

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Doyet A. Early, Circuit Court Judge

Appellate Case No. 2019-02425
Civil Action No. 2018-CP-40-000648

RECEIVED
OCT 09 2019
SC Court of Appeals

Jefferson Davis, Jr. Appellant,

v.

Ellen Weaver, Chad Connelly, Oran P. Smith, Neil J. Mellen, Howard S. Rich, Rick Reams, Stephen D. Kirkland, Palmetto Promise Institute, Palmetto Family Council, Palmetto Family Action, South Carolinians for Responsible Government, SCRG Foundation, Access Opportunity South Carolina, Friedman Foundation for Educational Choice, Inc., Cato Institute, South Carolina Educational Credit for Exceptional Needs Children Fund, South Carolina Education Oversight Committee, South Carolina Dept. of Revenue, South Carolina Dept. of Labor, Licensing and Regulation, First Impressions, Inc. d/b/a/ Richard Quinn & Associates, First Tuesday Strategies, LLC, Bill Wilson, Jason Bedrick, Jim DeMint, Randy Page, Tony Denny, Phillip Cease, Melanie Barton, Doris Cubitt, Susan Thomas, John McCormick, Nate Leupp, Institute of Management Consultants USA & John Doe(s) 1-40 Respondents.

**INITIAL BRIEF OF RESPONDENT SCRG FOUNDATION
N/K/A DONORS ENRICHING STUDENTS' KNOWLEDGE**

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COUNTER-STATEMENT OF THE ISSUES ON APPEAL

1. Did the trial court properly dismiss Mr. Davis' claims against the SCRG Foundation (n/k/a Donors Enriching Students' Knowledge ["DESK"]) because Mr. Davis failed to serve the Amended Complaint on DESK within the time frame required by the trial court's prior order?
2. Was the dismissal of Mr. Davis' claims against DESK further supported by the additional sustaining ground that the Amended Complaint fails to make any factual allegations whatsoever against DESK?
3. Was the dismissal of Mr. Davis' claims against DESK further supported by the additional sustaining ground that the claims Mr. Davis attempts to assert are fatally deficient?
4. Did the trial court properly dismiss Mr. Davis' claims against DESK with (rather than without) prejudice because Mr. Davis failed to comply with a prior order of the court, failed timely to serve DESK, has already been given an opportunity to amend his Complaint and *still* failed to assert viable claims or to allege facts capable of supporting them, and has identified no new facts in his post-dismissal filings that could remedy his deficient claims?

STATEMENT OF THE CASE AND FACTS

In the interest of economy and efficiency of the reader, DESK adopts and incorporates by reference the Statement of the Case and the Statement of the Facts found in the brief of co-Respondents Cato Institute and Howard S. Rich filed on October 7, 2019. *See* Rule 208(b)(6), SCACR ("In cases involving more than one appellant or respondent, . . . any party may adopt by reference all or any part of the brief of another."). By way of additional procedural history, DESK also notes that it that it filed a Motion to Dismiss on December 26, 2018, and filed a memorandum of law in support of the motion on February 6, 2019, arguing dismissal was warranted because the Amended Complaint (i) never even mentions DESK other than in the caption and the introductory section naming the defendants; (ii) never makes a factual allegation against DESK; (iii) never asserts a cause of action against DESK with anything approaching the degree of specificity necessary to assert a plausible claim; (iv) never asserts any cause of action upon which relief could be granted against DESK; and (v) impermissibly reasserts several causes of action that were previously dismissed without leave to amend by Judge Benjamin. *See* DESK Mot. to Dismiss (R. ____); DESK Mem. in Supp. (R. ____).

ARGUMENT

Rather than reasserting arguments and authorities that have already been argued to this Court in this appeal by other Respondents and which are equally applicable to DESK, this brief adopts and incorporates by reference the Arguments found in the brief of co-Respondents Cato Institute and Howard S. Rich, as well as any other applicable arguments asserted by other co-Respondents. *See* Rule 208(b)(6), SCACR. DESK supplements those arguments only by noting that this Court should affirm the dismissal of the claims against DESK on the additional sustaining ground that the Amended Complaint fails to allege facts that could give rise to DESK's liability. Specifically, other than in the pleading's caption, DESK is mentioned only in the following five paragraphs of the Amended Complaint, none of which allege any action or omission by DESK, much less an act or omission injuring or even *affecting* Mr. Davis:

- Paragraph 3 alleges defendant Chad Connelly was a former board member of DESK (when it was previously known as SCRG Foundation), *see* Amend. Compl. ¶ 3 (R. ____);
- Paragraph 6 alleges defendant Howard Rich was a donor to and director of DESK (when it was previously known as SCRG Foundation), *see id.* ¶ 6 (R. ____);
- Paragraph 13 identifies DESK as a defendant, *see id.* ¶ 13 (R. ____);
- Paragraph 26 alleges defendant Randy Page was a former board member of DESK (when it was previously known as SCRG Foundation), *see id.* ¶ 26 (R. ____); and
- Paragraph 28 alleges defendant Phillip Cease was a former board member of DESK (when it was previously known as SCRG Foundation), *see id.* ¶ 28 (R. ____).

Conspicuously absent from these five references are *any* factual allegation about DESK that could support *any* claim against DESK, either directly (for there is not a single allegation of any act or omission by DESK) or vicariously (for there is not a single allegation that any person with actual or apparent authority to act on DESK's behalf did, in fact, act on the basis of that authority to harm Mr. Davis, nor is there any allegation that DESK employed, directed, encouraged, or was even aware of any alleged conduct by anyone directed at Mr. Davis).

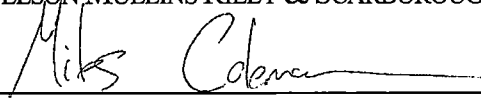
In the absence of such allegations, no claim may lie against DESK, and dismissal of the claims is appropriate. *See generally* Brief of Cato Institute and Mr. Rich at Argument II.A (compiling authorities); *see also Krych v. Hvass*, 83 F. App'x 854, 855 (8th Cir. 2003) (affirming dismissal of claims when the plaintiff “failed to state any claim whatsoever against Stender and Fitzloff-Meyer because he merely listed these individuals as defendants in his complaint and did not allege they were personally involved in the constitutional violations”); *Black v. Lane*, 22 F.3d 1395, 1401 n.8 (7th Cir. 1994) (“The magistrate judge properly dismissed Greer, the Chief Administrative Officer at Menard. Although Greer is named as a defendant, there are no factual allegations involving him other than that he was charged with the administration of Menard and is responsible for all persons at Menard. This is not sufficient personal involvement for the imposition of liability.”); *Hunt v. Hedgepath*, No. 8:18-cv-2684-TMC-JDA, 2018 WL 6031317, at *3 (D.S.C. Oct. 22, 2018) (recommending dismissal of *pro se* plaintiff’s claims because “Plaintiff has made no specific allegations in the body of his Complaint against these two Defendant, which is required to state a claim” and “[i]n the absence of substantive allegations of wrongdoing against these named Defendants, the Court is unable to liberally construe any type of plausible cause of action arising from the Complaint against them”); *Dupont v. County of Jasper*, No. 2008-CP-27-223, 2011 WL 12565700 (S.C. Ct. of Common Pleas, Jasper County, Hon. Carmen T. Mullen, June 14, 2011) (dismissing County from lawsuit because “the Complaint contains no substantive allegations against the County of Jasper”).

CONCLUSION

For the foregoing reasons, Respondent DESK respectfully requests this Court affirm the trial court’s Order dismissing Mr. Davis’ claims against it.

[SIGNATURE PAGE ATTACHED]

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October 9, 2019

Greenville, South Carolina

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APPEAL FROM RICHLAND COUNTY
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Jefferson Davis, Jr..... Appellant,

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Howard S. Rich, Rick Reams, Stephen D. Kirkland, Palmetto
Promise Institute, Palmetto Family Council, Palmetto Family
Action, South Carolinians for Responsible Government, SCRG
Foundation, Access Opportunity South Carolina, Friedman
Foundation for Educational Choice, Inc., Cato Institute, South
Carolina Educational Credit for Exceptional Needs Children
Fund, South Carolina Education Oversight Committee, South
Carolina Dept. of Revenue, South Carolina Dept. of Labor,
Licensing and Regulation, First Impressions, Inc. d/b/a/ Richard
Quinn & Associates, First Tuesday Strategies, LLC, Bill Wilson,
Jason Bedrick, Jim DeMint, Randy Page, Tony Denny, Phillip
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USA & John Doe(s) 1-40..... Respondents.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent SCRG Foundation n/k/a Donors Enriching Students' Knowledge ("DESK"), do hereby certify I have served all counsel in this action with a copy of the filings specified below by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

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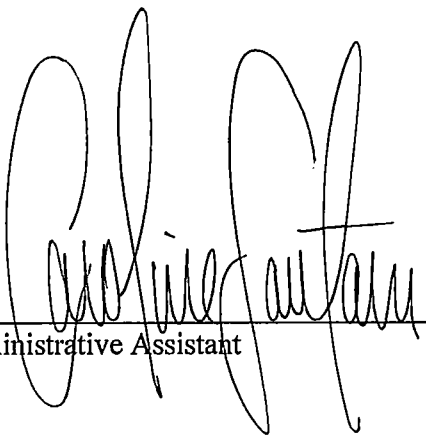
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OCT 09 2019

SC Court of Appeals

RE: Davis v. Weaver *et al.*
Appellate Case No. 2019-000648
Our File No. 058675/01500

Dear Ms. Kitchings:

In connection with the above-captioned matter, enclosed please find an original and one copy of the Initial Brief of Respondent SCRG Foundation n/k/a Donors Enriching Students' Knowledge ("DESK"). Also enclosed is an original and one copy of DESK's Designation of Matter. We ask that you file the originals and return clocked-in copies to us via our courier.

Also enclosed is a Proof of Service of the Initial Brief and Designation on Appellant and on the other Respondents' counsel of record.

Very truly yours,



Miles E. Coleman

Enclosures

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