included in the Record on Appeal and prohibition of their inclusion in the Record on Appeal. Additionally, Respondents respectfully request such an order strike the portions of Appellant's Initial Brief which bear reference to Items 21 and 22 and preclude their inclusion in Appellant's Final Brief.

[SIGNATURE TO FOLLOW]

Respectfully submitted,



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