

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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MAR 19 2020

SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Hon. Doyet A. Early, Circuit Court Judge

C.A. No.: 2018-CP-40-02425
Appellate Case No. 2019-000648

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 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) 1-40Respondents.

**APPELLANT’S RESPONSE IN OPPOSITION TO RESPONDENT KIRKLAND’S
MOTION TO SUPPLEMENT THE RECORD ON APPEAL**

Appellant, Jefferson Davis, Jr., (“Appellant”) respectfully submits the following in opposition to Respondent Stephen Kirkland’s (“Respondent Kirkland”) **MOTION TO SUPPLEMENT THE RECORD ON APPEAL AND TO STAY THE TIME FOR FILING THE FINAL BRIEF**. For the reasons set forth below, this Court should deny Respondent aforementioned Motion.

ARGUMENT

Rule 209(b), SCACR states, in pertinent part, the following: “ ... the Designation may only propose to include portions of the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal [See Rule 210(c)]. A party shall not include any matter in his Designation which is **not relevant** to the appeal.” (Emphasis added.)

Rule 210(c), SCACR states, in pertinent part, the following: "The Record on Appeal shall include all matter designated to be included by any party under Rule 209 The Record [on Appeal] shall not, however, include matter which was **not presented** to the lower court or tribunal." (Emphasis added.)

I. Respondent Kirkland should not be allowed to supplement the Record on Appeal with an affidavit that would not have been allowed initially under Rule 209(b), SCACR.

Rule 209(b), SCACR clearly states that the “**Designation may only propose to include the portions of the transcripts, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal [See Rule 210(c)].**” Respondent Kirkland request to add an affidavit that was not included in his or any other Designation of Matter filed by any of the numerous Respondent’s. Even if the affidavit had been officially designated, the affidavit would be improperly designated as it does not comply, as outlined below, with Rule 210(c), SCACR. Furthermore, the affidavit is totally unrelated to this appeal as outlined in **Appellant’s Motion to Strike** (dated and mailed 3/9/2020 – not appearing online at this time) previously filed with this Court, the arguments of which are incorporated herein by reference.

- II. Respondent Kirkland should not be allowed to supplement the Record on Appeal with an affidavit that relates to an issue and argument that was not raised to and ruled on by the lower court under Rule 210(c), SCACR.

As noted in Appellant's Motion to Strike (dated 3/9/2020), this appeal SOLELY deals with the interpretation of the following CONCLUSION in Judge Benjamin's October 30, 2018 Order:

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss is granted in part and denied in part.

IT IS THEREFORE ORDERED each John Doe referenced in the complaint shall be specifically named and served. This court allows the plaintiff 15 days to appropriately amend the pleadings.

AND IT IS SO ORDERED.

s/ The Honorable DeAndrea Gist Benjamin
Presiding Judge

**October 30, 2018 Order - Judge Benjamin
(Record on Appeal, Page 8)**

All 31 newly named defendants (Respondents in this appeal) were dismissed from this case purely on a procedural issue ... that issue being that even though Appellant timely amended his complaint within 15-days as Judge Benjamin ordered, Judge Early somehow interpreted the above to also require Appellant to PERSONALLY SERVE all 31 of the newly named and geographically diverse defendants within that same 15-day time period.

A physical impossibility, nothing ever discussed by Judge Benjamin before, and Appellant reasonably interpreted the above Order to be silent on when (thus defaulting to the SCRCPP) service must be completed. See Appellant's Initial Brief, Initial Reply and Motion to Strike.

Nothing on the merits have been ruled on in this case. None of the 31 newly named defendants (Respondents in this appeal) have had any of their Motions to Dismiss ruled on in this case. In fact, the Respondents have filed a total of 18 Motion's to Dismiss ... and not a single one has been ruled upon by the trial court ... yet each of the Respondents in this appeal have improperly raised the merits on their respective Motions to Dismiss in their Initial Reply Briefs and included the matter in their respective Designations.

Rule 210(c), SCACR, is clear, the "Record [on Appeal] shall not ... include matter which was **not presented** to the lower court or tribunal." (Emphasis added.)

The caselaw in South Carolina, including our SC State Supreme Court, clearly back up the requirements of Rule 210(c), SCACR, as well.

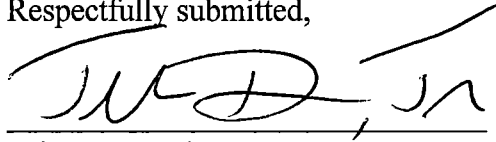
"a great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration. Issues and arguments are preserved for appellate review only when they are **raised to and ruled on by the lower court**. E.g., *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that **an issue cannot be raised for the first time on appeal**, but must have been **raised to and ruled upon by the trial judge** to be preserved for appellate review."); *Long v. Dunlap*, 87 S.C. 8, 68 S.E. 801 (1910) (**Supreme Court will not consider any point which was not presented and considered below** unless it involves jurisdiction of the court); *Gaffney v. Peeler*, 21 S.C. 55 (1884) (question of law which was **not presented to or passed upon by the trial court cannot be raised on appeal**); Rule 210(c), SCACR (record on appeal shall not include matter which was not presented to lower court)."

Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772 (S.C. 2004). (Emphasis added.)

CONCLUSION

For the foregoing reasons, as well as those in his Motion to Strike (dated 3/9/2020), Appellant respectfully requests this Court deny **RESPONDENT KIRKLAND'S MOTION TO SUPPLEMENT THE RECORD ON APPEAL AND TO STAY THE TIME FOR FILING THE FINAL BRIEF.**

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. Davis, Jr.", written over a horizontal line.

Date: March 17, 2020

Jefferson Davis, Jr.
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Appellant

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PROOF OF SERVICE

I certify that I have served the **APPELLANT'S RESPONSE IN OPPOSITION TO RESPONDENT KIRKLAND'S MOTION TO SUPPLEMENT THE RECORD ON APPEAL** on the below named parties at the addresses noted by depositing a copy of it in the United States Mail, postage prepaid on March 17th, 2020.

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March 17, 2020

The Honorable Jenny Abbott Kitchings
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RE: Jefferson Davis Jr, Appellant vs. Ellen Weaver, Et al. Respondents
Appellate Case No.: 2019-000648
C.A. NO. 2018-CP-40-02425

Dear Ms. Kitchings:

Please find enclosed the original and one (1) copy of the following for the above referenced matter:

1. APPELLANT'S RESPONSE IN OPPOSITION TO RESPONDENT KIRKLAND'S MOTION TO SUPPLEMENT THE RECORD ON APPEAL
2. Proof of Service

Please provide me with a clocked copy in the enclosed, self-addressed, stamped envelope.

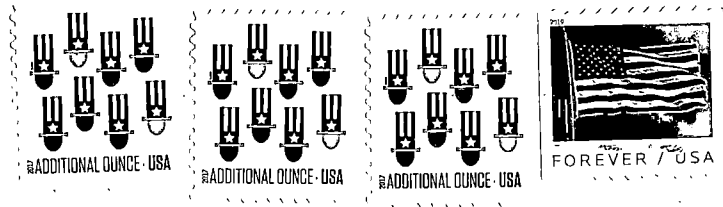
Thank you for your assistance. If you have any questions, please feel free to email me at jeff@apogeetax.com or give me a call at 843-901-8036 (cell).

Sincerely,



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