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 Rickerson .....Appellant

vs.

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

RESPONDENTS' REPLY TO APPELLANT'S RETURN TO RESPONDENTS' MOTION TO STRIKE

Respondents hereby set forth their Reply to Appellant's Return to Respondents' Motion to Strike. Respondents respectfully submit the Motion to Strike and supporting Memorandum are sufficient to apprise this honorable Court of the matters which should be stricken. Further, Respondents' Memorandum in Support of the Motion to Strike sets forth proper grounds for striking the offending matters—which Appellant concedes in his Return.

ARGUMENT

I. The Motion to Strike and Supporting Memorandum set forth the grounds of the Motion to Strike.

The Motion to Strike and accompanying Memorandum sufficiently set forth the grounds of the Motion to Strike. Although Respondents' counsel inadvertently did not include the specific grounds for the Motion in the body of said Motion, when the Memorandum, which is specifically incorporated into the Motion itself, is read with the Motion, this Court can still review the issue and ascertain the arguments. This Court has previously declined to dismiss an appeal when, although the parties failed to include certain required items in their brief and Record on Appeal, the Court could still decipher the arguments from the other documents which had been submitted to the Court. See Banker's Trust of South Carolina v. South Carolina National Bank of Charleston, 284 S.C. 238, 242, 325 S.E.2d 81, 84 (Ct. App. 1985) (holding the failure to include required elements of the briefs was not fatal to the appeal because the issues were "readily apparent" from the parties' filings). Such is the case here. Although not specifically included in the text of the Motion, the supporting Memorandum makes the grounds for the Motion to Strike "readily apparent."

With regard to Appellant's concern about the lack of documentation to support this Motion, Respondents respectfully submit the unique posture of this motion makes the submission of such documentation virtually impossible. As stated in the Motion and supporting Memorandum, the material to be stricken are those items proposed by Appellants which chronologically occurred after the final judgment was entered. The best evidence or documentation supporting these arguments are the very matters

requested to be stricken and not presented to the Court.[1] Appellant's interpretation of the rule would have Respondents argue certain items should not be presented to the Court by presenting those items to the Court in support of why the matters should not be presented to the Court. Such reasoning is circular and could not possibly be the result contemplated by the rules. Cf. Lexington Cnty. Health Svs. Dist. v. South Carolina Dep't of Rev., 384 S.C. 647, 682 S.E.2d 508 (Ct. App. 2009) (determining the Court should reject an interpretation of a statute that would lead to a result that is unintended by the legislature or plainly absurd). Submission of the documents to prove their impropriety would defeat the entire purpose of Respondents' motion—to ensure that the irrelevant matter is not before this Court.[2]

Based on the foregoing, Respondents respectfully submit any alleged deficiencies in the Motion to Strike are not fatal to the motion, as the grounds are readily apparent from the supporting memorandum.

II. Items 21 and 22 are not properly included in the Record on Appeal or in Appellant's briefs.

Items 21 and 22 in Appellant's Designation of Matter to be Included in the Record on Appeal are not properly included because the timing of the authorship of the items occurred after this case had been appealed. Therefore, Items 21 and 22 are not relevant nor were they "before the lower court." Appellant concedes this point. Appellant states in regard to the content of the documents, "[t]he trial Court is corresponding with the parties about matters not affected by the pending appeal." (App.

[1] To the extent such documentation could have been supplied, Respondents have attached the affidavit of Marian Williams Scalise, Esquire in Support of the Motion and this Reply. See Exhibit A.

[2] Respondents are aware that Appellant has attached the offending documents to his Return and do not approve of this attempt to usurp the purpose of this motion and this Court's pending ruling on said motion by putting forth the documents anyway.

Ret. To Motion to Strike, p.4, n.1). If "matters not affected by the pending appeal" are not a text-book example of irrelevant matter, Respondents' counsel is unaware of what is. "Matters not affected by the pending appeal" are irrelevant and should not be included in the Record on Appeal. See Rules 205, 209, and 210, SCACR. Because these items are not properly included in the Record on Appeal, they are not properly included in Appellant's briefs. See Rule 208, SCACR.

Further, Appellant's contention that Item 21 provides insight to the trial judge's reasoning is unpersuasive. Respectfully, what the trial judge "would have done" or "could have done" in the face of a new appellate court decision is not probative of what he actually did. How the judge would have ruled had he had the benefit of an appellate decision, which was decided *after* he entered final judgment in the matter and denied the motion for reconsideration, is immaterial to whether the judge erred in his decision. Appellate decisions, which change or effect the interpretation of laws and statutes, happen every day. The jurisprudential landscape, in its ever-changing form, could not survive if parties were permitted to include wishful statements from judges about what they could have done about a ruling had they had the benefit of a subsequent decision. Moreover, with the exception of supplemental authority as provided by SCACR 208(7), Respondents submit the inclusion in a brief or Record on Appeal of information obtained after a ruling is improper.

Appellant also argues Item 22 evidences Respondents' counsel's mental state during this action. This argument lacks merit. First, the "mental state" of Respondents' counsel is irrelevant to whether the trial judge erred in granting the Motion to Dismiss. Second, Item 22 only speaks of Respondents' counsel's consent to withdraw the appeal

and allow the trial court to reconsider the matter,[3] not "dogged determination" to not allow this case to proceed.

Finally, it is not Respondents' position that the item not "before the [trial] court" is essentially the Ross opinion. Appellant's assertion is incorrect. What was not before the trial court, and therefore should **not** be before this Court, are the trial judge's thoughts after his final order, which is the subject of this appeal, on the instant case. Once Appellant filed the Notice of Appeal, this Court had exclusive jurisdiction over the matter. Thus, these items could not be "before" the trial judge because he no longer had jurisdiction over this matter. Without jurisdiction, nothing was "before" the trial judge, including the Ross opinion. Despite Appellant's arguments, these items **are** extraneous to the materials which should be available to this Court in deciding the merits of this appeal. This is so because the trial judge's decisions occurred **before** the Ross opinion. Additionally, Items 21 and 22 do not shed light on the thinking of the trial judge at the time the order of dismissal or reconsideration was entered. Such reasoning is chronologically and rationally impossible. The correspondence came after the trial judge entered the dismissal and after the denial of Appellant's Motion to Reconsider. Therefore, despite Appellant's arguments to the contrary, the correspondence could not and does not provide the present state of mind of the trial judge at the time he entered judgment in this matter because the entry of judgment occurred before Items 21 and 22 were authored.

[3] Respondents would point out that it would appear Appellant is the party who is inhibiting this suit from going forward when it was he who declined to withdraw his appeal after Respondents consented to a withdrawal, and it is he who has stated he has appealed in the "interest of judicial economy" only because he "believed" Respondents would appeal anyway. (App. Ret. to Motion to Strike p. 5). Respondents respectfully submit it is not an efficient and appropriate use of judicial resources to appeal a case because one thinks the other party may appeal and he wants to "beat them to the punch."

CONCLUSION

Based on the foregoing, Respondents respectfully request the Court grant their Motion to Strike.

Respectfully submitted,

Sheila M. Bias

Sheila M. Bias
Marian W. Scalise
Lydia L. Magee
RICHARSON PLOWDEN & ROBINSON, P.A.
1900 Barnwell Street (29201)
P.O. Drawer 7788
Columbia, South Carolina 29202
803-771-4400

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

September 16, 2013

EXHIBIT A

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 Rickerson ..... Appellant

vs.

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

AFFIDAVIT OF MARIAN W. SCALISE, ESQUIRE

I, Marian W. Scalise, being duly sworn, certifies and states the following based on my own personal knowledge:

1. I am a citizen and resident of the state of South Carolina and am an attorney licensed to practice in the State of South Carolina.

2. I, along with Lydia Magee, Esquire and Sheila Bias, Esquire, represent John Karl, M.D., and Virginia Bell, CS, FNP in the above-captioned case.

3. I was present at the hearing for the Motion to Dismiss and submitted memoranda in support of that motion as well as the Motion for Reconsideration of Dismissal that are the subject of this appeal.

4. I received notice of Attorney William Isaac Diggs' Notice of Appeal on behalf of the Plaintiff/Appellant in the above-captioned matter on June 27, 2013.

5. Subsequent to my receipt of the Notice of Appeal, I received an email from Judge Culbertson, expressing his thoughts on the above-captioned matter. This email is referred to as Item 21 in Appellant's Designation of Matter to be Included in the Record on Appeal and is the subject of Respondents' Motion to Strike.

6. I replied to Judge Culbertson's email through a series of email correspondence between me, Mr. Diggs, and Judge Culbertson concerning the withdrawal of this appeal. One of the emails from this exchange of correspondence is referred to as Item 22 in Appellant's Designation of Matter to be Included in the Record on Appeal and is the subject of Respondents' Motion to Strike.

7. I received both Item 21 and Item 22 after the filing of the Notice of Appeal in this matter.

FURTHER THE AFFIANT SAYETH NOT.

Marian W. Scalise

Marian W. Scalise

Dated:

Sept. 16, 2013

SWORN to and subscribed before me
this 16th day of Sept., 2013

Notary Public for the State of South Carolina

My Commission Expires: 5/26/2016

THE 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 Rickerson .....Appellant,

v.

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

CERTIFICATE OF SERVICE

I, the undersigned, an employee of Richardson Plowden & Robinson, P.A., attorneys for Respondents John Karl, M.D. and Virginia Bell, CS, FNP, do hereby certify that I have this date served the foregoing Reply to Appellant's Return to Respondents' Motion to Strike by personally depositing a copy of the same in a United States Postal Service mailbox, postage prepaid, addressed to the following:

William Isaac Diggs
Law Office of William Isaac Diggs
1700 Oak Street, Suite D
Myrtle Beach, South Carolina 29577

Daisy F. Bonds

Dated: September 16, 2013

RICHARDSON PLOWDEN
RICHARDSON PLOWDEN ROBINSON, P.A.
ATTORNEYS AT LAW

COLUMBIA P.O. Drawer 7788 • Columbia, SC 29202
1900 Barnwell St., Columbia, SC 29201 P 803.771.4400 F 803.779.0016

MYRTLE BEACH P.O. Box 3646 • Myrtle Beach, SC 29578
2103 Farlow St., Myrtle Beach, SC 29577 P 843.448.1008 F 843.448.1533

CHARLESTON 40 Calhoun St., Suite 220 • Charleston, SC 29401
P 843.805.6550 F 843.805.6599

www.richardsonplowden.com

Reply to: Columbia
Direct Dial: (803) 576-3718
sbias@RichardsonPlowden.com

September 16, 2013

VIA HAND DELIVERY
The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: Thomas Rickerson v. John Karl, M.D., and Virginia Bell, CS, FSP
C/A No.: 2012-CP-3859
Our File No.: 5412-103

Dear Ms. Kitchings:

As counsel for the Respondents John Karl, M.D and Virginia Bell, CS, FSP, I have enclosed for filing an original and six copies of our Reply to Appellant's Return to Respondents' Motion to Strike to be Included in the Record on Appeal in the above referenced matter, along with our original Certificate of Service. I have also enclosed one additional copy of our Reply Appellant's Return to Respondents' Motion to Strike and would request that it be file stamped and returned to our courier.

We are this day serving a copy of our Reply to Appellant's Return to Respondents' Motion to Strike on Appellant's attorney.

Thank you for your assistance.

Sincerely,

Sheila M. Bias

Sheila M. Bias
SC Bar # 100005

SMB/dfb
Enclosures
cc: William Isaac Diggs, Esquire (w/enclosure)
Marian W. Scalise, Esquire (w/enclosure)
Lydia L. Magee, Esquire (w/enclosure)