

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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JUL 19 2016

**SC SUPREME COURT**

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

DeAndrea G. Benjamin, Fifth Judicial Circuit Court Judge

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Civil Action No.: 2014-CP-40-2507  
Appellate Case No. 2016-001285

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Brenda G. Harmon, ..... Petitioner,

v.

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

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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Brenda G. Harmon  
2100 Woodfield Drive  
Columbia, SC 29223  
Petitioner

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Attorneys for Respondent

**TABLE OF CONTENTS**

Procedural History and Statement of the Case.....3-5

Issue.....6

Arguments

    I.    Because Petitioner failed to provide an appropriate record on Appeal, the  
          Petition for Writ of Certorari should be denied.....6

Conclusion.....7

Respondent Joel Johnson, D.M.D. responds to the Petition for Writ of Certorari of Petitioner Brenda Harmon as follows:

**PROCEDURAL HISTORY AND STATEMENT OF THE CASE**

Petitioner filed her Summons and Complaint alleging dental malpractice on April 17, 2014 and served Respondent on May 22, 2014. Petitioner did not file a Notice of Intent to File suit as is required by S.C. Code Ann. 15-79-125 (Supp. 2010). Petitioner failed to include with the Summons and Complaint an affidavit by an expert witness detailing any breach of the standard of care by Respondent. Along with the summons and complaint, Petitioner filed a signed affidavit detailing the date upon which the statute of limitations was to run and asserted that because of the imminent statute of limitations, she was entitled to a 45-day extension in which to file an expert affidavit.

Respondent filed a Motion to Dismiss pursuant to Rule 12(b)(6), SCRPC on May 30, 2014 that was denied with leave to re-file by Judge Alison Lee on August 11, 2014. Respondent then filed an Answer and served discovery on August 12, 2014 in which Respondent denied every allegation in the Complaint with the exception of paragraphs 1, 2, and 3. Respondent received an unstamped "Response to Representatives of Defendant's Denial" from Petitioner dated August 21, 2014 in which Petitioner acknowledged Respondent's denial of claims in Respondent's Answer and Petitioner refused to respond to discovery.

Respondent filed a second Motion to Dismiss pursuant to Rule 12(b)(6), SCRPC on September 23, 2014 due to Petitioner's failure to provide an affidavit of an expert witness as is required by S.C. Code Ann. 15-79-125 and 15-36-100 (Supp. 2010). Petitioner then sent an unstamped document entitled "Willful Disrespect & Disregard for This Case and Time to Reply. Default" to Respondent's counsel in which she again acknowledged her receipt of Respondent's

Discovery. Despite Respondent's filing and service of an Answer and discovery and Petitioner's acknowledgment of the receipt of these pleadings, Petitioner filed a Motion for Default Judgment on November 10, 2014.

In a hearing on the Motion to Dismiss and Motion for Default Judgment Judge DeAndrea Benjamin found that Respondent had timely answered the Summons and Complaint and that Petitioner failed to produce an expert witness affidavit supporting her Complaint. Judge DeAndrea Benjamin then entered an Order of Dismissal on January 6, 2015, dismissing Petitioner's Complaint with prejudice. On the same day, Judge Benjamin entered an Order Denying Plaintiff's Motion for Default Judgment because Respondent's Answer was timely filed with the court and there was a Certificate of Service noting that the Answer was served on Respondent at her last known address. An appeal to the Court of Appeals followed.

On June 15, 2015, the Petitioner 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 Petitioner 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 Appeal and therefore again failed to comply with Rule 210, SCACR. The Petitioner'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. The document submitted by Petitioner 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, 2015 the Court ordered that Petitioner file an amended record on appeal that included the appropriate items. The Court listed 12 items in a footnote in the order. 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." 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, letters 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. The Petitioner 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 August 12, 2014. Finally, the Petitioner included in the record on appeal several copies of the various pleadings in the case, all numbered differently. As with Petitioner's previous records on appeal, the document rendered it impossible to file a complete and accurate final brief. Respondent again moved to dismiss the appeal due to Petitioner's failure to provide an appropriate Record on Appeal.

On March 23, 2016, the Court of Appeals issued an order dismissing Petitioner's appeal for her failure to provide an appropriate record on appeal despite having been offered several opportunities to do so. Petitioner then petitioned for rehearing, and the Court of Appeal denied her petition for rehearing in an Order filed on June 2, 2016. The Petition for a Writ of Certiorari followed.

## ISSUE

The issue presented is whether the Court of Appeals erred in its decision to dismiss the Petitioner's appeal due to Petitioner's failure to provide an adequate record on appeal.

## ARGUMENT

As a preliminary matter, the Petition for Writ of Certiorari of Petitioner Brenda Harmon fails to "present with accuracy, brevity and clarity the information and arguments that are essential to a ready and adequate understanding of the points requiring consideration" as is required by SCACR 242(d)(4). The Petition should therefore be denied pursuant to Rule 242(d)(4), SCACR.

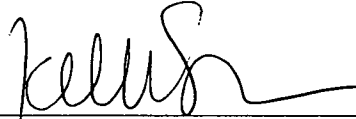
The South Carolina Supreme Court has long held that it is the burden of the appealing party to produce an appropriate Record on Appeal. *Germain v. Nichol*, 278 S.C. 508, 509, 299 S.E.2d 335 (1983). In *Johnson v. Dept. of Prob., Parole and Pardon Services*, 372 S.C.279, 641 S.E.2d 895 (2007), the Supreme Court upheld the ruling of the Court of Appeals' affirmation of the lower court ruling. 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 Petitioner's case because of its failure to provide an appropriate Record on Appeal.

In this case, Petitioner 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. The Court of Appeals went so far as to provide Petitioner with a list of items that should be contained in the Record on Appeal, to no avail. Petitioner has insisted on including references to various parties' racial groups or ethnicities in her pleadings and in her filings, and has continued to include documents in her record on appeal that were not considered by the lower court.

**CONCLUSION**

Based upon the foregoing, Respondent respectfully requests that Petitioner's request for a Writ of Certiorari be denied.

Respectfully submitted,



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July 13, 2016

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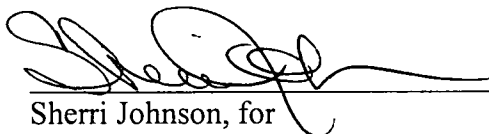
Joel E. Johnson, D.M.D., ..... Respondent.

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**CERTIFICATE OF SERVICE**

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I certify that I have served the *Respondent's Return to Petition for Writ of Certiorari* upon Petitioner, Brenda G. Harmon, by depositing a copy of it in the United States Mail, postage prepaid, on July 13, 2016, addressed to Brenda G. Harmon, 2110 Woodfield Drive, Columbia, SC 29223.



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