

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2024-001598
Case No. 2013-CP-42-1569

Kenneth and Angela Hensley, on behalf of their minor child BLH, and All
Others Similarly Situated,..... Respondents,

v.

South Carolina Department of Social Services,..... Appellant.

**APPELLANT’S MOTION TO STRIKE MATERIALS
DESIGNATED BY RESPONDENTS FOR INCLUSION
IN THE RECORD ON APPEAL**

The Appellant South Carolina Department of Social Services moves this Court pursuant to Rule 209(b) and Rule 210(c), SCACR, for an order directing that the following documents be excluded from the Record on Appeal when it is prepared:

1. Affidavit of Judy Caldwell, with Exhibits A-H
2. Affidavit of Jessica Hanak-Coulter

These documents, which were not filed in the lower court record nor presented to Judge Mark Hayes for inclusion in the summary judgment record, have been improperly designated by the Respondents for inclusion in the Record on Appeal.

In addition to the exclusion of these documents from the Record on Appeal, the Appellant seeks an order directing that the excluded materials not be referred to nor cited in the Respondents' brief.

The Appellant's motion is addressed in greater detail in the supporting memorandum filed herewith.

The Appellant requests that all deadlines be held in abeyance until this motion is adjudicated.

LINDEMANN LAW FIRM, P.A.

BY: s/ Andrew F. Lindemann

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Department of Social Services*

March 20, 2025

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**MEMORANDUM IN SUPPORT OF APPELLANT’S
MOTION TO STRIKE MATERIALS DESIGNATED
BY RESPONDENTS FOR INCLUSION
IN THE RECORD ON APPEAL**

This is an appeal from an order by the trial court granting the Respondents’ motion for partial summary judgment as to the exhaustion of administrative remedies defense and other related issues.

As required by Rule 209, SCACR, the Respondents filed a Designation of Matter to be Included in the Record on Appeal, together with the filing of their Initial Brief of Respondents. In that filing, the Respondents have designated two affidavits that have not been filed in the lower court record and were not presented to Judge Mark Hayes at the motion hearing held on June 5, 2024, nor in the materials submitted to Judge Hayes prior to that motion hearing.

Specifically, the Respondents have designated the Affidavit of Judy Caldwell, with Exhibits A-H, and the Affidavit of Jessica Hanak-Coulter. Those affidavits were prepared and submitted in a prior related action that was brought and litigated to final judgment in the United States District Court and the Fourth Circuit Court of Appeals. However, as indicated, these affidavits have not been filed in the state court action nor were they presented to Judge Hayes to be part of the summary judgment record. The affidavits show no filing stamp and could not be located in the Public Index. There is also no reference to the affidavits made by either side during the motion hearing held on June 5, 2024. In fact, the Appellants' counsel made the specific point that there is "no affidavit" and "no deposition testimony" in the record before the court. (See attached Transcript, p. 46). Moreover, in his orders on appeal, Judge Hayes makes no reference to these affidavits, and there is no indication he was even aware of their existence or relied on the affidavits for any purpose.

Rule 209(b), SCACR, provides that "the Designation may only propose to include portions of the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal [See Rule 210(c)]." Rule 209(b), SCACR. Rule 210(c), SCACR, then provides that "[t]he Record shall not, however, include matter which was not presented to the lower court or tribunal." 210(c), SCACR.

Based on the foregoing discussion, the Appellant respectfully requests that this Court issue an order directing that the two affidavits (with exhibits) as identified above be excluded from the Record on Appeal when it is prepared by the Appellant. Additionally, in their initial brief, the Respondents do reference the Affidavit of Judy Caldwell (with exhibits) and the Affidavit of Jessica Hanak-Coulter. Therefore, the Court is further requested to order that the excluded materials not be referred to nor cited in the Respondents' brief. In order to make that

correction, the Appellant has no objection to the Respondents being given an opportunity to file an amended brief with the Appellant being permitted to then file an amended reply brief.

Respectfully submitted,

LINDEMANN LAW FIRM, P.A.

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March 20, 2025

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STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG) IN THE COMMON PLEAS COURT

B.L.S.,)
Plaintiff,) TRANSCRIPT OF RECORD
-vs-) 2013-CP-42-01569

South Carolina Department)
of Social Services,)
Defendant.) June 5, 2024
Spartanburg, South Carolina

B E F O R E:
HONORABLE J. MARK HAYES, II, JUDGE

A P P E A R A N C E S:
TIMOTHY RYAN LANGLEY, ESQUIRE
JAMES FLETCHER THOMPSON, ESQUIRE
Attorneys for the Plaintiff

ANDREW F. LINDEMANN, ESQUIRE
JOEL STEVE HUGHES, ESQUIRE
Attorneys for the Defendant

Linda D. Moffitt
Circuit Court Reporter

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No sworn testimony.

No exhibits entered into evidence.

1 scheme dealing with the Department of Employment and work
2 Force, which is what was at issue in Robinson, is 41-35 --
3 I'm sorry. It's 41-35-660, and that's entitled appeals.

4 And the very first sentence says, "The claimant or any
5 other interested party may file an appeal from an initial
6 determination and redetermination or subsequent
7 determination not later than ten days after the
8 determination was mailed to his last known address."

9 Now, I highlight that again because it uses the word
10 may. That doesn't mean that you don't have to appeal and
11 you can file a private right of action in circuit court.

12 Clearly Robinson doesn't say that. It says absolutely
13 the opposite. No. You can't do that. You have to --
14 there are administrative remedies. You have to exhaust
15 them.

16 So, again, Your Honor, I would strongly suggest to the
17 Court not to get bogged down with the word may that was
18 used not in the statute, not in the regs, but was used in
19 the adoption subsidy agreement.

20 And of course there's no evidence before Your Honor.
21 There's no affidavit; there's no deposition testimony.
22 There's nothing in the record before Your Honor of
23 admissible evidence to show that the Mr. and Mrs. Hensley
24 intended to pursue this matter in either 2002 and 2004 but
25 thought it was optional.

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CERTIFICATE OF SERVICE

Pursuant to Section (d)(1) of the Supreme Court’s Order Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended April 24, 2024), the undersigned employee of Lindemann Law Firm, P.A., counsel for the Appellant, does hereby certify that service of **Appellant’s Motion to Strike Materials Designated by Respondents for Inclusion in the Record on Appeal and Memorandum in Support of Appellant’s Motion to Strike Materials Designated by Respondents for Inclusion in the Record on Appeal** in the above-captioned matter was made upon all counsel of record by email only this the 20th day of March 2025, as follows:

T. Ryan Langley, Esquire
Matthew T. Foss, Esquire
Langley Law Firm
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*Also Admitted in North Carolina

March 20, 2025

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SC Court of Appeals

Via Email Only

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Email: ctappfilings@sccourts.org

RE: Kenneth and Angela Hensley, on behalf of their minor child BLH, and All Others Similarly Situated v. South Carolina Department of Social Services
Appellate Case Number: 2024-001598
Civil Action Number: 2013-CP-42-1569
Our File Number: 103.8851

Dear Ms. Kitchings:

Pursuant to Section (b)(2)the Supreme Court's Order Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended April 24, 2024), please find enclosed for filing the **Appellant's Motion to Strike Materials Designated by Respondents for Inclusion in the Record on Appeal** and **Memorandum in Support of Appellant's Motion to Strike Materials Designated by Respondents for Inclusion in the Record on Appeal** with regard to the above referenced appeal. By copy of this letter, I am serving copies on all counsel of record by email only pursuant to Section (d)(1) of the same Supreme Court Order.

The Appellant is a state agency and is, therefore, exempt from the filing fee. If you have any questions, please advise. Thank you for your assistance.

Sincerely,

LINDEMANN LAW FIRM, P.A.

Andrew F. Lindemann

AFL/jac
Enclosures

cc: T. Ryan Langley, Esquire (w/ Enclosures, Via Email Only)
Matthew T. Foss, Esquire (w/ Enclosures, Via Email Only)
James F. Thompson, Esquire (w/ Enclosures, Via Email Only)