

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

RECEIVED
MAR 19 2020
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.

CATO INSTITUTE AND HOWARD S. RICH'S
RETURN TO APPELLANT'S MOTION TO STRIKE

Pursuant to Rule 240(e) of the South Carolina Appellate Court Rules ("SCACR"), Respondents Cato Institute and Howard S. Rich respectfully submit this Return to Mr. Davis' Motion to Strike dated March 9, 2020. As explained more fully below, the arguments asserted in Mr. Davis' motion are plainly incorrect, as is his repeated mischaracterization of the Order giving rise to this appeal. This Court should deny his motion.

RELEVANT BACKGROUND¹

Mr. Davis—a graduate of the University of South Carolina School of Law and a lawyer licensed to practice in Georgia—filed his *pro se* Complaint on May 3, 2018 asserting nine claims against an individual defendant (Ellen Weaver), a corporate defendant (Palmetto Promise Institute or “PPI”), and 20 pseudonymous defendants (Does 1–20). Weaver and PPI subsequently filed a Motion to Dismiss. Judge DeAndrea Benjamin held a hearing on the motion on October 1, 2018, and, at the conclusion of the hearing, orally granted in part and denied in part the Motion to Dismiss and gave leave to Mr. Davis to amend his complaint by naming and serving the John Doe defendants. Judge Benjamin specifically advised Mr. Davis that the amendment she was permitting required him to name *and* serve the John Doe defendants, and she specifically gave him 15 days to do so. Her subsequent Order (and the Amended Order filed to correct a scrivener’s error) repeated this requirement.

Mr. Davis subsequently filed an Amended Complaint naming 31 new defendants. He did not, however, serve Cato Institute, Mr. Rich, or any of the new defendants within the time period required by Judge Benjamin. Cato Institute and Mr. Rich filed a Motion to Dismiss the Amended Complaint and a memorandum in support thereof. The Motion and memorandum asserted numerous reasons for dismissal including Mr. Davis’ failure timely to serve the Amended Complaint; his failure to make specific factual allegations regarding Cato Institute or Mr. Rich; the absence of any claims on which relief could be granted; and the expiration of the statute of limitations. Many of the other newly-added defendants filed similar Motions to Dismiss and supporting memoranda raising these and other bases for dismissal.

¹ A more thorough recitation of the facts and procedural history that underlie this appeal may be found in Cato Institute’s and Mr. Rich’s brief, *see* Brief of Cato Institute and Rich at 2–10, and will not be repeated fully here.

Judge Doyet Early heard arguments on the new defendants' Motions to Dismiss on February 12, 2019. Fairly early in the hearing, after Judge Early had heard argument on only two of the new defendants' Motions, counsel for Cato Institute and Mr. Rich suggested to Judge Early that a common denominator among all the new defendants that would warrant dismissal of the claims against all of them (without hearing a roomful of lawyers argue a slew of Motions to Dismiss) was Mr. Davis' failure timely to serve the Amended Complaint on any of the new defendants. Judge Early carefully reviewed Judge Benjamin's Amended Order, determined it required Mr. Davis to file and serve his Amended Complaint by the deadline set therein, and concluded Mr. Davis' failure to do so warranted dismissal. Accordingly, Judge Early filed an Order on February 19, 2019 dismissing with prejudice Mr. Davis' claims against the new defendants. Mr. Davis filed a Motion to Reconsider; Judge Early denied it; and Mr. Davis appealed.

ARGUMENT

Mr. Davis' Motion to Strike asserts two primary arguments: (1) that Cato Institute's and Mr. Rich's appellate brief (as well as those of other Respondents) asserts arguments that, according to Mr. Davis, are improper because they are unrelated to the issue of untimely service, and (2) that Cato Institute's and Mr. Rich's Designation of Matter to be Included in the Record on Appeal (as well as those of other Respondents) designates materials that, in Mr. Davis' view, are improper because they are extraneous to the issue of untimely service. *See* Mot. to Strike at 2–5.² On these bases, Mr. Davis asks this Court to strike “all sections of Respondent's [sic] Initial Brief's [sic] addressing issues unrelated to the interpretation of any alleged service deadline in Judge Benjamin's Order,” and to strike every item “included in all Respondent's [sic] Designation of

² Mr. Davis also takes issue with specific items designated by the South Carolina Educational Credit for Exceptional Needs Children Fund. *See id.* at 5–6. That issue is not addressed herein.

Matter's [sic] except for the 7 items included in Appellant's Designation of Matter." *Id.* at 6. As explained more fully below, both of Mr. Davis' arguments are incorrect, and both his requests for relief should be denied.

First, Mr. Davis is simply incorrect regarding the supposed impropriety of Cato Institute's and Mr. Rich's appellate arguments unrelated to the issue of untimely service. The law is well settled that a prevailing party below (here, Cato Institute and Mr. Rich) may assert additional grounds to sustain the ruling below, even if (as here) those grounds were not relied on by the trial court in its ruling. *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'on, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 419–20, 526 S.E.2d 716, 723 (2000) ("Under the present rules, a respondent—the 'winner' in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court. . . . The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment."); J. Toal, *et al.*, *Appellate Practice in South Carolina* 62 (2d ed. 2002) (same). This is precisely what Cato Institute and Mr. Rich have done here by asserting additional sustaining grounds in their appellate brief.³ Mr. Davis' objections are not well-founded, and this Court should not indulge them.

³ *See, e.g.*, Brief of Cato Institute and Mr. Rich at 19–23 (arguing "[t]he dismissal of Mr. Davis' claims against Cato Institute and Mr. Rich is also supported by the additional sustaining ground that the Amended Complaint fails adequately to allege any facts that could give rise to their liability"); *id.* at 23–29 (arguing "[t]he dismissal of Mr. Davis' claims against Cato Institute and Mr. Rich is also supported by the additional sustaining ground that the causes of action he attempts to assert are fatally deficient").

Second, Mr. Davis is likewise incorrect regarding the supposed impropriety of the items Cato Institute and Mr. Rich designated to be included in the Record on Appeal. The determination of what may be designated for inclusion in the Record is governed by Rules 209(b) and 210(c), SCACR. These rules set forth two requirements for designation and inclusion in the Record: (1) a matter must be relevant to the appeal and (2) it must have been presented to the lower court. *See* Rule 209(b), SCACR (“A party shall not include any matter in his Designation which is not relevant to the appeal.”); Rule 210(c), SCACR (“The Record shall not, however, include matter which was not presented to the lower court or tribunal.”).

The items designated by Cato Institute and Mr. Rich satisfy these requirements.⁴ As to the former requirement, there can be no question the items designated by Cato Institute and Mr. Rich are relevant to the appeal. For example, Cato Institute’s and Mr. Rich’s Motion to Dismiss and supporting memorandum—items Mr. Davis seeks to strike from the Record—assert the exact service-related argument upon which Judge Early dismissed the suit. The motions and memoranda filed by some of the other newly-named defendants likewise raised service issues. Further, the pleadings, motions, and memoranda submitted to the trial court are indisputably relevant to a proper understanding of the nature of the lawsuit, the claims it attempts to assert, and the question of whether Mr. Davis has alleged claims on which relief can be granted—topics that are properly before this Court as additional sustaining grounds as explained above. Likewise, the prior Motion filed by Weaver and PPI is relevant to an understanding of the context of Judge Benjamin’s

⁴ Cato Institute and Mr. Rich designated 37 items in addition to those designated by Mr. Davis. The additional items including the Pleadings (namely the Complaint, Amended Complaint, and seven Answers to the Amended Complaint) and the motions and memoranda filed with the trial court (namely Weaver and PPI’s Motion to Dismiss and supporting memorandum, Mr. Davis’ response thereto, the 17 Motions to Dismiss the Amended Complaint, and eight memoranda in support of those motions).

ruling—a ruling that Mr. Davis agrees is a critical matter on appeal. In sum, each of the items designated by Cato Institute and Mr. Rich are relevant to the appeal. There is likewise no dispute that the items designated by Cato Institute and Mr. Rich were presented to the lower court. The items in question are pleadings, motions, and memoranda, and supporting exhibits that were filed with the trial court in this action and that sought dismissal of Mr. Davis’ claims. Accordingly, they are properly included in the Record on Appeal.

Finally, Mr. Davis’ Motion to Strike repeatedly and incorrectly misconstrues the rulings below and misapprehends the issues before this Court. Specifically, he argues that Judge Early interpreted Judge Benjamin’s Amended Order as requiring Mr. Davis to “PERSONALLY SERVE each of the newly named John Doe Defendants”—an interpretation that, according to Mr. Davis, was incorrect because such a task would have been impossible. *See* Mot. to Strike at 2 (capitalization in original); *see also id.* at 2–3 (arguing that “nothing in the October 30, 2018, Order by Judge Benjamin [] indicates that Appellant was instructed to PERSONALLY SERVE these 31 newly named defendants,” and that “it would have been a physical impossibility to personally serve these 31 newly named and geographically diverse defendants within that 15-day time period”) (capitalization in original); *id.* at 4 (arguing Cato Institute, Mr. Rich and the other Respondents “have not provided any reasonable explanation (much less a legal basis)” as to why Judge Benjamin would have imposed on him the “impossible task” of “physically serv[ing] all 31 of the newly named and geographically diverse defendants within 15-days [sic]”).

Contrary to Mr. Davis’ argument, however, Judge Early did not rule that Judge Benjamin’s Amended Order required Mr. Davis to *physically* serve the new defendants *in person*, nor did Cato Institute or Mr. Rich argue that this was required. Rather, Cato Institute and Mr. Rich argued, and Judge Early ruled, only that Mr. Davis was required to serve the Summons and Complaint by any

permissible means within 15 days after Judge Benjamin’s ruling. Notably, the Rules of Civil Procedure allow for service of a Summons and Complaint *by certified mail* on an individual or corporation. *See* Rule 4(d)(8), SCRCF. Indeed, when Mr. Davis—a graduate of this State’s leading law school and a licensed attorney—eventually attempted to serve some of the new defendants, he did so primarily by mailing them copies of the Summons and Complaint. The argument he now raises about the supposed impossibility of “physically” and “personally” serving the new defendants is belied by his actual efforts and, in any event, mischaracterizes the analysis and ruling in Judge Early’s Order dismissing the suit.

CONCLUSION

For the foregoing reasons, Mr. Davis’ Motion to Strike should be denied.

Respectfully submitted,

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March 19, 2020
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
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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.

PROOF OF SERVICE

I, the undersigned of the law offices of Nelson Mullins Riley & Scarborough LLP,
attorneys for Cato Institute and Howard S. Rich, do hereby certify that 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:

Pleadings:

**CATO INSTITUTE AND HOWARD S. RICH'S RETURN TO
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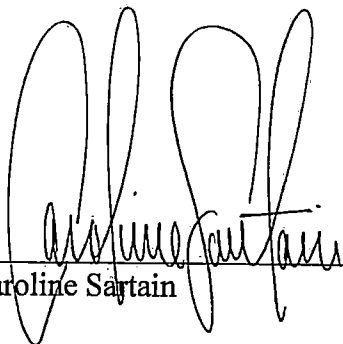
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March 19, 2020

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MAR 19 2020

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 seven copies of Cato Institute's and Howard S. Rich's Return to the Motion to Strike dated March 9, 2020. We ask that you file the original and six of the copies and return a clocked-in copy to us via our courier. By copy of this letter and the Proof of Service enclosed herein, a copy of this letter and the Return have been served on Mr. Davis and the other Respondents' counsel of record.

Very truly yours,



Miles E. Coleman

Enclosures

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March 19, 2020

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