

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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JAN 30 2015

SC Court of Appeals

APPEAL FROM Horry COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Case No. 2014-001685

Horry Electric Cooperative, Inc.Appellant

vs.

South Carolina Public Service Authority and Southern Electric International, Inc.,
Defendants,

Of whom South Carolina Public Service Authority is the Respondent

APPELLANT'S REPLY

1. In this case, the circuit court judge obviously misconstrued the statute of repose and the law governing the statute of limitations. This is evident and proved by the Respondent's response in its initial brief. Rather than address these principal issues, much of the Respondent's brief is devoted to vilifying the Appellant and its counsel and to criticizing the manner in which the underlying case was handled. Only a few pages are devoted to these principal issues. Presumably, the Respondent has attacked the Appellant and its counsel in the hope of diverting the court's attention from its own misconduct.

According to the Amended Complaint, Respondent knew its Good Cents program had a problem, failed to tell the Appellant, and encouraged the Appellant to participate in the program. Much of Respondent's argument is based upon matters that are outside the record and that were never before the circuit court judge. The Appellant must trust this Court to see Respondent's argument for what it is. The Appellant must trust this Court to disregard the many vituperative remarks made by Respondent against Appellant. The Appellant must trust this Court to focus sharply on whether the circuit court judge erred in granting the Respondent's motion to dismiss.

2. The Appellant is entitled to have the Rules of Appellate Practice followed and enforced. Rule 101(a) describes the scope of Appellate Court Rules, stating in part:

"Part II governs practice and procedure in appeals, petitions and motions in the Supreme Court and the Court of Appeals."

Rule 210(c), SCACR is clear and unambiguous. Rule 210(c) provides in pertinent part the following:

"The Record on Appeal shall include all matter designated to be included by any party under Rule 209 and shall comply with the requirements of Rule 267. **The Record shall not, however, include matter which was not present to the lower court or tribunal.** Matter contained in the Record on Appeal shall be arranged in the following order: the title page, index, orders, judgments, decrees, decisions, pleadings, transcripts, charges, exhibits and other materials or documents, and a certificate by appellant." Emphasis supplied.

Rule 212(a), SCACR, makes it clear that only that which was before the circuit court judge can be part of the record.

"The appellate court may require copies of all or any part of the transcript of proceedings **or other matter which was before the lower court or administrative tribunal** to be sent p for its inspection and consideration. It may likewise require a report of the trial or hearing, or of any matter relative

thereto, to be made by the trial judge or administrative tribunal. These matters shall become part of the Record on Appeal.” Emphasis supplied.

The South Carolina Appellate Court Rules were promulgated and adopted by the South Carolina Supreme Court. They have the force of law. They are binding on the Appellant, the Respondent and this Court. The Respondent cited no authority which would authorize a party to submit matters which were not before the circuit court judge.

Respondent cited the following cases to support its position that matters not presented to the circuit court judge can be presented on appeal.

- a. *Red Oak Lands, Inc. v. Lane*, 268 S.C. 631, 235 S.E.2d 718 (1977)
- b. *National Grange Mutual Insurance Company v. Butler*, 253 S.C. 325, 170 S.E.2d 371 (1969)
- c. *Butler*, 253 S.C. at 327, 170 S.E.2d at 327 (1969)
- d. *Freeman v. McBee*, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct. App. 1984)
- e. *South Carolina Public Interest Foundation v. Greenville County*, 401 S.C. 377, 737 S.E.2d 502 (2012)
- f. *Treasured Arts v. Watson*, 319 S.C. 560, 564, 463 S.E.2d 90, 92 (1995)
- g. *Wise v. Wise*, 394 S.C. 591, 715 S.E.2d 117 (Ct. App. 2011)
- h. *Spivey v. Carolina Crawler*, 367 S.C. 154, 624 S.E.2d 435 (Ct. App. 2005)

Cases (a) to (d) were decided prior to September 1, 1990, which was the effective date of the adoption of the South Carolina Appellate Court Rules. As to the remaining cases decided after September 1, 1990, none constitute authority for including matters not presented to the trial judge in the Record on Appeal or address Rule 210(c).

3. The Respondent wants this appeal stayed pending a decision on its motion to

dismiss the complaint in Civil Action 2014-CP-26-6571 filed by the Appellant on October 7, 2014 for equitable indemnification. However, a stay is the last thing that needs to happen.

The Appellant commenced this action on January 23, 2013. The Respondent did not answer but filed a motion to dismiss. When the Appellant served discovery requests, the Respondent frustrated Appellant's effort at discovery by filing a motion for protective order. This action is now two years old and it is still in the pleading stage. If this Court reverses the order of the circuit court judge, which dismissed all causes of action including the cause of action for equitable indemnification, the Appellant will dismiss Civil Action 2014-CP-26-681. If, however, this Court affirms the order of the circuit court judge, the Appellant will proceed with Civil Action 2014-CP-26-681.

CONCLUSION

When the South Carolina Supreme Court adopts rules which have the force of law, a party should be entitled to ask and insist that the rules be enforced. The Appellant's motion to strike should be granted.

As for a stay of this appeal, this Court should keep in mind that justice delayed is justice denied. This case is the perfect illustration. The case has yet to proceed through the pleading stage. The Respondent has prevented any meaningful investigation into the facts in this case for just over two years. A stay of the appeal would only add additional delay and justice would be denied. Instead of staying this appeal, the Court should keep it on tract for early argument and disposition.

Appellant's motion to strike should be granted. The judgment in favor of the Respondent should be reversed such that Appellant could proceed on all issues.



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Columbia, South Carolina
January 30, 2015

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PROOF OF SERVICE

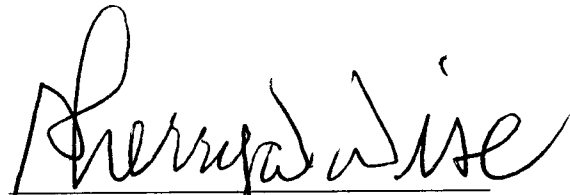
I, Sherry W. Wise, of Pope D. Johnson, III, Attorney at Law, hereby certify that I have served B. Rush Smith, III, attorney for Respondent, with the following pleadings by mailing a copy of same, postage prepaid and return address clearly indicated, to him at the following address this 30th day of January, 2015.

COUNSEL SERVED:

B. Rush Smith, III, Esquire
Nelson Mullins Riley & Scarborough, LLP
1320 Main Street, 17th Floor
Columbia, SC 29201

PLEADINGS:

Appellant's Reply


Sherry W. Wise

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SC Court of Appeals

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January 30, 2015

(Via Hand Delivery)

Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

RE: Horry Electric Cooperative, Inc. v. South Carolina Public Service Authority
Appellate Case No. 2014-001685

Dear Ms. Kitchings:

Enclosed herewith are the original and seven (7) copies of Appellant's Reply regarding the above-referenced action. Please file the original and six copies of the Reply and clock and return the additional copy to me.

With a copy of this letter to B. Rush Smith, III, attorney for the Respondent, I am serving a copy of the Reply upon him.

Sincerely,


Pope D. Johnson, III

PDJIII/sww
Enclosures

cc: B. Rush Smith, III, Esquire