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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appellate Case No.: 2012-206406

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APPEAL FROM ADMINISTRATIVE LAW COURT

SOUTH CAROLINA COURT OF APPEALS

The Honorable Deborah Brooks Durden

Docket No.: 10-ALJ-22-0938-AP

Nucor Corporation,.....Appellant,

v.

South Carolina Department of Employment
and Workforce, and Kim A. Legette, Respondents.

**RETURN TO RESPONDENTS' MOTION TO DISMISS OR IN THE ALTERNATIVE,
MOTION FOR ORDER COMPELLING APPELLANT TO FILE A RECORD ON
APPEAL IN COMPLIANCE WITH THE RULES AND FOR AN EXTENSION OF TIME
FOR RESPONDENTS TO FILE THEIR FINAL BRIEF**

The Appellant, by and through its undersigned attorneys, pursuant to Rule 240 of the South Carolina Appellate Court Rules, responds to Respondents' Motion as follows:

Rather than file their Final Brief, Respondents instead have filed a motion to dismiss this appeal citing three copying errors in the Record on Appeal. The errors consist of the following:

- (1) failing to copy the back side of one transcript of proceedings below (which Respondents have had in their possession for some time);
- (2) including duplicate copies of one set of exhibits in the

Record; and (3) failing to correct an earlier error by Respondent Legette's counsel in attaching exhibits to one of her briefs below in the improper order. All of these copying errors could have been easily corrected had Respondents' counsel brought these issues to Appellant's attention before filing this motion. None of these errors have caused prejudice and should not be considered as a basis for dismissing this appeal.

The current appeal is the fifth appellate proceeding following an initial ruling by a Claims Administrator in favor of Nucor. Hence, the Record on Appeal before this Court is necessarily voluminous and, in many cases, necessarily duplicative.¹ In fact, the Record on Appeal as filed contains over 791 numbered pages.² While undersigned counsel acknowledges that "the South Carolina Appellate Court Rules are not mere technicalities,"³ we also note that human error sometimes occurs despite the exercise of reasonable care. The technical errors complained of by Respondents are excellent examples of human error, both by counsel for Appellant as well as counsel for Respondent Legette.

Respondents first call to the attention of the Court Appellant's failure to include "side two" of each page of one transcript of proceedings below that was submitted by the official reporter in a two-sided format. As reflected by the Affidavit of April Hager (attached as Exhibit 1), this transcript was the only document in the entire package constituting the Record on Appeal which was printed on both sides of the page, and that fact escaped her recognition when she copied the material for the purpose of electronic page numbering. The Affidavit further demonstrates that normal custom and practice in her many years as a legal assistant is for

¹ Rule 210 (c) SCACR provides in pertinent part as follows: "When a portion of an order, judgment, decision or pleading is to be included in the Record on Appeal, the entire order, judgment, decision or pleading shall be included in the Record. . . ." In a case involving an initial ruling and five appeals, the orders and associated briefs, etc. each containing the same or a similar set of exhibits, duplicates are to be expected.

² Due to an inadvertent failure to copy both sides of one of the transcripts which was originally printed by the Official Reporter on both sides of the page, the numbered pages contain certain pages with an "A" designation indicating the pages originally omitted from the printing process. (See, e.g. Record on Appeal, pp. 333 – 400-A.

³ *Henning v. Kaye*, 307 S.C. 436, 415 S.E. 2d 794 (1992)

original transcripts to be printed on only one side of the page. It should be noted that the first indication from Respondents' counsel that there was any concern over the numbering of pages in the Record was the filing of this motion. A phone call or other communication easily could have resulted in a quick correction of the error without prejudice to either party. Nor can Respondents claim prejudice as a result of this copying error since the transcript in question was the official transcript of the hearing before the Administrative Hearing Officer on August 15, 2011, a transcript that had been previously provided to all counsel and included in earlier appeal proceedings.

Before the Record on Appeal was filed with this court, Appellant's counsel discovered this error and attempted to correct it by adding the omitted pages with the letter "A" designations so as not to cause all subsequent numbered pages to need re-numbering. Even this correction, however, did not cure the entire error since counsel did not notice, until the filing of this motion by Respondent, that the exhibits attached to that transcript were also printed on both sides.⁴

The remaining errors cited in this motion are not material and could not have caused any prejudice to Respondents. As noted, pages 448-468 and 469-489 are exact duplicates. This error of including duplicates of the same document could not have caused confusion, particularly since the error was identified by Respondents' Counsel.

Respondents finally complain that certain exhibits found at pages 648-651 originally attached to one of Respondent Legette's earlier briefs are out of order. These exhibits were copied in the same order they were originally attached to Legette's brief and included in the Record at pages 619-651.⁵ Appellant's perpetuation of an error originally committed by

⁴ Based upon this discovery, Appellant files contemporaneously with this Return a Motion, pursuant to Rules 240 and 212(b) SCACR to Supplement the Record on Appeal with the still-missing back-side pages of the exhibits. (Record, pp. 401-418).

⁵ See Affidavit of April Hager, Exhibit 1 at ¶ 7.

Respondent's Counsel who now blames Appellant for not correcting her own mistake should not be cited as a basis for dismissing this appeal.

Respondents cite two decisions of the South Carolina Supreme Court (*Johnson v. S.C. Dep't of Prob., Parole, & Pardon Servs.*, 372 S.C. 279, 641 S.E.2d 895 (2007) and *Talley v. S.C. Higher Educ. Tuition Grants Comm.*, 289 S.C. 483, 347 S.E.2d 99 (1986)) in support of the relief they seek in this motion, neither of which are factually similar to this motion. In *Johnson*, the Appellant failed to include in the transcript the very motion and order which was the subject of the appeal. The Supreme Court affirmed dismissal of the appeal by the Court of Appeals, not because of errors in copying the Record on Appeal, but because Rule 210(h) SCACR provides that "no point will be considered which does not appear in the record on appeal." 272 S.C. at 283. Since the Record did not contain the order from which appeal was taken, the Court was unable to consider it and had no choice but to dismiss the appeal. Here, the Record as filed contains all facts and other matters cited by any party in their respective briefs. Therefore, it cannot be said that the appeal can be dismissed for failure to comply with Rule 210(h) SCACR, and *Johnson*, supra. is inapposite.

Likewise, the *Tally* decision provides no support for Respondents' position. Respondents rely upon *Tally* for the proposition that "[d]ismissal is justified where there are numerous procedural errors." Motion to Dismiss, p. 2. The "numerous procedural errors" the Supreme Court found sufficient to dismiss Tally's appeal included the following: (1) raising multiple issues in a single exception; (2) raising issues for the first time on appeal that had not been presented to the court below; (3) failing to preserve an issue raised below but not ruled upon by the court below; and (4) raising as an exception an issue on which he had prevailed below rather than properly asserting it as an additional sustaining ground. 289 S.C. at 487. It is apparent that

the “numerous procedural errors” committed by Tally affected the entire appellate process in a substantive way and did not involve errors in the Record on Appeal. The copying errors cited here do not come close to the substantial nature of the procedural errors in *Tally* and should not justify dismissal of this appeal.

The Supreme Court’s Order in the case of *Henning v. Kaye*, 307 S.C. 436, 415 S.E. 2d 794 (1992) is instructive. There, the Respondent moved to dismiss Appellant’s appeal based upon numerous substantial rules violations relating to Appellant’s initial brief and his Designation of Matter to be Included in the Record on Appeal (“Designation”). The opinion did not specify the issues related to the Designation, but described the deficiencies in the initial brief as follows:

Appellant's brief fails to comply with the Rule 207 in the following particulars: the components of the brief are incorrectly organized and labeled, the issues are not distinctively headed, the table of authorities is not alphabetized or referenced to the body of the brief, the statement of the case contains contested matter and omits required information, and the arguments contain no citations to the record or to the cases listed in the table of authorities.

307 S.C. at 436. After noting that these substantial procedural errors are “not mere technicalities” and would justify dismissal of the appeal, the Court exercised its discretion in denying the motion to dismiss and ordered the party to correct the errors by submitting an amended initial brief and Designations. Similarly Appellant here urges this court to deny the motion to dismiss because the cited errors are not nearly as substantial as those cited above and neither impair the orderly administration of justice nor inhibit appellate review. *See*, 307 S.C. at 436.

Appellant’s counsel accepts full responsibility for the cited copying errors identified by Respondent, but requests the Court to deny the motion to dismiss and grant leave to file a

Supplemental record to correct these technical errors. Appellant also consents to Respondent's request for an extension of time within which to file her final brief.

Respectfully submitted,

TURNER, PADGET, GRAHAM & LANEY, P.A.



John S. Wilkerson, III, SC Bar No.: 6105

Nosizi Ralephata, SC Bar No.: 72484

40 Calhoun Street, Suite 200 (29401)

P.O. Box 22129

Charleston, South Carolina 29413

Telephone: (843) 576-2807

Facsimile: (843) 576-1655

Email: JWilkerson@TurnerPadget.com

NRalephata@TurnerPadget.com

ATTORNEYS FOR APPELLANT NUCOR
CORPORATION

December 27, 2012

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appellate Case No.: 2012-206406

APPEAL FROM ADMINISTRATIVE LAW COURT

The Honorable Deborah Brooks Durden

Docket No.: 10-ALJ-22-0938-AP

Nucor Corporation,.....Appellant,

v.

South Carolina Department of Employment
and Workforce, and Kim A. Legette,Respondents.

PROOF OF SERVICE

I certify this 27th day of December, 2012 that I served copies of the **Return to Respondents' Motion to Dismiss or in the Alternative, Motion for an Order Compelling Appellant to File a Record on Appeal in Compliance With the Rules and for an Extension of Time for Respondents to File Their Final Brief** by United States Mail, postage prepaid, addressed to the following:

Ms. Anne E. Mjaatvedt
Anne E. Mjaatvedt Law Firm, LLC
39 Broad Street, Suite 208
Charleston, SC 29401

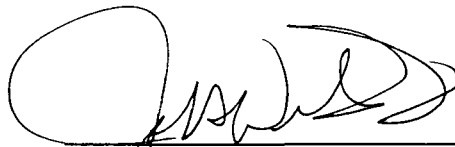
ATTORNEY FOR RESPONDENT
KIM A. LEGETTE

Ms. Debra Tedeschi
Ms. Sandra Grooms
S.C. Department of Employment and
Workforce
P.O. Box 8597
Columbia, SC 29202

ATTORNEY FOR RESPONDENT SOUTH
CAROLINA DEPARTMENT OF
EMPLOYMENT AND WORKFORCE

The undersigned further certifies that the original and six copies of the **Return to Respondents' Motion to Dismiss or in the Alternative, Motion for an Order Compelling Appellant to File a Record on Appeal in Compliance With the Rules and for an Extension of Time for Respondents to File Their Final Brief and Proof of Service** were sent via United States mail for filing with the Clerk of Court for South Carolina Court of Appeals, pursuant to the South Carolina Appellate Court Rules.

TURNER PADGET GRAHAM & LANEY, P.A.



John S. Wilkerson, III, SC Bar No.: 6105

Nosizi Ralephata, SC Bar No.: 72484

40 Calhoun Street, Suite 200 (29401)

P.O. Box 22129

Charleston, South Carolina 29413

Telephone: (843) 576-2801

Facsimile: (843) 577-1649

Email: JWilkerson@TurnerPadget.com

NRalephata@TurnerPadget.com

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AFFIDAVIT OF APRIL D. HAGER

PERSONALLY APPEARED BEFORE ME April D. Hager, who, after being duly sworn, deposes and says as follows:

1. I am a resident of Dorchester County, South Carolina and employed as an Administrative Assistant in the Charleston, South Carolina office of Turner Padgett Graham and Laney, PA.

2. I have been employed as an Administrative Assistant in a litigation law practice for 20 years, the last 7 with Turner Padgett Graham and Laney. In that capacity, I have had occasion to become familiar with transcripts of depositions and court proceedings, having handled hundreds of them during my career.



3. In my experience, original transcripts are routinely printed on one side of a page and I cannot recall ever handling a transcript where the original was printed on both sides of the page, the transcript of the August 15, 2011 hearing before the Administrative Hearing Officer of the S. C. Dept. of Employment & Workforce being the only exception I can recall.

4. I personally duplicated the documents to be included in the Record of Appeal for this case and utilized an electronic page numbering system. The duplication and numbering involves inserting the documents into a copier with an automatic feeder, and I did not notice in that process that the above-referenced transcript was printed on both sides of the page.

5. I have now reviewed all other documents included in the Record on Appeal and confirmed that the above-referenced transcript was the only document in the entire Record that was printed on both sides of the page.

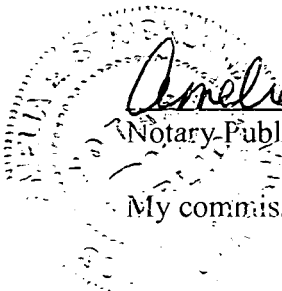
6. Ms. Ralephata reviewed the Record on Appeal before it was served on counsel and apparently did not notice the failure to copy both sides of the pages of this transcript.

7. I have reviewed the original of Respondent Legette's brief and attached exhibits as received from Respondent Legette which are now reproduced in the Record on Appeal at pages 648-651. The order in which the exhibits attached to that Brief in the Record on Appeal is identical to the order they were in when originally received by service from Legette's counsel.

FURTHER AFFIANT SAITH NOT.


April D. Hager

Sworn to and subscribed before me this
the 27th day of December, 2012.


Amelia E. Strickland
Notary Public for South Carolina
My commission expires: 1-23-2017