

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge
Case No.: 2018-CP-40-02425

Appellate Case No. 2019-000648

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OCT 11 2019
SC Court of Appeals

Jefferson Davis, Jr.,Appellant

v.

Ellen Weaver, Chad Connelly, Oran P. Smith, Neil J. Mellen, Howard S. Rich, Rick Reames, 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 Department of Revenue, South Carolina Department of Labor, Licensing and Regulations, 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 STEPHEN D. KIRKLAND

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TABLE OF AUTHORITIES

Mr. Kirkland incorporates by reference all applicable authorities found in the Table of Authorities section of the Brief of co-Respondents Cato Institute and Howard S. Rich. The additional authorities cited in this brief are listed below:

Rules	Page(s)
SCACR Rule 220(c)..	2
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COUNTER-STATEMENT OF THE ISSUES ON APPEAL

1. Did the circuit court properly dismiss Mr. Davis's claims against Mr. Kirkland because Mr. Davis failed to state facts sufficient to support any of the nine causes of action that he asserted against Mr. Kirkland?

2. Did the circuit court properly dismiss Mr. Davis's claims against Mr. Kirkland because Mr. Davis failed to timely and properly serve Mr. Kirkland the Amended Summons and Complaint in accordance with the South Carolina Rules of Civil Procedure and within the time frame required by the circuit court's prior order?

STATEMENT OF THE CASE

In the interest of economy and efficiency, Respondent Stephen D. Kirkland adopts and incorporates by reference the Statement of the Case found in the brief of co-Respondents Cato Institute and Howard S. Rich. To that statement, Mr. Kirkland adds that he filed his own Motion to Dismiss on December 21, 2018, and supported that motion with a memorandum of law filed on February 6, 2019, arguing that dismissal was warranted because Mr. Davis failed to state facts sufficient to constitute a cause of action against Mr. Kirkland and Mr. Davis never properly served the Amended Summons and Complaint on Mr. Kirkland. *See* Kirkland Mot. to Dismiss (R. ___); Kirkland Mem. in Supp. (R. ___). Mr. Kirkland also notes that while he was present at the Motion to Dismiss hearing that was held on February 12, 2019, Judge Early concluded the hearing and issued his order prior to Mr. Kirkland having an opportunity to argue his own Motion to Dismiss and the specific grounds as to why the dismissal of all causes of action against him was warranted. *See* Hearing Tr. 10:15-18 (R. ___); Order at N. 1 (R. ___).

STATEMENT OF THE FACTS

In the interest of economy and efficiency, Mr. Kirkland adopts and incorporates by reference the Statement of the Facts found in the brief of co-Respondents Cato Institute and Howard S. Rich.

STANDARD OF REVIEW

Mr. Kirkland adopts and incorporates by reference the Standard of Review found in the brief of co-Respondents Cato Institute and Howard S. Rich.

ARGUMENT

Mr. Kirkland incorporates by reference the Arguments found in the Brief of co-Respondents Cato Institute and Howard S. Rich, which are applicable to Mr. Kirkland as well, and any other applicable arguments asserted by other co-Respondents. To those arguments, Mr. Kirkland asserts two additional sustaining grounds upon which this Court should affirm the circuit court's decision. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order decision or judgment upon any ground(s) appearing in the Record on Appeal.").

I. The Circuit Court did not Err in its Order for Dismissal Because Mr. Davis Failed to State Facts Sufficient to Constitute a Cause of Action Against Mr. Kirkland.

This Court should affirm the circuit court's dismissal of Mr. Davis's claims against Mr. Kirkland because Mr. Davis failed to state facts sufficient to constitute a cause of action against Mr. Kirkland. The only factual allegations specific to Mr. Kirkland relate to him being retained by Defendant South Carolina Department of Revenue, or Defendant Rick Reames, to conduct a limited audit of Plaintiff and his nonprofit organization, Palmetto Kids FIRST. *See* Amended Compl. ¶ 121 (R. ____). Plaintiff contends that Mr. Kirkland was "conflicted" in this engagement due to his status as Board Member for Defendant Palmetto Family Council and Defendant Palmetto Family Alliance. *Id.* at ¶ 124 (R. ____).

None of the nine causes of action asserted by Mr. Davis in his Amended Complaint allege any specific action or omission by Mr. Kirkland that affected or injured Mr. Davis. *See* Kirkland Mem. in Supp. at Argument A (R. ____). Mr. Kirkland does not know and did not interact with Mr. Davis, did not make any statements or representations regarding Mr. Davis, and

did not perform the audit with any other party to the present lawsuit. *Id.* The facts alleged in Mr. Davis's Amended Complaint are therefore insufficient to entitle him to the relief he seeks, and dismissal of the claims is appropriate. *See generally* the authorities cited in the Briefs of Cato Institute and Mr. Rich at Argument II. A (R. ____).

II. The Dismissal of Mr. Davis's Claims Against Mr. Kirkland is Also Warranted on the Basis that Mr. Davis Failed to Properly Serve the Amended Summons and Complaint on Mr. Kirkland in Compliance With the Service of Process Requirements Set Forth in Rule 12(b)(5), SCRPC.

In addition to the fact Mr. Davis did not serve Mr. Kirkland within the time limit imposed by Judge Benjamin in her Amended Order, dismissal is also warranted because Mr. Davis failed to serve Mr. Kirkland pursuant to Rule 12(b)(5), SCRPC. Mr. Davis may have attempted to serve Mr. Kirkland by certified mail on November 26, 2018, at his residence. Kirkland Mem. in Supp. at Argument B (R. ____); Rule 4(d)(8), SCRPC (stating a plaintiff may serve an individual defendant by registered or certified mail, return receipt requested and delivery restricted to the addressee) (R. ____). However, Mr. Kirkland averred that no one was present at his house on the date and time of service listed in the return receipt. Kirkland Affidavit, Ex. A, Mot. to Dismiss (R. ____). Therefore, the handwritten Kirkland "signature" on the return receipt was not made by him, his wife, or anyone else authorized on his behalf, and the Amended Complaint could not have been, and was not, left with an individual as is stated in Mr. Davis's Proof of Service documents. *Id.* (R. ____). To date, Mr. Kirkland has not otherwise been served with process in compliance with Rule 4, SCRPC. Accordingly, dismissal of the claims against Mr. Kirkland is also appropriate based upon insufficiency of service of process.

CONCLUSION

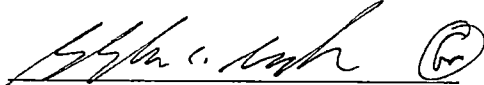

Because Mr. Davis did not serve Mr. Kirkland with the Amended Summons and Complaint pursuant to Rule 4 of the South Carolina Rules of Civil Procedure, or within the time frame required by Judge Benjamin's order, this Court should affirm the circuit court's dismissal. Even if service was effective, Mr. Davis's failed to state facts sufficient to constitute a cause of action against Mr. Kirkland. Accordingly, this Court should affirm the circuit court's dismissal on the merits.

This 9th day of October, 2019.

Respectfully submitted,

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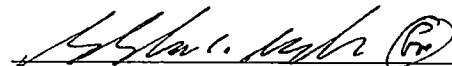
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I certify that I have served the *Respondent Stephen D. Kirkland's Designation of Matter to be Included in the Record on Appeal*, by depositing a copy in the United States Mail, postage prepaid, on this the _____ day of October, 2019, addressed to all counsel of record as follows:

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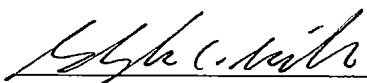
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CSKL File No.: 01834-58192

Dear Ms. Kitchings:

Enclosed please find the original and one (1) copy of Respondent Stephen D. Kirkland's Initial Brief, Designation of Matter to be Included in the Record on Appeal, and Proof of Service in this case. Please provide me with a clocked copy in the enclosed, self-addressed, stamped envelope. By copy of this letter, I am serving the same upon all counsel of record. If you have any questions, please feel free to contact me..

Sincerely,



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