THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM THE LEXINGTON COUNTY
Court Of Common Pleas

Frank R. Addy, Circuit Court Judge

APPELLATE CASE NO.: 2014-000091

James Spencer, individually and on behalf of the Estate of Doris Holt and on behalf of Southern Holdings, Inc.; and Irene Santacroce, Plaintiffs,

Of whom James Spencer is the Appellant, Appellant,

v.

John R. Rakowsky, Adrian L. Falgione, and The Law Offices of Adrian Falgione, LLC, Defendants,

Of whom John R. Rakowsky and Adrian L. Falgione are the Respondents.

RESPONDENT ADRIAN L. FALGIONE'S RETURN TO APPELLANT'S MOTION TO REMAND

Respondent Adrian L. Falgione ("Falgione"), by and through his undersigned counsel, hereby submits this Return in opposition to the Motion Pursuant to SCAR 212(b) to Remand and Supplement Record filed November 13, 2015 by Appellant James Spencer ("Appellant" of "Spencer").

This is an appeal from an Order of Dismissal in a legal malpractice case. Appellant moves under Rule 212(b) for this Court to remand this case because he has been unable to locate material documents he claims the trial court cited and relied on in deciding the Respondents' motions to dismiss. However, there is no basis, factually or

legally, to remand this case to reconstruct the record. Furthermore, there is no good ground to support Appellant's argument that he "had no idea he was attending a hearing that had no authority to have been called in the first place and that Judge Addy had no authority to grant or rule against the motion for mistrial by the Appellant." (App.'s Mot. to Remand p. 6.) Consequently, Appellant's motion violates Rule 11(a), SCRCP, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §§ 15-36-10 to 100, ("FCPSA") and the Court should strike the motion and award sanctions.

ARGUMENT

I. Appellant's Motion should be denied because no portion of the record needs to be reconstructed.

Appellant seeks remand and reconstruction of the record pursuant to Rule 212(b), SCACR. That Rule provides,

> With the written consent of all attorneys of record, a party may supplement the Record on Appeal at any time before argument commences. Without such consent or after argument commences, a party desiring to supplement the Record on Appeal must move the appellate court for leave to do so. In response to that motion, the other party(s) shall designate any supplemental materials which that party desires to add if the Court grants the motion.

In addition, Appellant cites several cases discussing the authority of an appellate court to remand a case to have the record reconstructed where a recording or transcript of the hearing before the lower court has been damaged, destroyed or lost. In China v. Parrott, no transcript of the trial was available because portions of the court reporter's trial notes were lost before they were transcribed. 251 S.C. 329, 332, 162 S.E.2d 276, 277 (1968). Therefore, "[i]n order to settle the record on appeal, it became necessary for the trial judge to determine what transpired . . . ." 251 S.C. at 334, 162 S.E.2d at 278.

Similarly, Dolive v. J.E.E. Developers, Inc., 308 S.C. 380, 418 S.E.2d 319 (Ct. App. 1992), involved damage to portions of the recording from proceedings before a zoning Bbard. 308 S.C. at 382, 418 S.E.2d at 320-21. As a result, the record on appeal omitted the respondent's evidentiary presentation to the zoning board. Id. On appeal, the circuit court allowed the respondent to reconstruct the record by affidavits rather than remanding the matter to the zoning board for a hearing *de novo*. Id. at 382, 418 S.E.2d at 321. The Court of Appeals found no error in the circuit court's decision. Id. at 383, 418 S.E.2d at 321.

In Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002), the petitioner sought belated appellate review of a 1992 post-conviction relief (PCR) case. Because no recording or transcript was available from the PCR hearing held twenty years prior, 352 S.C. at 218-19, 574 S.E.2d at 201, the Court remanded the case for a hearing to reconstruct the record. Id. at 221, 574 S.E.2d at 203.

Finally, in Koon v. State, 358 S.C. 359, 595 S.E.2d 456 (2004), another petitioner in a PCR case sought remand to reconstruct the record of his prior PCR case because no transcript was available. 358 S.C. at 367, 595 S.E.2d at 460. The Court declined the petitioner's motion to remand the case for reconstruction of the record despite the lost transcript. Id. See also State v. Ladson, 373 S.C. 320, 324, 644 S.E.2d 271, 273 (Ct. App. 2007) ("Most jurisdictions require an appellant to demonstrate specific prejudice flowing from an incomplete or reconstructed record.").

Appellant's reliance on Rule 212(b) and case law is misplaced. In stark contrast to the cases cited, Appellant can point to no missing transcript or recording in this case. This is an appeal of an Order granting the respondents' motions to dismiss. The trial

court conducted a hearing on those motions on June 5, 2013. There is no dispute about what occurred during the June 5, 2013 hearing. To the extent the Appellant contends a dispute exists, the parties and the Court have the benefit of a full and complete transcript from the hearing. Thus, contrary to Appellant's arguments, there is no need to reconstruct the record of what transpired during that hearing. All matter the parties presented to the trial court has been available to the Appellant, see Rule 210(C), SCACR ("The Record shall not . . . include matter which was not presented to the lower court or tribunal."), and none of the materials at issue in Appellant's motion to remand are cited or referred to in the trial court's Order of Dismissal.

Finally, nothing in Appellant's motion has established any prejudice he has suffered. See State v. Ladson, supra. Appellant argues he is prejudiced because the materials he cannot obtain formed a basis of the trial court's findings. That argument, however, is premised on the misconception that materials forwarded from another circuit judge were "a basis, and possibly...the sole basis...for the decisions reached by Judge Addy[.]" (App.'s Mot. to Remand p.6.) The Order of Dismissal shows otherwise. (O. of Dismissal, August 19, 2013, Exhibit A.) ("After careful consideration of the allegations in the complaint and the arguments of the parties at the hearing. . ."). The trial court clearly set forth its findings of fact and conclusions of law in the Order of Dismissal based on the allegations Appellant stated in his complaint. Nowhere in the Order did the court indicate any reliance on the materials Appellant identifies in his motion. Rather, the trial court duly considered Appellant's arguments and dismissed his case because there was no question that Appellant (i) failed to file an expert affidavit pursuant to the FCPSA and (ii) filed suit more than three years after he knew or should have known his

claims had accrued. Id. The materials at issue in Appellant's motion to remand have no relevance to the findings in the Order of Dismissal or to the issues on appeal. Accordingly, Appellant's inability to obtain the materials has no prejudicial affect on the merits of his appeal.

For these reasons, Appellant's motion to remand should be denied.

II. Appellant's Frivolous Arguments.

In support of his motion, Appellant argues that he "had no idea he was attending a hearing that had no authority to have been called in the first place and that Judge Addy had no authority to grant or rule against the motion for mistrial by the Appellant." (App.'s Mot. to Remand p. 6.) The transcript from the June 5th hearing clearly shows there is no good faith basis for that representation:

> THE COURT: One housekeeping matter that I do need to take care of before we proceed: I only received Judge Griffith's letter last week. And I received a copy of the -- most of the materials which had been provided to him. And the letter that I'm talking about is dated May the 30th, in which Judge Griffith informed Ms. Dudgeon -- Dudgeon, Mr. Bruner, and Mr. Spencer that he was recusing himself from further action on the case.
>
> The letter also indicated that I would be able to hear these motions -- or the pending motions today. And in that material that I reviewed yesterday, it included the order of Judge Toal -- Justice Toal, rather -- dated January 17th of this year, which appointed Judge Griffith as chief judge for administrative purposes to hear this particular matter. Apparently, Judge McMahon and Keesley had conflicts on hearing the case.
>
> I contacted court administration because I was a little concerned about the -- what was in the body of the order. It basically indicated that Judge Griffith had been appointed. Judge Griffith had been under the impression, based on a conversation I had with him last night, that because he was chief judge for administrative purposes, he could appoint this matter or assign this matter to me or some other judge.
>
> In conversing with court administration last night, what they basically said was that -- that that's an incorrect reading of the Chief Justice's order, but that what they could do is get a -- do another order, in light of Judge Griffith's conflict; appoint somebody else as chief admin judge to hear this

> matter: either appoint me or appoint somebody else who could then assign it to me.
>
> The gentleman, Motte Talley, who I spoke with late yesterday evening, told me that he's on vacation for the next two days so -- or next three days -- today, tomorrow, and Friday. So he was not going to be able to do an order last night in advance of this hearing. Usually, the way that we handle these things is that they're done *nunc pro tunc* when they eventually get around to it. Is everybody okay proceeding today? is what I'm basically asking, with the anticipation that court administration will be issuing this order, probably sometime early next week, giving me authority to hear this matter. And -- and so basically what I'm asking is: Is it -- the -- what I'm saying is the order is en route; it's just not here yet. Everybody okay to go forward today? Mr. Spencer, you're all right with that?
>
> MR. SPENCER: Yes, sir.

(Transcript of June 5, 2013 Hearing, page 5, line 2 to page 6, line 23, Exhibit B.) The Order of Dismissal made a similar finding:

> The parties consented on the record to allow the undersigned to hear this matter pending issuance of an order granting this Judge jurisdiction. That order was issued on June 27, 2013, *nunc pro tunc* June 5, 2013.

(O. of Dismissal p. 1.) It is indisputable that the jurisdictional issue was explained to Spencer and that he consented to the trial court hearing the motions and deciding them pending an order *nunc pro tunc*. The Order Nunc Pro Tunc was issued June 25, 2013. (O. Nunc Pro Tunc, June 25, 2013, Exhibit C.) In addition to giving his consent on the record during the motions hearing, Appellant waived any challenge to the court's authority by failing to raise it in his initial brief. Thus, there is no good ground to support Appellant's argument that he "had no idea" there may be some question about the trial court's authority to hear and decide the motions. That argument is the epitome of frivolity; it serves no purpose other than to obstruct, hinder, delay and unnecessarily complicate this case. Accordingly, the Court should deny Appellant's motion and sanction the Appellant.

CONCLUSION

For these reasons, the Court should deny Appellant's motion to remand this case to reconstruct the record and should issue sanctions as it deems proper.

November 23, 2015

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Of whom John R. Rakowsky and Adrian L. Falgione are the Respondents.

PROOF OF SERVICE

I, Bridget Steele, an employee of Bruner, Powell, Wall & Mullins, LLC, attorneys for Respondent Adrian L. Falgione, certify that I served a copy of the attached *Respondent Adrian L. Falgione's Return to Appellant's Motion to Remand* by depositing a copy of it in the U.S. Mail, postage prepaid, on November 23, 2015, addressed to the *pro se* Appellant, James B. Spencer, 7001 Saint Andrews Road, Suite 183, Columbia, South Carolina 29212, and to Respondent John R. Rakowsky's attorneys of record, David W. Overstreet, Esquire and Michael B. McCall, Esquire at Carlock, Copeland & Stair, LLP, 40 Calhoun Street, Suite 400, Charleston, South Carolina 29401.

November 23, 2015

Bridget Steele

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November 23, 2015

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk of Court, S.C. Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: ***James Spencer, et al. v. John Rakowsky, et al.***
Appellate Case No.: 2014-00091
BPWM File No.: 3-1742-108

Dear Ms. Kitchings:

Enclosed herewith for filing please find an original and seven (7) copies each of Respondent Adrian Falgione's *Return to Appellant's Motion to Remand* in the above referenced action, together with a proof of service for each. Please file the original and copies and return one file stamped copy via my courier.

Thank you for your assistance in this matter. If you have any questions, please do not hesitate to contact me.

With my kindest regards, I am,

Very truly yours,

Bridget Steele

Bridget S. Steele
Legal Assistant to Benjamin C. Bruner

BCB/gh
Enclosures

cc: James B. Spencer (via U.S. Mail w/ encl.)
David W. Overstreet, Esq. (via U.S. Mail w/ encl.)
Michael B. McCall, Esq. (via U.S. Mail w/ encl.)