

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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AUG 07 2015

APPEAL FROM SPARTANBURG COUNTY
Brian M. Gibbons, Circuit Court Judge

SC Court of Appeals

Case No. 2013-CP-42-1569

BLH by parents/general guardians Kenneth and
Angela Hensley, and on behalf of all others similarly
situated, Respondent,

v.

South Carolina Department of Social Services, Appellant.

**APPELLANTS' SUPPLEMENTAL RETURN TO
MOTION TO DISMISS APPEAL**

The Appellant South Carolina Department of Social Services ("DSS") presents this supplemental return in response to the Court's letter dated July 16, 2015, inviting the parties to file "supplemental memoranda supporting or opposing the pending motion to dismiss." Subsequent thereto, the Court sent an additional

letter dated August 4, 2015, advising Respondent's counsel as follows: "If you wish to renew your motion to dismiss, you must file a new motion with the Court."

The Appellant contends that the pending motion to dismiss is now moot -- which appears to be consistent with the Court's recent correspondence as described above which directs the Respondent to file a new motion to dismiss, if she so chooses. By way of background, the Appellant filed the original Notice of Appeal on October 16, 2014. The Respondent subsequently filed a motion to dismiss that appeal on or about October 31, 2014. The Appellant served its return to that motion on November 10, 2014, pointing out that a Rule 59(e) motion remained pending in the Circuit Court, but due to preservation reasons and concerns with a potential argument that the pending Rule 59(e) motion was successive (which argument was never made), the Appellant proceeded with filing the Notice of Appeal. This Court agreed and issued an order filed December 2, 2014, staying the appeal and remanding for a decision on the pending Rule 59(e) motion. A hearing was subsequently held on February 27, 2015, by Circuit Judge Brian M. Gibbons, who issued an order filed April 30, 2015, granting in part and denying in part the Rule 59(e) motion. The Appellant then filed an Amended Notice of Appeal on June 8, 2015, which included an appeal of the latest order issued by Judge Gibbons.

Given the filing of the Amended Notice of Appeal which includes an appeal from the latest Circuit Court order which granted some relief and denied other relief, the Respondent's pending motion to dismiss appeal is now moot. That pending motion does not address the Amended Notice of Appeal or the latest Circuit Court order. The Respondent's counsel sent a letter dated July 23, 2015, attempting to "renew" their prior motion to dismiss and then offering new arguments. However, as indicated, the Court, by letter dated August 4, 2015, has now advised the Respondent's counsel that they are required to file a "new motion" with the Court. Given this procedural posture, the Appellant submits that the pending motion is moot – which is consistent with the Court's directions to Respondent's counsel – and the Appellant will respond to the merits of the "new motion" should one be filed.

Nonetheless, the Appellant continues to maintain that the orders entered by the Circuit Court, including the most recent order in particular, present issues that are immediately appealable under existing precedent including such cases as *Salmonsens v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81 (2008); *Doe v. Howe*, 362 S.C. 212, 607 S.E.2d 354 (2004); and *Ex Parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 630 S.E.2d 464 (2006). However, the Appellant will wait to provide further discussion on the question of appealability, if the Court so directs, if that issue is

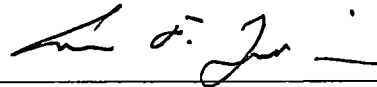
re-asserted by the Respondent with the filing of a "new motion" per the Court's recent direction.

Moreover, the Appellant would respectfully submit that any motion to dismiss is actually premature at this point. Under the South Carolina Rules of Appellate Procedure, the appealing party is required to set forth the issues for appeal at the first instance *in its initial brief* and not earlier in the appellate process. *See*, Rule 208(b)(1)(B), SCACR. Hence, any argument that an appeal is raising issues that are not immediately appealable is actually premature at least until the Appellant's initial brief is filed and such issues may be identified and fully briefed so that the Court may make an informed determination on appealability.

Based on the foregoing discussion, and the directions of the Court per the August 4, 2015 letter, the Appellant requests that the Respondent's pending motion to dismiss be denied as moot. In the event a "new motion" is filed, per the Court's direction, to challenge the Amended Notice of Appeal and the appealability of the latest Circuit Court order, the Appellant reserves the right to address those issues at that point in greater detail. Alternatively, should the Court agree with the Appellant's position that the question of appealability is premature until the Appellant files its initial brief, the Appellant believes it would be appropriate for the Court to direct the Appellant to proceed with filing its initial brief and to address the question of appealability as part of that brief.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY:  _____

ANDREW F. LINDEMANN

JOEL S. HUGHES

1611 Devonshire Drive

Post Office Box 8568

Columbia, South Carolina 29202

(803) 806-8222

*Counsel for Appellant South Carolina
Department of Social Services*

Columbia, South Carolina

August 7, 2015

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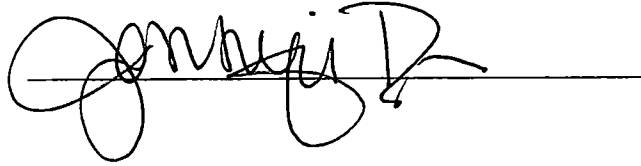
South Carolina Department of Social Services, Appellant.

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Appellant, does hereby certify that service of the **Appellants' Supplemental Return to Motion to Dismiss Appeal** in the above-captioned matter was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 7th day of August 2015:

Charles J. Hodge, Esquire
T. Ryan Langley, Esquire
Hodge & Langley Law Firm, P.C.
Post Office Box 2765
Spartanburg, South Carolina 29304-2765

James Fletcher Thompson, Esquire
Law Offices of James Fletcher Thompson, LLC
Post Office Box 1853
Spartanburg, South Carolina 29304

A handwritten signature in black ink, appearing to read "James F. Thompson", is written over a horizontal line. The signature is stylized and cursive.

DAVIDSON & LINDEMANN, P.A.

ATTORNEYS AND COUNSELLORS AT LAW

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AUG 07 2015
Dated Copy
SC Court of Appeals

Joel S. Hughes
Justin Bagwell
David A. DeMasters
Steven R. Spreeuwiers
Todd R. Flippin

Of Counsel
Kenneth P. Woodington

William H. Davidson, II
Andrew F. Lindemann*
James M. Davis, Jr.†
Robert D. Garfield
Michael B. Wren

1611 Devonshire Drive, Second Floor
Post Office Box 8568
Columbia, South Carolina 29202-8568
Telephone: (803) 806-8222
Facsimile: (803) 806-8855
www.dml-law.com

*Also Admitted In North Carolina
†Certified Mediator

August 7, 2015

Writer's Email: alindemann@dml-law.com

Hand Delivered

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: BLH (dob 2/20/97) by parents/general guardians Kenneth and Angela Hensley, AND on behalf of all others similarly situated v. South Carolina Department of Social Services
Appellate Case No. 2014-002254
Civil Action Number: 2013-CP-42-1569
Our File Number: 103.8851

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven copies of **Appellants' Supplemental Return to Motion to Dismiss Appeal** in the above referenced matter. Please file the original and return a clocked-in copy to me by way of my courier.

By copy of this letter, I am serving copies on all counsel of record.

Thank you for your assistance in this matter.

Sincerely,

DAVIDSON & LINDEMANN, P.A.



Andrew F. Lindemann

AFL/jmb
Enclosures

cc: Charles J. Hodge, Esquire (w/ Enclosure)
T. Ryan Langley, Esquire (w/ Enclosure)
James Fletcher Thompson, Esquire (w/ Enclosure)