

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 1609593

RECEIVED
FEB 28 2020
SC Court of Appeals

Gena Cain-Davis, Claimant, Appellant,

v.

SC Department of Corrections, Employer,
and State Accident Fund, Carrier, Respondents.

RETURN TO MOTION TO STRIKE

Appellant, by and through her undersigned attorney, hereby files her Return to Motion to Strike.. As grounds for denying this motion, Appellant would show the following:

1. Appellant filed her Initial Brief of Appellant and Designation of Matter on July 5, 2019. In the Designation of Matter, Appellant designated "Claimant's Form 58 and list of APA submissions" as matter to be included in the Record on Appeal. Not only did Respondents make no objection, they themselves designated the exact same document. [Respondents' Designation [sic] of Matter to be Included in the Record on appeal].

2. Pursuant to the designation by both parties, the Form 58 was included in the Record on Appeal. [R. P. 46-46]. These documents show that they were timely served on Respondents and filed directly with the trial commissioner, Commissioner Campbell, on October 6, 2017 – eighteen days before the scheduled hearing. As such, these documents (and the "Factual Background"

included therein) are part of the record below.

3. As the Hearing Commissioner dismissed the Form 21 and allowed Appellant to withdraw her Form 50 without prejudice without going on the record, the 365 pages of supporting documents were not entered into evidence.

4. In her Brief, Appellant includes a separate *Statement of the Facts*. As noted in a footnote, Appellant explained that:

This Statement of the Facts is taken from Claimant's pre-hearing brief filed with the Commission. [R.P. 46-56]. As the hearing was continued by Commissioner Campbell before going on the record, no testimony or medical records were admitted into evidence. [Brief of Appellant, page 4 n.1].

Appellant makes it clear to the Court that the *Statement of Facts* is drawn from her summary of the evidence presented to the Commission in her Pre-Hearing Brief. The Statement of the Facts is there to ensure the Court has a full understanding of the procedural posture and positions of the parties to the hearing before Commissioner Campbell.

5. Respondents argue Appellant's Brief violates Rule 208, SCACR. In the motion, they state:

any statement of the case contained in a brief to the Court of Appeals "shall not contain contested matters." Despite this mandatory prohibition, the "Statement of the Facts" contained in the Appellant's Brief is comprised solely of contested matters manufactured out of whole cloth, yet presented as established facts supported by actual evidence.

Putting aside the unfounded accusation that Appellant "manufactured [facts] out of whole cloth," the *Statement of the Facts* violates no rule because it is not part of the *Statement of the Case*. It is included as a "a separate statement of facts relevant to the issues presented for review, with reference to the record on appeal, which may include contested matters and summarize the party's

contentions.” [Rule 208(b)(1)(E), SCACR]. As such the *Statement of the Facts* is wholly within the rules and properly included in Appellants’ Brief.

6. Respondents argue the *Statement of the Facts* violates Rule 208 and 210 because there is no evidence in the record to support the factual allegations. As noted above, the *Statement of the Facts* is drawn from pleadings filed with the Commission – the **same pleading designated by Respondents**. It is undisputed that the *Factual Background* from which the *Statement of the Facts* is drawn was “presented to the lower court or tribunal.” [Ruled 210©, SCACR]. As such, Respondents’ argument is without merit and should be rejected.

7. Respondents further argue that “Appellant’s recitation of and argument regarding matters, which were never submitted into evidence before the Workers’ Compensation Commission and that are not contained in the Record on Appeal, is grossly prejudicial to the Respondents . . .” They go on to say that “one could not ethically represent to the Court of Appeals that such contested evidence represented undisputed ‘facts.’”

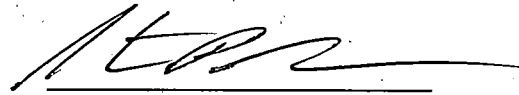
Appellant has been completely truthful and candid to the Court, specifically noting in her Brief that the *Statement of the Facts* is drawn from her Prehearing Brief, even so far as going to explain that the supporting evidence was not entered into the record at trial. She has complied with her obligation of candor to the tribunal. There is no ethical violation here nor is there any prejudice to Defendants. Even if there were some conceivable prejudice, Respondents waived their objection by designating Appellant’s Pre-Hearing Brief in their Designation of Matter.

8. Although not necessary to the Court’s decision on this Motion, Appellant wishes to draw to the Court’s attention that Respondents Final Brief actually does violate the Appellate Court Rules. Respondents’ Initial Brief did not include a Table of Contents nor a Table of Authorities.

These items have been added to the Final Brief of Respondents. Secondly, Respondents' Statement of the Case includes argument on contested matters.¹

9. For the foregoing reasons, Appellant requests the Court deny Respondents' Motion to Strike. Additionally, Appellant moves the Court pursuant to Rule 269, SCRPC, to impose such sanctions as the circumstances of the case and discouragement of like conduct in the future may require.

Respectfully Submitted:



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February 28, 2020
Columbia, South Carolina

Counsel for the Appellant

¹As one example of improper argument contained within the Statement of the Case, Respondents' state "However, with her Brief to the Court of Appeals, Davis attempts to impugn the integrity of the Respondents by boldly asserting that the Respondents' arguments rest on technicalities, rather than [sic] dealing directly with the merits of their obligations to care for "their injured employees." [Brief of Respondents, page 6].

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 1609593
Appellate Case No.: 2019-000560

Gena Cain-Davis, Claimant/Appellant,

v.

S.C. Department of Corrections, Employer and State Accident Fund,
Carrier,/Respondents.

PROOF OF SERVICE

I certify that I, Wanda Powell, paralegal for the Samuels Law Firm, LLC, have served **Appellant's Return to Respondent's Motion to Strike** upon counsel for the Respondents via email and also by depositing a copy of it in the United States Mail, postage prepaid on February 28, 2020, addressed as follows:

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February 28, 2020



STEPHEN B. SAMUELS
P. JASON REYNOLDS
ATTORNEYS AT LAW

February 28, 2020

Via Hand Delivery

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

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SC Court of Appeals

RE: Gena Cain Davis v. S.C. Department of Corrections
Appellate Case No.: 2019-000560

Dear Ms. Kitchings:

Enclosed for filing please find the original and seven (7) copies of **Appellant's Return to Respondent's Motion to Strike** in the above-referenced case.

By copy of this letter and enclosure to Kirsten L. Barr, counsel of record for Respondents, we are serving her with a copy of our **Appellant's Return to Respondent's Motion to Strike** as indicated by the attached **Proof of Service**.

Please have your staff clock in the **Appellant's Return to Respondent's Motion to Strike** and **Proof of Service** and return the clocked copies to our courier.

Thank you for your consideration in this matter. Please contact us with any questions or if further information is needed from our office.

With kindest regards, I am

Respectfully,

A handwritten signature in black ink, appearing to read "Stephen B. Samuels", written over a horizontal line.

Stephen B. Samuels

SBS/wp
Enclosure(s) as stated

cc: Kirsten L. Barr, Esquire (*via email: kbarr@trask-howell.com and US Mail*)

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