

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J. C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2016-001266

RECEIVED
OCT 10 2018
SC Court of Appeals

Personal Care, Inc.,.....Appellant,

v.

Jerry N. Theos; Uricchio, Howe, Krell,
Johnson, Toporek, Theos & Keith, P.A.;
Cheryl D. Shoun; and Taylor, Shoun,
Bowley & Byrd, LLC, Respondents.

**APPELLANT’S RETURN TO RESPONDENTS’ JOINT MOTION TO
SUPPLEMENT RECORD ON APPEAL**

TO: THE HONORABLE JUDGES OF THE COURT OF APPEALS OF
SOUTH CAROLINA:

Respondents Jerry N. Theos; Urrichio, Howe, Krell, Johnson, Toporek,
Theos & Keith, PA; Cheryle D. Shoun; and Taylor, Shoun, Bowley & Byrd,
LLC (“Respondents”) have jointly moved to supplement the record on appeal.

Appellant Personal Care, Inc. (“Appellant”) opposes Respondents’ joint motion to supplement the record and respectfully requests the Court deny Respondents’ motion.

FACTS/PROCEDURAL BACKGROUND

The following are pertinent facts in the instant dispute:

- Appellant hired Respondents to assist him in a dispute against a competitor and former employees of Appellant. This assistance included Respondents writing a cease and desist letter to the competitor.
- Respondents negligently transmitted the letter to a third party, which was a former customer of Appellant (and a new customer of the competitor).
- Following publication to the third party, the competitor maintained this letter contained defamatory content, which was actionable.
- As a product of this alleged defamation, the competitor sued Appellant (via counterclaim), which resulted in Appellant having to expend substantial time and money defending and resolving the competitor’s claim. A sizeable settlement ended the dispute with the competitor.
- By virtue of having to expend this resource, Appellant was demonstrably damaged due to Respondents’ error.

- Appellant thereafter hired Attorney Thomas Pendarvis and sued Respondents in the Circuit Court, alleging legal malpractice relating to the letter's transmission and resulting damages sustained by Appellant.
- The action brought by Appellant following the Circuit Court's denial of Appellant's motion to restore pursuant to Rule 40(j), SCRCF.
- The denial of Appellant's motion to restore is the basis for the instant appeal.
- During the pendency of the instant appeal (and long after the parties had submitted their respective final briefs to this Court)¹, Appellant brought a separate and distinct action against Pendarvis in the Circuit Court for his failure to timely restore the initial action against Respondents.²
- Appellant was damaged again, this time due to Pendarvis' error; hence, Appellant's pursuit of relief in the Circuit Court.

¹ Appellant filed its final brief with this Court on June 8, 2017.

² Appellant's action against Pendarvis was filed in the Circuit Court on February 28, 2018, more than 8 months after Appellant had filed its final brief with this Court in the instant appeal.

See Exhibit A (Substituted Modified Order on Plaintiff's Motion to Alter or Amend Judgment, filed June 14, 2016, at pp. 2-8)³ and Exhibit B (Summons and Complaint, Personal Care, Inc. v. Thomas A. Pendarvis and Pendarvis Law Offices, PC, C/A 2018-CP-10-1084, filed February 28, 2018).

Respondents now seek to supplement the Record on Appeal with matters filed in the above-referenced action attached as Exhibit B.

LAW/ANALYSIS

The Appellate Court Rules provide that matters not presented to the trial court are not properly included in the Record on Appeal. Rule 210(c), SCACR; see also Sanders v. Allis Chalmers Mfg. Co., 235 S.C. 259, 111 S.E.2d 201 (1959); State v. White, 372 S.C. 364, 642 S.E.2d 607 (Ct. App. 2007); Norris v. Ferre, 315 S.C. 179, 432 S.E.2d 491 (Ct. App. 1993) (record may not be supplemented with matters not presented to trial judge); S.C. Jur. Appeal and Error § 63. Furthermore, matters not presented to the Circuit Court will not be

³ In addition to the Substituted Modified Order on Plaintiff's Motion to Alter or Amend Judgment, filed June 14, 2016, Appellant appeals: Order Denying Plaintiff's Motion to Restore, filed March 3, 2015; Order on Plaintiff's Motion to Alter or Amend Judgment, filed June 22, 2015; and Modified Order on Plaintiff's Motion to Alter or Amend Judgment, filed May 23, 2016. See Exhibit C (Appellant's Amended Notice of Appeal (without attachments), served on October 31, 2016 and filed November 1, 2016).

given substantive consideration on appeal. Reed v. Becka, 333 S.C. 676, 511 S.E.2d 396 (Ct. App. 1999); Rule 210(c), SCACR (“The Record shall not, however, include matter which was not presented to the lower court or tribunal.”).

Respondents now seek to supplement the Record on Appeal with a matter unrelated to the instant appeal. Neither the Complaint, the allegations contained in the same, nor any document related to the Personal Care, Inc. v. Thomas A. Pendarvis and Pendarvis Law Offices, PC, C/A 2018-CP-10-1084, were before or presented to the lower court.

Respondents rely on Curtis v. State, 345 S.C. 557, 549 S.E.2d 591 (2001). In Curtis, the Court granted the Attorney General’s motion to supplement the record with a subsequent order on the merits of the legality of a state statute. The matter was on appeal following the denial of Curtis’ motion for a temporary injunction. While the matter was pending on appeal, the merits of the case—specifically the legality of a state statute—was decided. The Attorney General sought to supplement the record on appeal with the lower court’s order. Notably distinct from Respondents’ motion is that the Attorney

General sought to supplement the record with an order issued within the same case that was pending on appeal.⁴

Respondents do not seek to supplement the record with a subsequent order in the matter of Personal Care, Inc. v. Theos, et al.; rather, Respondents seek to include filings in an unrelated matter in the record on appeal for this Court's consideration of the merits of this appeal. Respondents fail to cite to any authority allowing for such supplementation. Accordingly, the complaint filed in a separate action cannot be included in the record on appeal. See Rule 210(c), SCACR.

Furthermore, while Respondents contend that the above-referenced matter is "relevant and essential to the determination of this proceeding,"⁵ such

⁴ Likewise, Respondents rely on Clay v. Burckle, 369 S.C. 651, 633 S.E.2d 173 (Ct. App. 2006), a family court matter, wherein the mother sought to supplement the record on appeal with a subsequent opinion issued by the Florida appellate court. Notably, the parties in the South Carolina matter and the Florida matter were identical, involving the same underlying subject matter regarding custody of the child. Here, Respondents seek to supplement the record with a Complaint that does not involve Respondents, and is unrelated to the issues on appeal in the subject case involved Respondents.

⁵ Respondents aver that the instant appeal is an appeal of the Circuit Court's denial of Appellant's Motion to Restore under Rule 40(j), SCRCP. Respondents allege that the malpractice complaint against Pendarvis related to the failure to timely file Appellant's Motion to Restore is ostensibly a concession that Appellant's claims against Respondents are time barred,

argument is misplaced. As articulated in Appellant's Return to Respondents' Motion to Dismiss, Appellant was under a compulsion to bring the separate action against Pendarvis so as to avoid these secondary claims from being time barred. (See Exhibit C, Appellant's Return to Respondents' Motion to Dismiss, Argument I).

CONCLUSION

Based on the aforementioned, Appellant respectfully requests the Court deny Respondents' Joint Motion to Supplement the Record on Appeal.

[SIGNATURE PAGE TO FOLLOW]

effectively nullifying this Appeal. (Resp. Joint Motion to Supplement, p. 4). Of note, this Court has previously denied Respondents' Joint Motion to Dismiss based on this same argument. (Order Denying Motion to Dismiss, Filed June 20, 2018).

Respectfully submitted,

COLLINS & LACY, P.C.



By: _____

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**APPELLANT'S RETURN TO
RESPONDENTS' JOINT MOTION
TO SUPPLEMENT THE RECORD
ON APPEAL**

Columbia, South Carolina
October 8, 2018

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Bowley & Byrd, LLC,..... Respondents.

PROOF OF SERVICE

Counsel for Appellant Personal Care, Inc. certifies that he served Appellant's Return to Respondents' Joint Motion to Supplement the Record on Appeal upon all parties by placing a copy in the United States mail, postage prepaid, to the below listed parties on October 8, 2018, addressed to the following:

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URICCHIO, HOWE, KRELL,
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[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

COLLINS & LACY, P.C.

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Columbia, South Carolina
October 8, 2018



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October 8, 2018

VIA UNITED STATES MAIL

The Honorable Jenny A. Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

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Re: *Personal Care, Inc. v. Jerry N. Theos; Uricchio, Howe, Krell, Johnson, Toporek, Theos & Keith, P.A.; Cheryl D. Shoun; and Taylor, Shoun, Bowley & Byrd, LLC*
Appellate Case No. 2016-001266
C&L File No. 002008-00100

Dear Ms. Kitchings:

Please find enclosed for filing the unbound original and seven (7) copies of Appellant's Return to Respondents' Joint Motion for Leave to Supplement the Record on Appeal in the above referenced matter. Please file the original and return a clocked copy of same via our courier.

By copy of this letter and enclosure, we are serving same on counsel of record.

Thank you for your time and attention. Should you have any questions or concerns, please do not hesitate to contact us.

Respectfully,

Christian Stegmaier
Christian Stegmaier

CS/net

Enclosures

cc (via U.S. Mail and Email):

- Thomas A. Pendarvis, Esquire
- Christopher Lempesis, Jr., Esquire
- Oana D. Johnson, Esquire
- Karen E. Spain, Esquire
- Jennifer H. Thiem, Esquire
- M. Dawes Cooke, Esquire
- Phillip S. Ferderigos Esquire

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