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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
In the Court of Common Pleas

The Honorable Perry H. Gravely, Circuit Court Judge

Case No. 2016-CP-23-02113

Appellate Case No. 2017-001147

Aminah A. Richburg,.....Appellant,

v.

E.A. "Rico" Williams, Director, District One S.C. Basketball Officials Association and the South Carolina High School League, ...Respondents.

RESPONDENTS' JOINT MOTION TO STRIKE

Pursuant to Rule 240, SCACR, Respondents jointly seek an order striking the motion filed by Appellant Aminah Richburg styled as follows:

> MOTION FOR THE STATE OF SOUTH CAROLINA IN THE COURT OF APPEALS TO PUNISH AND FINE THE RESPONDENTS AND THEIR LEGAL COUNSEL FOR COMMITTING PERJURY ACCORDING TO THE TRANSCRIPT OF RECORD ON MARCH 20, 2017 AND ALLOWING THE APPELLATE AN EXTENSION ON FUTURE COURT PROCEEDINGS TO ORDER TRANSCRIPTS OF ALL COURT APPEARANCES PRIOR TO MARCH 20, 2017 DISCUSSED IN THE TRANSCRIPT OF RECORD TO PRESENT AS EVIDENCE

The Court should strike Appellant's motion because it is procedurally flawed, wholly without merit, and deserving of scrutiny from the Court as a frivolous filing under Rule 269, SCACR.

BACKGROUND

This appeal arises out of the grant of summary judgment in favor of Respondents by Order filed April 19, 2017, in the Greenville County Court of Common Pleas. Appellant filed a Notice of Appeal in the circuit court on April 27, 2017, and thereafter, she prematurely filed with the Court of Appeals a document titled "Brief of Appellant," which was received on May 26, 2017. Following a deficiency notice, Appellant twice tried to file a document titled "Brief of Appellant" on June 14, 2017, and again on June 28, 2017. Appellant received additional deficiency notices and then successfully filed her brief on November 20, 2017. To date, Appellant has received ten deficiency notices from this Court for improper filings.

In Appellant's Statement of the Case in her Initial Brief, she claims that "[t]he Appellate [sic] was treated unfairly and unjustly by the court and the legal counsel of the Respondents hoodwinked the court by presenting false, tampered and invalid documentation as well as engaging in discovery abuse." This is the only reference to any alleged conduct by Respondents' counsel at the summary judgment hearing on March 20, 2017. Currently, Respondents' Briefs are due on January 29, 2018, although Respondent South Carolina High School League has received an extension to file its brief by February 28, 2018. Appellant filed the present Motion on January 17, 2018. For the reasons set forth below, this Motion should be dismissed and stricken from the record.

ARGUMENT

I. Appellant's Motion is Procedurally Improper

Appellant's motion fails to comply with the requirements of Rule 240, SCACR, for several reasons. First, the motion requests relief that cannot be granted under the South Carolina Appellate Court Rules. Appellant is not facing any deadline that would enable her to make a request for a

time extension. Moreover, while the court certainly can sanction parties or their counsel for conduct while proceeding before the Court of Appeals, Appellant is seeking sanctions against Respondents for alleged conduct that occurred in front of the circuit court. She is also asking this Court to grant motions that do not exist under the South Carolina Rules of Civil Procedure and requesting a jury trial. Appellant's motion must fail because a party cannot use an appellate motion to seek a ruling on the merits of the appeal.

More importantly, it is axiomatic that an appellate court is limited to reviewing matters that were raised to and ruled upon by the trial court. See Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 511, 598 S.E.2d 712, 715 (2004) ("[A]n appellate court cannot address an issue unless it was raised to and ruled upon by the trial court."). At no time during the proceedings in the lower court did Appellant seeks sanctions for the conduct of Respondents' counsel at the summary judgment hearing on March 20, 2017. In fact, when it was her time to respond to the arguments presented by Respondents' counsel in support of the motions for summary judgment, Appellant began her comments with, "Thank you. I'm glad to hear you have the patience, Your Honor. But what I have to say is pretty much in line with what you've heard from the Defense, but in a different perspective." (Transcript, p. 37, ll. 7-11).[1] Indeed, Appellant never complained to Judge Gravely that Respondents' counsel committed perjury, acted unethically, or were maliciously deliberate by communicating false testimony. Appellant likewise never filed a motion to reconsider Judge Gravely's Order.[2]

[1] This portion of the transcript is attached as Exhibit A to this Motion. Given that the Record on Appeal has not been filed, Rule 240(c) requires the parties to file documents supporting their position.

[2] To be clear, Appellant filed three separate documents five days after Judge Gravely's Order was filed. However, in her initial brief, Appellant concedes that those documents were filed prior to her receipt of Judge Gravely's Order. App. Initial Br. at 16.

Because Appellant cannot use a Motion to seek a ruling on the merits of issues she raised in her initial brief, and because the issue she raises is not preserved for appellate review, Appellant's motion should be stricken because it is procedurally barred under the South Carolina Appellate Court Rules. See JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 369 (3d ed. 2016) (noting a motion to strike is an appropriate appellate motion because "[t]he record on appeal must not include matter not presented to the lower court" (citing Rule 210(c), SCACR)).

II. Appellant's Motion is Wholly Without Merit

Even if the Court were to address the merits of Appellant's motion, the motion should be dismissed because it is completely meritless.

Appellant first accuses Respondents' counsel of committing perjury. Quite simply, Respondents' counsel could not have committed perjury because perjury requires testimony under oath. See S.C. Code Ann. § 16-9-10 (2003). Counsel for Respondents argued the summary judgment motions before Judge Gravely, which did not require them to be "sworn in" or otherwise testify under oath. See generally Shinn v. Kreul, 311 S.C. 94, 102, 427 S.E.2d 695, 700 (1993) (noting the argument of counsel is not evidence). Certainly, Respondents' counsel advocated on behalf of their respective clients, as did Appellant on her own behalf. However, Appellant's default reaction to all of the evidence in this case, which was unfavorable to her and did not support her claims, is to cry foul and allege that such evidence has been fabricated, even though she has no evidence to support this bare and conclusory allegation.

Furthermore, to the extent Appellant claims that Respondents and their counsel have given misleading, incomplete, inconsistent, or erroneous statements, such conduct is not sanctionable. South Carolina courts have recognized a broad and absolute privilege not only for filings in a court

action, but also for communications incidental to litigation. An "absolute privilege exists as to any utterance arising out of the judicial proceeding and having any reasonable relation to it . . . ." Crowell v. Herring, 301 S.C. 424, 430, 392 S.E.2d 464, 467 (Ct. App. 1990) (per curiam) (citing RESTATEMENT (SECOND) OF TORTS (AM. LAW INST. 1977)).

The litigation privilege applies to statements by attorneys and litigants. Crowell, 301 S.C. at 429, 392 S.E.2d at 466; Clark Cty. Sch. Dist. v. Virtual Educ. Software, Inc., 213 P.3d 496, 502 (Nev. 2009). The privilege does not require that the statement be made in a judicial proceeding. See Crowell, 301 S.C. at 430, 392 S.E.2d at 467. Rather, statements explaining a party's position in the litigation are regarded as privileged when such statements are made to persons with an interest in the controversy or the party. Id.; see also Marchioni v. Chicago Bd. of Educ., 341 F. Supp. 2d 1046, 1051–52 (E.D. Ill. 2004).

The privilege does not require proof that the statement was made in good faith or was strictly necessary. See, e.g., Marchioni, 341 F. Supp. 2d at 1051 (asserting that the privilege is absolute, and "unreasonableness" and "motive" are irrelevant). All doubts should be resolved in favor of recognizing the privilege, permitting parties to communicate about pending litigation without fear of retaliatory claims from opposing parties. Id.; Walker v. Majors, 496 So. 2d 726, 730 (Ala. 1986). The availability of the privilege in a given case is a question of law for the court. Clark Cty. Sch. Dist., 213 P.3d at 502; Walker, 496 So. 2d at 730.

Here, Respondents' counsel are covered by the absolute privilege because the allegedly objectionable statements were made in good faith throughout the course of litigation. Respondents would be remiss not to note the irony of Appellant's assertions in her Motion. Her underlying claims, of course, arise out of alleged defamation and damage to her reputation following an email questioning her professionalism. However, Appellant apparently has no problem filing a legal

document with the court accusing Respondents' counsel of (1) committing perjury; (2) behaving unethically; (3) being maliciously deliberate in communicating false, misleading, incomplete, inconsistent, and erroneous testimony; (4) having "deviant and unprofessional practices;" and (5) acting deceitfully.

Because Appellant's motion is completely devoid of any merit, Respondents request that the motion be dismissed. The statements of Respondents' counsel are covered by an absolute privilege, and the present motion is unfortunately just another example of Appellant questioning the motives of everyone who disagrees with her.

III. Appellant's Motion is Frivolous

Pursuant to Rule 269, SCACR, an appellate court may impose sanctions against a party for filing a motion that is frivolous or taken solely for the purpose of delay. One factor for the imposition of sanctions is "discouragement of like conduct in the future." *See* Rule 269, SCACR. While Respondents understand that Appellant deserves some flexibility as a pro se litigant, the Supreme Court of South Carolina has held that "[t]he right of self-representation does not exist to be used as a tactic for delay, for disruption, for distortion of the system, or for manipulation of the trial process." See City of Columbia v. Assaad Faltas, 420 S.C. 28, 45, 800 S.E.2d 782, 790 (2017) (quoting State v. Samuel, 414 S.C. 206, 212, 777 S.E.2d 398, 401 (Ct. App. 2015)). Further, pro se litigants do not have a license to ignore relevant rules of procedural and substantive law. Id. (quoting Faretta v. California, 422 U.S. 806, 834 (1975)).

Respondents have previously set forth the procedural and substantive defenses in support of their position that this motion is frivolous. Additionally, it bears repeating that Appellant's request for an open extension on all future court proceedings can only be viewed as "solely for the purpose[] of delay" given the absence of any deadline currently facing Appellant.

Finally, the court should consider an appropriate sanction to discourage Appellant from engaging in similar conduct in the future. Although Respondents gave Appellant wide latitude before the circuit court, despite a number of questionable filings, such leeway in the Court of Appeals is problematic because Respondents are required to respond to every motion or risk being deemed to consent to Appellant's requested relief. See Rule 240(e), SCACR. Appellant's filings have already caused Respondents to incur a great deal of unnecessary expense in this case. Accordingly, Respondents respectfully request that the court sanction the Appellant in an appropriate manner to discourage similar filings in the future.

For the reasons set forth above, Respondents move to strike Appellant's motion and respectfully request that the Court issue an appropriate sanction to curb Appellant's frivolous conduct in the future. Simply put, "[t]here is no constitutional right of access to the courts to prosecute an action that is frivolous or malicious." Assaad Faltas, 420 S.C. at 49, 800 S.E.2d at 793 (quoting Childs v. Miller, 713 F.3d 1262, 1265 (10th Cir. 2013)).

Respectfully submitted,

TURNER PADGET

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January 22, 2018

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January 22, 2018

So, again, for those reasons that we set forth in our brief, unless there are any questions, we will join in with the remaining defenses by Mr. Williams.

THE COURT: All right. Ms. Richburg, I'm sure you have a lot to respond to there. I'll be glad to hear from you.

MS. RICHBURG: Thank you.

I'm glad to hear that you have the patience, Your Honor. But what I have to say is pretty much in line with what you've heard from the Defense, but in a different perspective.

The Defendants refer to the e-mail. That's what I referred to earlier. This is what initiated everything. And the big dissertation that you received --

THE COURT: Well, let me ask you this just -- just so I can get it clear in my mind. Is the e-mail that -- is the -- I mean, I realize there's lots of background information --

MS. RICHBURG: Right.

THE COURT: -- but is the e-mail the basis of your lawsuit as far as defamation?

MS. RICHBURG: That's what initiated it.

THE COURT: Okay.

MS. RICHBURG: That's what initiated it. And that is why I was leading to this when I submitted the document on

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Aminah A. Richburg ..... Appellant,

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E.A. "Rico" Williams, Director, District One S.C. Basketball Officials Associations and the South Carolina High School League..... Respondents.

CERTIFICATE OF SERVICE

I, the undersigned legal assistant of the law offices of Sowell Gray Robinson Stepp & Laffitte, L.L.C., attorneys for Defendant, South Carolina High School League, do hereby certify that I have served Appellant and all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Respondents' Joint Motion to Strike

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January 22, 2018

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: Aminah A. Richburg v. E.A. "Rico" Williams, Director, District One S.C. Basketball Officials Association, and South Carolina High School League
Appellate Case No. 2017-001147
Our File No. 5346/1536

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of Respondents' Joint Motion to Strike in the above referenced matter. Please return a clocked-in copy of same to me.

By copy of this letter to counsel and plaintiff shown below, I am serving a copy of same upon them by mail. With warmest regards, I remain

Sincerely,

Michael Montgomery

JMM:rco
Enclosures

cc: Ms. Aminah A. Richburg
Sarah Day Hurley, Esquire
Vordman Carlisle Traywick, III, Esquire