

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Appellate Case No. 2012-212725

DAVIS AIR, INC., and GARY DAVIS, Respondents.

vs.

CORPORATE AIR, LLC, and
CAM INVESTMENTS, INC., Appellants,

APPELLANTS' FINAL REPLY BRIEF

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**RESPONDENTS ARE SEEKING THE ULTIMATE RELIEF REQUESTED THROUGH
THE DISCOVERY PROCESS, SO THEIR MOTION TO COMPEL SHOULD HAVE
BEEN DENIED.**

Respondent's brief is not supported by facts on the record; relies on filings made after the trial court's ruling; and, fails to acknowledge the underlying dispute. Appellants contend that the financial information regarding Appellant Corporate Air, LLC provided to Respondents (as well as to the officers of Corporate Air) over the last several years is in fact all the financial information they are required to provide. Respondents disagreed, asserting that they are entitled to **all** of Appellant Corporate Air's voluminous accounting and financial records. Respondents requested a declaratory judgment that the financial information provided was inadequate and thus a breach of the parties' agreements. The Respondents' discovery requests included all of both Appellants' voluminous accounting and financial records. If Appellants are correct in the underlying dispute, Respondents are not entitled to more financial information than they received. If the Respondents are correct in the underlying dispute, they are entitled to more or all of Appellant Corporate Air's accounting and financial records. And, even then, they are not entitled to any of Appellant CAM Investment's accounting and financial records. Compliance with the Motion to Compel would provide Respondents more information in discovery than they are entitled to even under Respondent's interpretation of the agreements. Respondents argue about a number of other unsubstantiated alleged breaches to obscure the fact that the alleged breach they sought declaratory judgment on at the time of the ruling on the Motion to Compel is a contract interpretation issue easily determined without any compliance with Respondent's overburdening discovery request.

In Respondents' Brief, they make numerous factual assertions not supported by the record. These assertions must be disregarded under SCACR 208 (b)(4), which provides that

“[t]he brief shall contain references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal ... to support the salient facts alleged.”

The Statement of Facts contains no references to materials included in the Record on Appeal other than two references to the Complaint on page 6. The “facts” set forth beginning on page 3, beginning with the second sentence under the heading “FACTS,” through the first two lines on page 6, were not in the record at the time of the hearing on the Motion to Compel and, therefore, are not and may not be included in the Record on Appeal. SCACR 210(c). Also, the assertions set forth in the last paragraph on page 6 are not supported by the facts in the record before the trial court on the motion to compel.

Respondents have further made statements of “fact” as to what Judge Young said during the hearing that are not supported by the transcript of the hearing. They are simply bold misstatements by Respondent and are not reflected in the Transcript. In Respondents’ Final Brief, page 3, they state: “Judge Young correctly noted that the ultimate relief requested in the Summons and Complaint was for the Respondent DavisAir, Inc. to be reinstated to its previous positions within Corporate Air, LLC as a 20% member.” From a review of the transcript, Judge Young never noted the above and, instead, merely commented that, in addition to the prayer requesting the records, Respondents also asked that the Appellants be declared in default. As noted by Appellants’ counsel at the hearing, the requested default would arise only if the Court ultimately found that Respondents were entitled to receive various documents under the parties’ agreements that they did not receive. (R. pp. 34-35.)

Respondents argue that, because they have subsequently filed an Amended Complaint in which they have deleted from their prayer for relief the specific request to be provided these

voluminous documents, the provision of these documents is no longer the ultimate relief requested. Of course, this posture was not before the trial court at the time that it ruled on the Motion to Compel at issue here. Nevertheless, even if the Amended Complaint is considered in this appeal, Respondents ignore the fact that they are asking the trial court to find Appellants in default, because the trial court finds the agreement requires that they provide all accounting and financial records of Appellant Corporate Air. Appellants contend that they have provided the amount of financial information to which Respondents are entitled. That is still the ultimate question to be decided by the trial court – whether the agreement required Appellants to provide all of these documents, rather than the financial documents that were provided. If the trial court finds in favor of the Respondents, it will de facto declare that Appellants must provide Respondents the accounting and financial records of Appellant Corporate Air.

Respondents have made three arguments in their brief, all of which concern whether or not Appellants were in default under their agreement with Respondents due to Appellants' refusal to provide all of Appellant Corporate Air's financial and accounting records. Thus, the ultimate question to be decided at the trial of this action remains whether Appellants had a duty under the agreements to provide all of Appellant Corporate Air's financial and accounting records to Respondents, and Respondents are not entitled to that relief until they have proved at trial that they are entitled to such accounting records. Appellants affirmatively assert that they have provided all financial and accounting records to which Respondents are entitled under the Redemption and Settlement Agreement and Default Agreement. So that, if Appellant is required to produce all of the information contained in Respondents' discovery request, Respondents will be obtaining the relief to which they are entitled only if they prevail on the merits of their case, without having had to prove their underlying case.

Respondents' first issue states that the issue before the trial court is whether Appellants were in default for failing to maintain past accounting practices. As the Respondents subsequently state, the requirement in the agreement was that Appellant Corporate Air "shall maintain all of its accounting and financial records in accordance with past practice ...". Respondents argue that the lack of a distribution in 2011 related to 2010 taxable income was a change of Appellant Corporate Air's accounting practice. There is simply no requirement that the Appellants make a distribution or that such distribution is a part of any financial or accounting practice. Instead, the requirement is that they maintain their records as they have in the past. Because Respondents have the burden of proving that they are entitled to these records as part of their case in chief, the trial court abused his discretion in awarding them the ultimate relief requested in Respondents' Complaint.

Respondents' second issue is that a finding of default is not a prerequisite to the production of the documents. As Respondents aptly state, they contend that the production of the documents is a requirement under the agreement for which they have sought a declaratory judgment. Appellants agree that the Court has to rule on what the agreement says prior to Respondents being entitled to the documents.

Respondents' third and last issue raised in their brief is that their filing an Amended Complaint after the trial court ruled on the Motion to Compel renders this appeal moot. First, that Amended Complaint was not before the trial court at the time that the motion was heard. Even if this Court considers the Amended Complaint, it did not render this appeal moot.

In Linda Mc Company, Inc. v. Shore 390 S.C. 543, 557, 703 S.E.2d 499, 506 (2010), the Supreme Court discussed mootness:

“A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some

event occurs making it impossible for [the] reviewing Court to grant effectual relief.”” Curtis v. State, 345 S.C. 557, 567-68, 549 S.E.2d 591, 596 (2001) (quoting Mathis v. S.C. State Highway Dep’t, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973).)

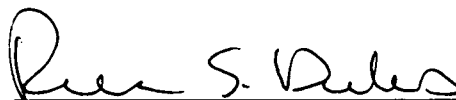
Of course, that is not the situation here. The ultimate issue in this lawsuit is whether the agreement requires Appellants to provide all of Appellant Corporate Air’s accounting and financial records such that a default occurred when they were only provided with the same financial reports distributed internally. Thus, requiring production of these documents in discovery constitutes the granting of the ultimate relief requested. There is clearly an existing controversy, and this Court’s ruling will have a practical legal effect upon the controversy.

Here, the trial court made no factual findings that these documents were something other than the ultimate relief requested in ruling that the Respondents were entitled to them during the discovery phase of the litigation. Appellants will be severely prejudiced if they have to produce these documents. Accordingly, the order was an error of law and an abuse of the trial court’s discretion.

CONCLUSION

For the reasons stated above and in Appellants’ Final Brief, this Court should reverse the trial court’s Order compelling discovery.

RESPECTFULLY SUBMITTED,



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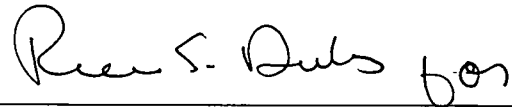
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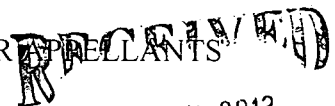
CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Appellants' Final Reply Brief Complies
with Rule 211(b), SCACR.



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PROOF OF SERVICE

I certify that I have served the Appellants' Final Reply Brief on Respondents by U.S. Mail, postage prepaid, on August 12, 2013, addressed to their attorneys of record as follows:

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