

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**  
NOV 06 2019  
SC Court of Appeals

JEFFERSON DAVIS, JR.,

APPELLANT,

v.

ELLEN WEAVER, ET AL.

RESPONDENTS.

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**INITIAL BRIEF OF RESPONDENTS DORIS  
CUBITT AND SOUTH CAROLINA  
DEPT. OF LABOR, LICENSING AND REGULATION**

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HOWSER, NEWMAN & BESLEY, LLC  
ANDREW E. HASELDEN  
215 EAST BAY STREET / SUITE 303  
CHARLESTON, SC 29401  
(843) 216-6940

**ATTORNEY FOR RESPONDENTS DORIS CUBITT AND SOUTH  
CAROLINA DEPT. OF LABOR, LICENSING AND REGULATION**

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### **COUNTER-STATEMENT OF THE ISSUES ON APPEAL**

1. Did the trial court properly dismiss Mr. Davis' claims against Doris Cubitt ("Cubitt") and South Carolina Dept. of Labor, Licensing and Regulation ("LLR") because Mr. Davis failed to serve the Amended Complaint on them within the time frame required by the trial court's prior order?
2. Was the dismissal of Mr. Davis' claims against Cubitt and LLR further supported by the additional sustaining ground that the claims Mr. Davis attempts to assert are fatally deficient?
3. Did the trial court properly dismiss Mr. Davis' claims against Cubitt and LLR with (rather than without) prejudice? Did this manner of dismissal occur because Mr. Davis failed to comply with a prior order of the court, failed timely to serve Cubitt and LLR, 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 finally has identified no new facts in his post-dismissal filings that could remedy his deficient claims?

### **STATEMENT OF THE CASE / FACTS**

In the interest of economy and efficiency of the reader, Cubitt and LLR adopt and incorporate 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, Cubitt and LLR note that they each filed a Motion to Dismiss on January 25, 2019, asserting as additional grounds to dismiss that there were no facts in the Amended Complaint that established any liability to Mr. Davis on the part of either Cubitt or LLR under South Carolina law. *See Motion to Dismiss on Behalf of Defendant Cubitt (January 25, 2019); Motion to Dismiss on Behalf of Defendant LLR (January 25, 2019).*

## 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 , 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*. Cubitt and LLR supplement those arguments only by noting that this Court should affirm the dismissal of the claims against them on the additional sustaining ground that the Amended Complaint fails to allege facts that could give rise to Cubitt and LLR's liability. Specifically, other than in the pleading's caption, Cubitt and LLR are mentioned only in five (5) paragraphs of the Amended Complaint, none of which allege any action or omission by Cubitt and LLR, much less an act or omission injuring or even *affecting* Mr. Davis. See Amended Complaint at ¶¶ 142-146.

Conspicuously absent from these five references are *any* factual allegation about Cubitt or LLR that could support *any* claim against them, either directly (for there is not a single allegation of any act or omission by Cubitt or LLR) or vicariously (for there is not a single allegation that any person with actual or apparent authority to act on Cubitt or LLR's behalf did, in fact, act on the basis of that authority to harm Mr. Davis, nor is there any allegation that Cubitt or LLR 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 Cubitt or LLR, and dismissal of the claims was 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

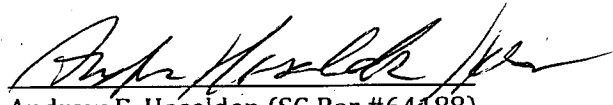
constitutional violations”); Black v. Lane, 22 F.3d 1395, 1401 n.8 (7th Cir. 1994) (“The magistrate judge properly dismissed Greer, the Chief Administrative Officer at Menard. Although Greer is named as a defendant, there are no factual allegations involving him other than that he was charged with the 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 Defendants, 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-GP-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 Cubitt and LLR respectfully request that this Court affirm the trial court’s Order dismissing Mr. Davis’ claims against them.

[SIGNATURE PAGE TO FOLLOW]

**HOWSER, NEWMAN & BESLEY, LLC**



Andrew E. Haselden (SC Bar #64188)

215 East Bay Street, Suite 303

Charleston, SC 29401

(843) 216-6940 (telephone)

(843) 216-6942 (facsimile)

ahaselden@hnblaw.com

**ATTORNEY FOR RESPONDENTS**

**DORIS CUBITT AND SCLLR**

November 6, 2019

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY  
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**PROOF OF SERVICE / INITIAL BRIEF OF DORIS CUBITT  
AND SOUTH CAROLINA DEPT. OF LABOR, LICENSING AND REGULATION**

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I, the undersigned employee of Howser Newman & Besley, LLC, hereby certify that pursuant to Rules 208(a) and 262(b), SCACR, I have served the **Initial Brief of Respondents Doris Cubitt and South Carolina Dept. of Labor, Licensing and Regulation** in this matter on **All Parties Of Record** by mailing a copy, United States Mail, postage prepaid, on November 6, 2019, to the following addresses:

Jefferson Davis, Jr.  
403 McCarther Avenue  
Greenville, SC 29615

Jennifer Foulk Nutter  
Maryrose L. Pritchard, Esquire  
Hood Law Firm, LLC  
P.O. Box 1508  
Charleston, SC 29402-1508

Douglas Walker MacKelcan, Esquire  
Copeland, Stair, Kingma & Lovell, LLP  
40 Calhoun Street, Suite 400  
Charleston, SC 29401

Miles E. Coleman, Esquire  
Nelson, Mullins, Riley &  
Scarborough, LLP  
104 South Main Street, Suite 900  
Greenville, SC 29601

Christopher S. Elliot, Esquire  
Boykin & Davis, LLC  
P.O. Box 11844  
Columbia, SC 29211

William J. Farley, III, Esquire  
TROUTMAN SANDERS, LLP  
301 South College Street, Suite 3400  
Charlotte, NC 28202

Geoffrey Kelly Chambers, Esq.  
CPER Law Group LLC  
411 Walnut Street, No. 10646  
Green Cove Springs, FL 32043-  
3443

J. Kenneth Carter, Jr., Esq.  
Ross Durant, Esq.  
Turner Padgett Graham & Laney,  
PA  
P.O. Box 1473  
Columbia, SC 29202

Michael B. Wren, Esquire  
Davidson, Wren & Plyler, PA  
Post Office Box 8568  
Columbia, SC 29202

M. Dawes Cooke, Jr., Esq.  
Justin Paul Novack, Esq.  
Barnwell, Whaley, Patterson  
& Helms, LLC  
P.O. Drawer 11  
Charleston, SC 29402

Martin S. Driggers, Jr., Esquire  
Sweeny, Wingate & Barrow, P.A.  
115 Cargill Way, Suite B  
Hartsville, SC 29550

Mark Steven Barrow  
Sweeny, Wingate & Barrow, P.A.  
P.O. Box 12129  
Columbia, SC 29211



Chelsea Thorne

November 6, 2019

R. Davis Howser  
James P. Newman, Jr.<  
Benjamin D. McCoy^  
Kelley Shull Cannon^  
Andrew E. Haselden<  
George V. Hanna, IV\*  
Michal Cooper Jones  
Kyliene L. Keesley^  
Albert Richard Pierce, Jr.\*  
James P. Sullivan  
Jeffrey I. Silverberg

**HNB**  
**HOWSER, NEWMAN**  
**& BESLEY, LLC**

*Attorneys and Counselors at Law*

Post Office Box 12009  
Columbia, SC 29211  
www.hnblaw.com

Columbia Office  
1508 Washington Street  
Columbia, SC 29201  
Telephone 803.758.6000  
Fax 803.758.4445  
Toll Free 866.207.6209

Charleston Office  
215 East Bay Street  
Suite 303  
Charleston, SC 29401  
Telephone 843.216.6940  
Fax 843.216.6942  
Toll Free 877.216.6970

William G. Besley (1964-2018)

< Certified Circuit Court Mediator  
^ Certified Circuit Court Mediator and Arbitrator  
\* Also Admitted in North Carolina

November 6, 2019

**VIA HAND DELIVERY**

The Honorable Jenny Abbott Kitchings  
Clerk of Court, South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

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SC Court of Appeals

**RE: Jefferson Davis, Jr. v. Ellen Weaver, et. al**  
*Appellate Case No:* 2019-00648  
*Civil Action No.:* 2018-CP-40-02425  
*Our Matter No:* 137-076


Dear Ms. Kitchings:

On behalf of Respondents Doris Cubitt and SCLLR, please find enclosed for filing, the original of each of the following documents in the above-captioned action:

- *Initial Brief of Respondents; Cubitt and SCLLR*
- *Proof of Service* with respect to the Brief;
- *Designation of Matter to be Included in the Record on Appeal;* and
- *Proof of Service* with respect to the Designation.

By copy of this letter, I am serving all parties of record with a copy of each of the above-described documents. Thank you for your assistance in this matter and please do not hesitate to contact me with any questions or concerns.

Regards,

  
Andrew E. Haselden

AEH/

cc: All Parties of Record

# **HNB**

**HOWSER, NEWMAN  
& BESLEY, LLC**

*Attorneys and Counselors at Law*

Post Office Box 12009  
Columbia, SC 29211

The Honorable Jenny Abbott Kitchings  
Clerk of Court, South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

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