

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Cyril J. Okadigwe,

Appellant,

vs.

South Carolina Department of Labor,
Licensing and Regulation, State Board of
Pharmacy,

Respondent.

Case No. 2017-001339

RESPONDENT'S MOTION TO STRIKE
AFTER-CREATED EVIDENCE

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Respondent respectfully moves this Court to grant Respondent's Motion to Strike After-Created Evidence from Appellant's Brief for the reasons as set forth below.

Respondent's motion is based upon the South Carolina Appellate Court Rules ("Appellate Court Rules" or "Rule ___, SCACR"), the Administrative Procedures Act, S.C. Code Ann. § 1-23-310 *et seq.* (1976, as amended) ("APA"), South Carolina Administrative Law Court Rules of Procedure ("SCALC Rules"), and applicable case law.

Appellant, in his Brief, has referenced and discussed an affidavit of John C. Ruoff, Ph.D. To briefly summarize, in his affidavit Ruoff provided a summary of his review of the Board of Pharmacy's public orders from 2009 through August 2016 to argue that the Board has treated Appellant differently than other pharmacists. Importantly, Ruoff never testified before the trier of fact (here the Board), was never subject to cross-examination by opposing counsel, and was never asked questions by the Board. Rather, Appellant, after the Board hearings, first added and discussed Ruoff's summary to his brief to the Administrative Law Court ("ALC")¹ and again has discussed that summary in his brief before this Court. For the reasons set forth below,

¹ Appellant attached both Ruoff's affidavit as well as his curriculum vitae to his brief to the ALC.

Respondent moves this Court to strike any references or discussion of Ruoff's affidavit or his findings from Appellant's Brief, as they amount to after-created evidence that was improperly included in Appellant's Brief.²

The APA establishes that, in appellate matters, the Court's review is limited to the record established during the agency's contested proceeding. *See* S.C. Code Ann. § 1-23-380(4) (2008) ("The review must be conducted by the court and must be confined to the record.") The SCALC Rules also address this issue. Specifically, SCALC Rule 36(G) provides that "[t]he Administrative Law Judge will not consider any fact which does not appear in the Record."

Additionally, SCALC Rule 68 provides that "[t]he South Carolina Rules of Civil Procedure and the South Carolina Appellate Court Rules, in contested cases and appeals respectively, may, in the discretion of the presiding administrative law judge, be applied to resolve questions not addressed by these rules." Following, Rule 210(c), SCACR, provides, in pertinent part, that "[t]he Record shall not . . . include matter which was not presented to the lower court or tribunal." *See also* Rule 210(h), SCACR ("Except as provided by Rule 212 and Rule 208(b)(1)(C) and (2), the appellate court will not consider any fact which does not appear in the Record on Appeal.")

In addition to the SCALC Rules, the Appellate Court Rules, and the APA, case law also supports Respondent's position that discussion of this after-created evidence was improperly included in Appellant's Brief to this Court and should be stricken.

In *Williamsburg Rural Water & Sewer Co., Inc. v. Williamsburg Cnty. Water & Sewer Auth.*, 367 S.C. 566, 571, 627 S.E.2d 690, 693 (2006), the South Carolina Supreme Court found that it was improper for the Court of Appeals' majority in the underlying case to rest its decision, in large part, not on evidence in the record, but rather on an affidavit that was attached to a

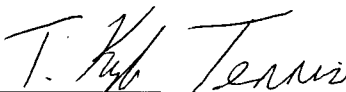
² In its concurrently-filed brief to this Court, Respondent has addressed Appellant's argument that the ALC committed error when it struck this after-created evidence.

party's petition for rehearing after the first Court of Appeals' decision. ("Nothing in the appellate court rules permits a party to unilaterally add after-created evidence to the record. We review . . . using only the evidence presented to the trial court and included in the Record on Appeal.") See also *S.C. State Highway Dep't v. Meredith*, 241 S.C. 306, 311, 128 S.E.2d 179, 182 (1962) ("[C]ounsel is prohibited from embodying in their briefs any fact which does not appear in the record.")

In *Gale v. State Bd. of Med. Exam'rs of S.C.*, 282 S.C. 474, 479, 320 S.E.2d 35, 38 (Ct. App. 1984), this Court also reached a similar conclusion, finding that the argument of alleged disparate treatment for similar violations in the context of licensee discipline proceedings could not be addressed since the record did not contain evidence of prior Board actions in other cases.

Like *Williamsburg* and *Adler*, the factual allegations of sanctions imposed upon allegedly similarly situated pharmacists in Ruoff's affidavit were not received or considered by the Board below. Thus, they do not form a part of the Record on Appeal and should not be considered. Accordingly, because Ruoff's affidavit was not included as part of the record before the Board, Respondent respectfully moves this Court to strike any reference to this after-created evidence from Appellant's Brief and limit the Record on Appeal to matters properly before this Court.

November 7, 2017



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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT
S. Phillip Lenski, Administrative Law Judge

Case No. 2017-001339

Cyril J. Okadigwe, Appellant,

v.

South Carolina Department of Labor, Licensing and Regulation,
State Board of Pharmacy, Respondent.

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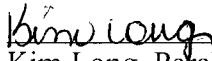
CERTIFICATE OF SERVICE BY MAILING

I hereby certify that I have this day served Respondent's Initial Brief, Designation of Matter, and Motion to Strike, by depositing same in an envelope, securely wrapped in the United States mail, properly addressed to the following addresses:

The Honorable Jenny Abbott Kitchings
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November 7, 2017

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RE: Cyril J. Okadigwe, Appellant v. South Carolina Department of Labor, Licensing and Regulation, South Carolina State Board of Pharmacy, Respondent
Appellate Case No. 2017-001339

Dear Ms. Kitchings:

Please find enclosed the original and one copy of Respondent's Initial Brief and Designation of Matter. Additionally, please also find enclosed the original and six copies of Respondent's Motion to Strike. Copies of Respondent's Initial Brief, Designation of Matter, and Motion to Strike were mailed to Counsel for Appellant today.

Sincerely,

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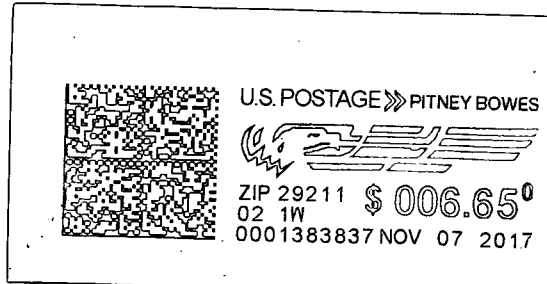
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SC Court of Appeals

Cc: Herbert E. Buhl, Esq., Counsel for Appellant



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