

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Knox McMahon, Circuit Court Judge

Case No.: 2018-000887

Erick George Johnson,

Appellant,

vs.

Abigail Marie Williams,

Respondent.

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SC Court of Appeals

MOTION TO STRIKE

Appellant respectfully moves this Court for an Order granting Appellant’s Motion to Strike all references to Magistrates Court proceedings from the Respondent’s Brief and from the Record on Appeal for the reasons set forth below.

Appellant’s motion is based upon the South Carolina Appellate Court Rules (“Appellate Court Rules”, and applicable case law.

Respondent, in her Brief, has included argument and references to proceedings in Magistrate Court and has designated matter to be included in the record to include the pleadings and Orders from the Magistrate Court which were not presented to the Circuit Court, and which were not placed in the record of the Trial Court, and are therefore improperly included in the Record on Appeal, and referenced in Respondent’s Brief.

The Appellant moves to strike from the Record on Appeal all references to the proceedings in Magistrate Court (R. p. 67 though R. p. 73) and all references in Respondent’s

Brief.

The South Carolina Appellate Court Rules, 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.”)

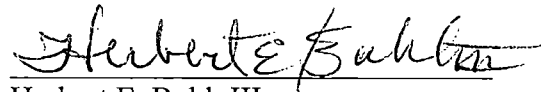
In addition to the Appellate Court Rules, case law also supports Appellant’s position that the Magistrate Court proceedings were improperly included in Respondent’s Brief and in the Record on Appeal and should be stricken.

In *Williamsburg Rural Water & Sewer Co., Inc. v. Williamsburg Cnty. Water & Sewer Auth.*, 368 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 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), the South Carolina Court of Appeals found 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 or prior Board actions in other cases.

The pleadings and Orders of the Magistrate Court proceedings were not received or considered by the Court below. In fact, several of the Magistrate Court proceedings did not occur until after the Notice of Appeal was filed in this case. Thus, they do not form a part of the Record on Appeal and should not be considered. Appellant respectfully moves this Court to strike said documents, and any reference to the documents, from Respondent's Brief and from the Record on Appeal.

Respectfully submitted,



Herbert E. Buhl, III
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ATTORNEY FOR APPELLANT

Columbia, South Carolina

February 19, 2019

STATE OF SOUTH CAROLINA
In The Court of Appeals

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Knox McMahon, Circuit Court Judge

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CERTIFICATE OF SERVICE

I certify that I am the attorney for Appellant in the above-captioned matter and that on the 19th day of February, 2019, in Columbia, South Carolina, I served a copy of Appellant's **Motion to Strike** onto the Court and Respondent in this matter by mailing, respectively, to the following addresses:

Abigail Marie Williams Eiler
2019 San Sus Drive
West Columbia, SC 29170

Columbia, South Carolina

February 19, 2019


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February 18, 2019

Clerk
SC Court of Appeals
1220 Senate Street
Columbia, SC 29201

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SC Court of Appeals


Re: Erick George Johnson v Abigail Marie Williams,
Appellate Case No.: 2018-000887

Dear Madam,

Enclosed you will find the original and six (6) copies of a Motion to Strike in the above-captioned matter. Also enclosed is my check for \$50.00 to cover the cost of the filing fee.

Thank you for your assistance in this matter.

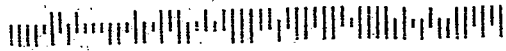
Sincerely,


Herbert E. Buhl, III
Attorney at Law

HEB/kw

Enclosures: (as stated above)

cc: Abigail Marie Williams Eiler



Columbia P&DC 290
TUE 19 FEB 2019 PM

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