

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

RECEIVED

DeAndrea G. Benjamin, Fifth Judicial Circuit Court Judge

SEP 21 2015

SC Court of Appeals

Appellate Case No. 2015-000061

Brenda G. Harmon,..... Appellant,

v.

Joel E. Johnson, D.M.D.,..... Respondent.

**RESPONDENT'S MOTION TO DISMISS APPEAL OR IN THE ALTERNATIVE
MOTION TO COMPEL**

Julius W. McKay, II
Kelli L. Sullivan
Courtney R. Pawley
McKay, Cauthen, Settana & Stublely,
P.A
1303 Blanding Street (29201)
P.O. Drawer 7217
Columbia, SC 29202
(803) 256-4645 - Phone
(803) 765-1839 - Fax
jmckay@mckayfirm.com
ksullivan@mckayfirm.com
cpawley@mckayfirm.com
Attorneys for Respondent

MOTION TO DISMISS

Respondent hereby moves to dismiss this appeal on the grounds that the Appellant has failed to provide an adequate Record on Appeal despite being notified of its deficiencies by the Clerk of the Court of Appeals and being given multiple opportunities to perfect the deficiencies.

MOTION TO COMPEL

Respondent hereby moves to compel the Appellant to include the matters designated in Respondent's Designations of Matter in the Record on Appeal.

**MEMORANDUM FOR MOTION TO DISMISS OR IN THE ALTERNATIVE
MOTION TO COMPEL**

Under Rule 210(a), South Carolina Rules of Appellate Procedure, “[w]ithin thirty (30) days after service of the last brief, the appellant shall serve a copy of the Record on Appeal on each party who has served a brief. Proof of service of the Record shall be immediately filed with the clerk of the appellate court.” As for the content of the Record on Appeal under Rule 210(c), SCACR it “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 presented to the lower court or tribunal.” Rule 210, SCACR also sets forth guidelines for how the content of the Record on Appeal is to be arranged. Furthermore, under Rule 211, SCACR, the parties to an Appeal have 20 days after service of the Record on Appeal in which to file and serve their final briefs.

On June 15, 2015, the appellant filed with the Court of Appeals a document purported to be the “Record on Appeal”. However, that document did not comply with Rules 210 or 267, SCACR. On June 18, 2015, the Clerk of the Court of Appeals informed Appellant of several of the deficiencies and requested that an appropriate Record on Appeal be submitted within 10 days. On June 26, 2015 counsel for Respondent received a new document entitled “Record on Appeal”. The

second document does not include all of the documents listed by the Respondent in his Designation of Matters to be Included in the Record on Appeal¹ and therefore again fails to comply with Rule 210, SCACR. The Appellant's second version of the "Record on Appeal" is also not in compliance with Rule 210, SCACR because it includes documents that were not presented to the circuit court.² Appellant's third version of the Record on Appeal filed on July 17, 2015 contains the same items as the second version but was properly numbered and captioned.

Respondent complied with the Court of Appeals Order and filed a Memorandum containing the documents that should rightfully be included in the Record on Appeal in compliance with the South Carolina Rules of Civil Procedure and Respondent's Designations of Matter on September 11, 2015. On September 15, 2015 the Appellant filed another packet of information and correspondence. This packet included photos, letters, notes, and a copy of the Charters of Freedom that were not before the lower court. Some of the documents had also already been improperly included in the various iterations of the "Record on Appeal". The filing still failed to include the documents that are necessary for an adequate Record on Appeal including all nine of the items that were reiterated from Respondent's Designations of Matter in Respondent's Memorandum:

1. Complaint;
2. Affidavit of Brenda Harmon;
3. Defendant's Motions to Dismiss;

¹ Appellant has failed to include the following documents in the Record on Appeal that were included in Respondent's Designations of Matter: Complaint, Affidavit of Brenda Harmon, Defendant's Motions to Dismiss, Defendant's Answer, Certificate of Service with Defendant's Answer, Plaintiff's Response, Plaintiff's willful disregard document, Form 4 Order signed by Judge Benjamin, and Order of Dismissal.

² Appellant included the following documents in the "Record on Appeal" that were not presented to the lower court: prescription for oral surgery, a letter from Dr. McKenzie to Dr. Johnson, documents from Dr. Bhadori, medical records, and the names of witnesses although no witnesses were called at the hearing or deposed. Appellant additionally designated other things that Appellant wanted in the Record on Appeal but failed to include: notes of daily suffering, her mouth and gums, pictures, and The Charters of Freedom. The latter documents were not presented to the lower court.

4. Defendant's Answer;
5. Certificate of Service with Defendant's Answer;
6. Plaintiff's Response;
7. Plaintiff's willful disregard document;
8. Form 4 Order signed by Judge Benjamin; and
9. Order of Dismissal.

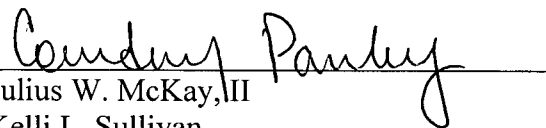
Therefore, because the purported Record on Appeal submitted by Appellant still does not comply with the South Carolina Rules of Appellate Procedure, it is clear that the document submitted by Appellant is an inadequate Record on Appeal. Further, the fact that the purported Record on Appeal does not contain matters referred to in the Respondent's Initial Brief and included in Respondent's Designations of Matter renders it impossible for Respondent to cite to the Record in his final brief.

The South Carolina Supreme Court has long held that it is the burden of the appealing party to produce an appropriate Record on Appeal. *Germain v. Nichol*, 278 S.C. 508, 509, 299 S.E.2d 335 (1983). In *Johnson v. Dept. of Prob., Parole and Pardon*, 372 S.C.279, 641 S.E.2d 895 (2007), the Supreme Court upheld the ruling of the Court of Appeals' affirmation of the lower court. The Court of Appeals opinion was unpublished, but the Supreme Court made note of the fact that the lower court refused to hear the merits of the Appellant's case because of its failure to provide an appropriate Record on Appeal. More specifically, in *Johnson* the appellant failed to include in the Record on Appeal the final order that was the basis of the Department's appeal. As in *Johnson*, the appellant has failed to include in the Record on Appeal the Form 4 Order signed by Judge Benjamin and the Order of Dismissal. Both of these items were set forth in Respondent's Designations of Matter. Therefore, Respondent respectfully moves this Court to dismiss Appellant's appeal based

on her failure to provide an appropriate Record on Appeal, especially in light of the fact that she has been instructed on the requirements by the Clerk of the Court of Appeals and afforded multiple opportunities to correct the deficiencies.

In the alternative, Respondent respectfully moves this court to compel the Appellant to include those documents designated by the Respondent in Respondent's Designations of Matter filed on May 26, 2015 and listed in Respondent's Memorandum to the Court filed September 11, 2015. Respondent also moves this court to compel the Appellant to remove those documents from the Record on Appeal that were not before the trial court and therefore improperly included in Appellant's three previous versions on the Record on Appeal. Respondent further requests that all time limits for filing final briefs be stayed pending the Court's decision with regard to this Motion.

Respectfully Submitted,



Julius W. McKay, III

Kelli L. Sullivan

Courtney R. Pawley

McKay, Cauthen, Settana & Stublely, P.A.

1303 Blanding Street (29201)

P.O. Drawer 7217

Columbia, SC 29202

(803) 256-4645 - Phone

(803) 765-1839 - Fax

jmckay@mckayfirm.com

ksullivan@mckayfirm.com

cpawley@mckayfirm.com

Attorneys for Respondent

Columbia, South Carolina
September 21, 2015

RECEIVED

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

SEP 21 2015

SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea G. Benjamin, Fifth Judicial Circuit Court Judge

Appellate Case No. 2015-000061

Brenda G. Harmon,..... Appellant,

v.

Joel E. Johnson, D.M.D.,..... Respondent.

CERTIFICATE OF SERVICE

I certify that I have served the *Respondent's Second Motion to Dismiss or in the Alternative Motion to Compel* upon Appellant, Brenda G. Harmon, by depositing a copy of it in the United States Mail, postage prepaid, on September 21, 2015, addressed to Brenda G. Harmon, 2110 Woodfield Drive, Columbia, SC 29223.

Allison Driggers

Allison Driggers, for
Julius W. McKay, II
Kelli L. Sullivan
Courtney R. Pawley
McKay, Cauthen, Settana & Stublely, P.A.
1303 Blanding Street (29201)
P.O. Drawer 7217
Columbia, SC 29202
(803) 256-4645 - Phone
jmckay@mckayfirm.com
ksullivan@mckayfirm.com
cpawley@mckayfirm.com
Attorneys for Respondent