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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Circuit Court Judge

Case No.: 2013-CP-10-6019

RECEIVED
JAN 30 2017
SC Court of Appeals

Jack Powell,Appellant,

v.

Knology of Charleston, Inc.,Respondent.

**MOTION TO STRIKE PORTIONS OF
APPELLANT’S MOTION FOR RELIEF OF JUDGMENT,
AND OF APPELLANT’S RESPONSE TO RESPONDENT’S
RETURN IN OPPOSITION**

Pursuant to Rule 240, SCACR, Respondent Knology of Charleston, Inc. moves to strike portions of Appellant’s Motion for Relief of Judgment, dated December 13, 2016 (“Motion”), and of his Response to the Respondents Return in Opposition to Motion for Relief of Judgment, dated January 11, 2017 (“Response”), as well as attachments to both pleadings. The basis for Respondent’s Motion to Strike is that Appellant has substantively relied on and attached material to both his Motion and his Response that are not part of the record in this case.

Specifically, with respect to Appellant’s Motion and as noted in Respondent’s Return in Opposition to Motion for Relief of Judgment, dated December 20, 2016 (“Return”), this non-record material includes alleged statements made by Judge Dennis in pre-hearing conferences, in hearings in other cases involving other parties, and in

alleged telephone conversations or conversations “in the hallway” with defense counsel, (Motion pp. 7-8, 12, 13, 14, 24), as well as Attachments B, C,¹ D, E, and H to his Motion. Attachments B, C, D and E are medical records that were not submitted to the Circuit Court in this case. Attachment H is a purported email from Jason Tant to Appellant. As explained in Respondent’s Return, the alleged statements and conversations should be stricken because there is no evidence to substantiate Appellant’s version of them. The identified Attachments should be stricken because they were never presented to the Court below and, therefore, cannot be considered by this Court. *See, e.g.,* Rule 210(c), SCACR (the record on appeal “shall not ... include matter which was not presented to the lower court or tribunal”); State v. White, 372 S.C. 364, 387, 642 S.E.2d 607, 619 (Ct. App. 2007) (refusing to consider evidence that was not submitted to the lower tribunal); Cobb v. Benjamin, 325 S.C. 573, 581 n.2, 482 S.E.2d 589, 593 n.2 (Ct. App. 1997) (the Court of Appeals will not consider evidence not presented to the lower court).

With respect to Appellant’s Response, the non-record materials include Attachments A, D, E and F to his Response, as well as substantive references to those attachments and to non-record materials attached to his Initial Brief, (Response pp. 1, 2,² 4-6, 8-14, 16, 18, 20, 21). Attachment A to his Response is the transcript of an entirely separate proceeding involving a different Defendant. *Jack Powell vs. Medical University of South Carolina*, No. 2013-CP-10-5351. Attachments D and E purport to be printouts

¹ Attachment C to Appellant’s Motion also was attached improperly to his Initial Brief as Att. A.

² It is completely unfounded to allege that Respondent “intentionally hid[]” any emails that Respondent now attempts to rely on, (Response p. 2), when the purported emails appear to be to or from Appellant. *See* Att. H to Motion; Att. F to Response.

of pages from searches performed on LinkedIn. Attachment F is a purported email from Jack Powell to Jason Tant. None of these items are part of the record in this case and, as a result, should be stricken. *See* Rule 210(c), SCACR; State v. White, 372 S.C. at 387, 642 S.E.2d at 619; Cobb, 325 S.C. at 581 n.2, 482 S.E.2d at 593 n.2. Although Appellant describes these items as “new evidence,” (Response pp. 1), he has not moved this Court for admission of any after-acquired evidence. Nor would they qualify.

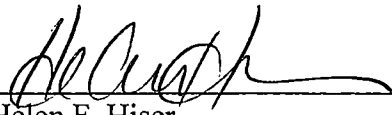
For the same reasons that the non-record items attached to his Initial Brief do not qualify as newly acquired evidence, the non-record items attached to his Motion and Response also do not qualify. None of these items meet the standard for admitting after-acquired evidence. Pursuant to Rule 60(b)(2), newly discovered evidence is admissible *only* if it could not have been discovered, even with the exercise of due diligence, in time to move for a new trial. Rule 60(b)(2), SCRCF; *see also Lanier v. Lanier*, 364 S.C. 211, 220, 612 S.E.2d 456, 460 (Ct. App. 2005) (holding that Rule 60(b)(2) only provides relief when “the newly discovered evidence could not have been discovered by due diligence prior to trial”). In other words, “[w]here a litigant *could* have discovered the new evidence prior to trial, he or she is not entitled to relief under Rule 60(b)(2).” 364 S.C. at 220, 612 S.E.2d at 461 (emphasis added). Appellant has presented no evidence or argument that he did not or could not have discovered the referenced materials during the pendency of this case before the Circuit Court. Appellant has admitted he had at least one of the purported Tant emails in his possession but just “did not discover he had this E-mail until after the Order for Summary Judgment was signed ...” (Motion pp. 26, 45). In fact, both of the purported Tant emails are either to or from him, meaning if they are genuine, he would have had them in his possession all along.

CONCLUSION

For all the reasons stated herein, Respondent moves this Court to strike the portions of Appellant's Motion and Response, as well as attachments thereto as identified herein.

January 27, 2017

McANGUS GOUDELOCK & COURIE, LLC



Helen F. Hiser

S.C. Bar No.: 76124

735 Johnnie Dodds Blvd., Suite 200 (29464)

P.O. Box 650007

Mount Pleasant, South Carolina 29465

(843) 576-2900