

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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DEC 29 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.

RESPONDENT'S MOTION TO DISMISS APPEAL

Julius W. McKay, II
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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 on two occasions and being given an opportunity to perfect the deficiencies.

MEMORANDUM FOR MOTION TO DISMISS

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 Respondents received a new document entitled “Record on Appeal”. The second document does not include all of the documents listed by the Respondents in their Designation of Matters to be Included in the Record on Appeal¹ and therefore again failed to

¹ Appellant 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

comply with Rule 210, SCACR. The Appellant's second version of the "Record on Appeal" was also not in compliance with Rule 210, SCACR because it includes documents that were not presented to the circuit court.² The document submitted by Appellant was an inadequate Record on Appeal because it failed to contain required items, and also included items not presented to the lower court. Further, the fact that the purported Record on Appeal did not contain matters referred to in the Respondent's Initial Brief and included in Respondent's Designations of Matter rendered it impossible for Respondent to cite to the Record in his final brief.

On December 2, 2013 the Court ordered that Appellant file an amended record on appeal that included the appropriate items. The Court listed 12 items in a footnote. The order specifically stated that "[a]ppellant is reminded that the record shall not include any documents that were not listed in the parties' designation of matter or any documents that were not presented to the circuit court."³ Despite the Court's order, Respondent filed a record on appeal on December 18, 2015 including several items that were either not presented to the circuit court or were not included in the parties' designation of matter, including, but not limited to documents letter or records from Dr. Gregg W. McKenzie, copies of prescriptions, letters from Dr. Hamid Bahdori, copies of case law, and conclusory statements in the "index" regarding the race or ethnicity of various individuals.⁴ The Appellant failed to include items that Respondent had designated including the Defendant's answer filed August 12, 2014 and the certificate of service serving the answer on

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.

³ Order, South Carolina Court of Appeals, December 2, 2015

⁴ Examples of some of the inappropriate items can be found at pages 2, 112, 115-118, 139-141, 142-146 148-149, and 170. Appellant also included her own comments at various locations throughout the transcript of the hearing that she filed with the record on appeal.

August 12, 2014.⁵ Finally, the Appellant included in the record on appeal several copies of the various pleadings in the case, all numbered differently.⁶ As with Appellant's previous records on appeal, the document renders it impossible to file a complete and accurate 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.

In this case, Appellant has been given three opportunities to produce a correct Record on Appeal, and has apparently willfully disobeyed the Court's order to include certain items and to remove items not submitted to the circuit court. 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 an opportunity to correct the deficiencies.

⁵ These items were specifically ordered to be included in the Court's December 2, 2015 order.

⁶ For example, Judge Benjamin's order of January 6, 2015 denying the motion for default judgment can be found at pages 19, again at 105, and again at 181, while copies of Appellant's affidavit can be found at 86 and 153. Judge Benjamin's January 6, 2015 order granting the motion to dismiss can be found at 101 and 179.

Respectfully Submitted,



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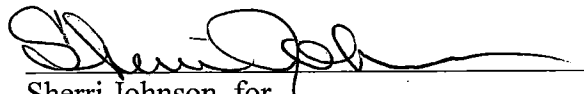
Brenda G. Harmon,Appellant,

v.

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

CERTIFICATE OF SERVICE

I certify that I have served the *Respondent's Motion to Dismiss Appeal* upon Appellant, Brenda G. Harmon, by depositing a copy of it in the United States Mail, postage prepaid, on December 29, 2015, addressed to Brenda G. Harmon, 2110 Woodfield Drive, Columbia, SC 29223.



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Of Counsel:
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December 29, 2015

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of the Court of Appeals
1220 Sentate Street
Columbia, SC 29201

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SC Court of Appeals

Re: Brenda G. Harmon v. Joel E. Johnson, DMD
Appellate Case No: 2015-000061
Our File No: 390-436

Dear Ms. Harmon:

Attached are the original and eight copies of *Respondent's Motion to Dismiss Appeal* along with our check in the amount of \$25.00 to cover the filing fee. Please return two clocked copies to our courier.

Thank you for your assistance in this matter.

Yours very truly,



Kelli L. Sullivan

KLS/saj
Enclosures