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

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 SECOND REPLY
TO APPELLANT'S MOTION TO MODIFY

In Respondent's First Reply To Appellant's Original Motion to Modify This Court's Order To Remand To the Circuit Court, Respondent's made three points:

(1) It certainly appeared that Appellant's Arguments Were Made Without Citation To Law in Appellant's Original Motion to Modify;

(2) On the Merits, Appellant appeared to be unwilling to recognize that Respondent has now been informed that much of the original trial transcript and the exhibits have been located and are available for transcription;

(3) At least in some instances, it is a question for the Court of Appeals to determine after a Circuit Court does what it can to reconstruct the record, whether or not the reconstructed record does or does not afford the parties meaningful appellate review.

In response to Appellant's Reply, the Respondent has now elected to file a new "modified" Motion. This very brief Second Reply by Respondent is to discuss the Appellant's newest filing, its Modified Motion to Amend.

Point 1

Lack of Citation In Appellant's Original Motion To Modify

Of course, now that it has previously **specifically been pointed out** that Appellant's Original Motion failed to cite any cases or statutes in support of Appellant's arguments, Appellant has promptly filed a Motion to Amend with some general citations in an effort to cure this problem.

Whether or not an Amended Motion actually cures the Appellant's original failure to follow S.C. App. Rule 240 is a very interesting question. Respondent would respectfully suggest that an Amended Motion to Modify, which for the very first time containing citations to fulfill the requirements of Rule 240, is probably ineffective to satisfy the Rule, in precisely the same manner that a Motion for Reconsideration, which for the very first time raises something that should have been raised earlier in the trial, is ineffective. **See Anderson Memorial Hospital, Inc. v. Hagen, 313 S.C.497, 443 S.E.2d 399 (S.C. App. 1994)** (a party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not). Of course, this is a settled rule of law.

Point Two

On The Merits, Would It Be An Error Not To Consider The Actual Testimony and Exhibits From the Former Trial?

Appellant continues to argue in its Appellant's Amended Motion that the available evidence should not be transcribed. Again, this entire argument is made with no citation to any authority. See Appellant's Modified Motion, Pgs 4 and 5 (dealing with Point Number Two).

First, Respondent again respectfully suggests that an argument without any citations is defective under Rule 240. **See also** Rule 209(D), SCACR (requiring an appellant to set forth an issue in its brief then discuss it with citations to authority).

Second, and even more fundamentally, this argument appears to be wrong on its very face. The actual evidence of the actual case should always be used in the Transcript when it is available and when one party desires that it be included in the record. As everyone agrees that some transcripts have been located, but not yet transcribed, it is fundamental that either party can ask that this evidence be included in the Record. See, for countless authorities to this effect, "Any portion of the record to which the parties wish to direct the Supreme Court's particular attention must be printed in a joint appendix prepared in conformity with the rule by the appellant or petitioner in the court below" Am. Jur 2d Appellate Section 914.

Third, the South Carolina Rules of Appellate Procedure specifically provide pursuant to Rule 209 (a) and (b) that the Respondent is permitted to designate what parts of the Record should be included in the Record on Appeal. Obviously, it is very clear

that Respondent has the right to ask the Court to declare the Transcript, or any part of it, to be transcribed so that Respondent can exercise his rights under Rules 209 (a) and (b) and include some or all of this evidence in any appeal.

Point Three

Does Asking the Lower Court to Recreate The Record, as Best It Can, And Leave To This Court The Question Whether Or Not A Meaningful Appeal Can Then Take Place "Circumvent the Lower Court" (as argued by Appellant, Pg. 5 of the Amended Motion)?

Respectfully, Respondent is a little surprised at the Appellant's argument on page 5 of its Amended Motion. Appellant (again with no citation to any authority concerning this final argument) argues that the question of whether or not the reconstruction of the record by the lower court would "circumvent any judgment of the Circuit Court (the "Court of Record") and its role to reconstruct the record."

To the contrary, Respondent continues to believe that this Court's Order, permits the Lower Court, to the best of its ability, is to reconstruct the record, and then for this Court to make the ultimate determination whether or not the Lower Court's attempts, supplemented if necessary as permitted by law or prior practice, to permit meaningful appellate review.

Summary & Conclusion

S.C. Appellate Rule 240 calls for more than a mere argument but some support by citation in either Law or in the Rules of Procedure. Appellant continues, however, even after this matter has been specifically called to his attention to argue in his Summary & Conclusion (Pg. 6) that this rule puts the "cart before the horse." Respectfully,

Respondent disagrees and believes that arguments made in this type of Motion call for some type of citation of authority. On this ground alone, the Motion should be denied.

Second, on the merits, Respondent continues to believe that he has the right to have the evidence in this case transcribed (and will formally make that request in a proper motion to the Lower Court before the Court holds a hearing on this matter) based upon the very rules of S.C. Appellate Procedure.

Third, and finally, the Respondent does not believe that following this Court's Order in any way, shape, or form, is tantamount to circumvent any judgment of the Circuit Court.

Accordingly, for any or all of the above reasons, Respondent asks that Appellant's Second Attempt to Modify this Court's prior Order should be denied.

Very Respectfully Submitted,

Stephen A. Spitz /by Susan Vos

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Attorneys for Respondent

August 30, 2013
Hilton Head Island, South Carolina

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CERTIFICATE OF SERVICE

I, John Bowen, do hereby certify that I have this date served one (1) copy of the Respondent's Second Reply to Appellant's Motion to Modify 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:

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August 30, 2013

VIA U.S. MAIL
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
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 Second Reply to Appellant's Motion to Modify and Certificate of Service. 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