

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 23 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.

**RESPONDENT SOUTH CAROLINA EDUCATIONAL CREDIT  
FOR EXCEPTIONAL NEEDS CHILDREN FUND'S  
RETURN TO APPELLANT'S MOTION TO STRIKE**

Pursuant to Rule 240(e), SCACR, Respondent South Carolina Educational Credit for Exceptional Needs Children Fund ("ECENCF") respectfully requests that this Court should deny Appellant's Motion to Strike on the grounds that the portions of ECENCF's initial brief and designation of matter to be included in the Record on Appeal sought to be stricken are relevant to the appeal in that they address additional reasons this Court should affirm the trial court's order

dismissing Appellant's claims against ECENCF and the other respondents for failing to comply with the order allowing Appellant leave to amend the Complaint.

### FACTS<sup>1</sup>

On October 30, 2018, the Honorable DeAndrea Benjamin entered an Amended Order in the instant action providing, *inter alia*, Appellant 15 days to amend the original Complaint to include additional facts to support certain causes of action and dismissing other causes of action. The Amended Order specifically commanded that "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." (October 30, 2018 Am. Order, at 3.)

On November 19, 2019, Appellant filed a First Amended Complaint ("Amended Complaint"), which sought to join ECENCF and the other respondents to this appeal as named defendants in the action. The Amended Complaint, however, failed even to mention ECENCF other than to: (a) identify it and its executive director; and (b) allege that another named defendant provides services to it, assisted it with fundraising and once employed a current ECENCF employee. (*See* Am. Compl. ¶¶ 3, 17, 180, 185, 186.) The Amended Complaint did not otherwise reference ECENCF or specifically assert any cause of action against it. (*See generally id.*)

The filing of the Amended Complaint also came shortly after a hearing on ECENCF's motions for judgment on the pleadings and for summary judgment in the matter of *Jefferson Davis, Jr. v. South Carolina Educational Credit for Exceptional Needs Children Fund*, Civil Action Nos. 2017-CP-23-04748/2017-CP-40-06976, which the Honorable DeAndrea Benjamin granted on

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<sup>1</sup> In the interest of economy, ECENCF incorporates by reference the Statement of the Case included in the Initial Brief of Respondent South Carolina Educational Credit for Exceptional Needs Children Fund, pp. 2-5.

December 21, 2018.<sup>2</sup> Appellant's appeal of that order is currently pending in the South Carolina Court of Appeals as Appellate Case No. 2019-001231.

After Plaintiff did not serve the newly named parties with the Amended Complaint within the 15-day period set forth in the Amended Order, ECENCF served and filed a Motion to Dismiss the Amended Complaint pursuant to South Carolina Rules of Civil Procedure 8(a), 12(b)(6) and 12(b)(8). (*See* Dec. 14, 2018 Mot. to Dismiss, at 1.) ECENCF supported this Motion with a Memorandum in Support of Motion to Dismiss filed on February 10, 2019, in which ECENCF argued that, *inter alia*, (1) certain of Appellant's claims were barred by the doctrines of res judicata, estoppel by record, and waiver, (2) the Amended Complaint failed to state facts sufficient to constitute any cause of action against ECENCF or show that Plaintiff is entitled to any relief from ECENCF, and (3) another action is currently pending between the same parties for the same claim. Additionally, ECENCF argued that Appellant failed to properly amend within the 15 days permitted by the Amended Order. (*See* ECENCF Mem. Supp. Mot. to Dismiss, at 3 n.2.)

On February 19, 2019, the Honorable Doyet A. Early entered an Order dismissing Appellant's claims against ECENCF and the other respondents with prejudice for failing to comply with Judge Benjamin's October 30, 2018 Amended Order. After denial of Appellant's Motion for Reconsideration on March 27, 2019, Appellant filed a Notice of Appeal on April 13, 2019.

#### STANDARD

"Appeal may be taken, as provided by law, from any final judgment, appealable order, or decision." Rule 201(a), SCACR. In response to an appeal, "[a] respondent 'may raise on appeal

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<sup>2</sup> On July 31, 2017, Appellant filed a Summons and Complaint for FOIA Enforcement in the Court of Common Pleas for the County of Greenville, Civil Action No. 2017-CP-23-04748. Venue was later transferred to the Court of Common Pleas for Richland County, Civil Action No. 2017-CP-40-06976, pursuant to the Honorable Perry H. Gravely's Form 4 Order filed November 7, 2017.

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.” *Sims v. Amisub of South Carolina, Inc.*, 408 S.C. 202, 214-15, 758 S.E.2d 187, 194 (Ct. App. 2014) (quoting *I'on, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000). “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.” *I'on, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000).

Accordingly, “[a r]espondent's brief may also contain argument asking the court to affirm for any ground appearing on the record as provided in Rule 220(c), SCACR.” Rule 208(b)(2). “The Record on Appeal shall include all matter designated to be included by any party [but] shall not, however, include matter which was not presented to the lower court or tribunal.” Rule 210(c), SCACR. “A party shall not include any matter in his Designation which is not relevant to the appeal.” Rule 209(b), SCACR. “The appellate court may [then] affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.” Rule 220(c), SCACR; *I'on, LLC*, 338 S.C. at 419, 526 S.E.2d at 723 (“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.”).

#### ARGUMENT

Appellant and ECENCF agree that the first issue on appeal should be whether the trial court properly dismissed Appellant's claims against ECENCF and the other respondents to this appeal because Appellant failed to file and serve the Amended Complaint in accordance with the Amended Order. ECENCF, however, also raised other reasons in its initial brief for which this Court should affirm Judge Early's Order dismissing Appellant's claims against ECENCF and the

other respondents with prejudice for failing to comply with Judge Benjamin's October 30, 2018 Amended Order.

First, ECENCF's initial brief argues that this Court should also consider whether the trial court properly dismissed Appellant's claims against ECENCF because the Amended Complaint failed to assert any claims against ECENCF upon which relief could be granted as a matter of law pursuant to Rule 12(b)(6), SCRCP. In reviewing a trial court's dismissal for failure to state a claim pursuant to Rule 12(b)(6), SCRCP, an appellate court applies the same standard as the trial court—the pleadings must be construed liberally and all well-pled facts must be presumed true. *See Doe v. Bishop of Charleston*, 407 S.C. 128, 134, 754 S.E.2d 494, 498-99 (2014). Although not required, ECENCF argued this reason to the trial court in ECENCF's Motion to Dismiss the Amended Complaint filed on Dec. 14, 2018, and in ECENCF's Memorandum in Support of Motion to Dismiss filed on February 10, 2019.<sup>3</sup>

Although not designated in Appellant's Designation of Matter to be Included in the Record on Appeal, the Amended Complaint dismissed by Judge Early's Order is relevant to the issue of whether it failed to assert any claims against ECENCF upon which relief could be granted as a matter of law pursuant to Rule 12(b)(6), SCRCP. The inclusion of the original Complaint is also necessary to the determination of whether certain of Appellant's claims are barred by the doctrines of res judicata, estoppel by record, and waiver, having been dismissed pursuant to Judge Benjamin's October 30, 2018 Amended Order, as argued in ECENCF's Memorandum in Support

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<sup>3</sup> ECENCF's Motion to Dismiss the Amended Complaint and in ECENCF's Memorandum in Support of the Motion to Dismiss are relevant to the appeal in that they are necessary to the determination of the matters presented to the lower court and for consideration of other reasons for which this Court should affirm Judge Early's Order. The other respondents' various motions to dismiss and memoranda in support are similarly relevant.

of Motion to Dismiss. As a result, it is appropriate that this argument appear in ECENCF's initial brief and that each of these materials are included in the Record on Appeal.

Second, ECENCF's initial brief argues that this Court should also consider whether the trial court properly dismissed Appellant's claims against ECENCF because another action is currently pending between the same parties for the same claim pursuant to Rule 12(b)(8), SCRPC. An appellate court also employs the same standard of review as the trial court in reviewing the dismissal of a claim pursuant to Rule 12(b)(8), SCRPC. *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009). "[E]ach of the components of the rule are determined as a matter of law and thus [the appellate court applies] a de novo standard of review[.]" *Id.* ECENCF similarly argued this reason to the trial court in ECENCF's Motion to Dismiss the Amended Complaint and in ECENCF's Memorandum in Support of Motion to Dismiss.

ECENCF's Memorandum in Support of Motion to Dismiss specifically argued that Appellant's attempt to join ECENCF to this action as a named defendant was a thinly disguised attempt to pursue the same claims asserted against it in *Jefferson Davis, Jr. v. South Carolina Educational Credit for Exceptional Needs Children Fund*, Civil Action Nos. 2017-CP-23-04748/2017-CP-40-06976. In support of this argument, ECENCF specifically cited the pleadings in that action, ECENCF's motions for judgment on the pleadings and for summary judgment in that action, and Judge Benjamin's order granting ECENCF's motions for judgment on the pleadings and for summary judgment as evidence that the two actions contained the same claims. ECENCF's memorandum also specifically cited Appellant's motion for reconsideration of Judge Benjamin's order granting ECENCF's motions for summary judgment and judgment on the pleadings, which was subsequently denied, and the order transferring the action from the Court of Common Pleas for Greenville County to the Court of Common Pleas for Richland County. Moreover, ECENCF's initial brief specifically cites its Motion for Protective Order seeking

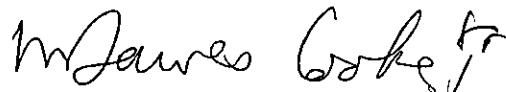
protection from Appellant's "First Request for Production of Documents and Things To Defendant" dated December 7, 2018, contemporaneously filed with its Motion to Dismiss the Amended Complaint.<sup>4</sup>

Each of these materials was presented to the lower court and is relevant to the determination of whether the trial court properly dismissed Plaintiff's claims against ECENCF because another action is currently pending between the same parties for the same claim pursuant to Rule 12(b)(8), SCRPC. Moreover, the argument asserted by ECENCF and reference to the action pending between the same parties for the same claim presented the public filings in that action to the lower court for use in its determination. As a result, it is appropriate that this argument appear in ECENCF's initial brief and that each of these materials are included in the Record on Appeal.

#### CONCLUSION

For the foregoing reasons, this Court should deny Appellant's Motion to Strike on the grounds that the portions of ECENCF's initial brief and designation of matter to be included in the Record on Appeal sought to be stricken are relevant to the appeal in that they address additional reasons this Court should affirm the trial court's order dismissing Appellant's claims against ECENCF and the other respondents for failing to comply with the order allowing Appellant leave to amend the Complaint.

Respectfully submitted,



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M. Dawes Cooke, Jr., Esquire  
Justin P. Novak, Esquire  
Barnwell Whaley Patterson & Helms, LLC  
P.O. Drawer H  
Charleston, South Carolina 29402  
Phone: (843) 577-7700

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<sup>4</sup> ECENCF's Motion for Protective Order was also pending before Judge Early at the time of his consideration of ECENCF's Motion to Dismiss the Amended Complaint.

Fax: (843) 577-7708  
mdc@barnwell-whaley.com  
jnovak@barnwell-whaley.com

– and –

Geoffrey K. Chambers, Esquire  
CPERL Group  
411 Walnut Street  
Number 10646  
Green Cove Springs, FL 32043  
Phone: 864-508-0899  
Geoffrey@CPERLgroup.com

***Attorneys for Defendant South Carolina  
Educational Credit for Exceptional Needs  
Children Fund***

March 19, 2020

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**PROOF OF SERVICE**

I, the undersigned employee of Barnwell Whaley Patterson & Helms, LLC, hereby certify that pursuant to Rule 262(b), SCACR, I have served ***Respondent South Carolina Educational Credit for Exceptional Needs Children Fund's Return to Appellant's Motion to Strike*** in this matter upon the Clerk of the South Carolina Court of Appeals, all counsel of record, and all pro se parties by delivering a copy or mailing a copy by United States Mail, postage prepaid, on March 19, 2020, to the following addresses:

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

Jefferson Davis, Jr.  
403 McCarther Avenue  
Greenville, South Carolina 29615

Miles Edward Coleman  
Nelson Mullins Riley & Scarborough, LLP  
104 South Main Street, Ninth Floor  
Greenville, South Carolina 29601

Douglas Walker MacKelcan, III  
Carlock, Copeland & Stair, LLP  
40 Calhoun Street, Suite 400  
Charleston, South Carolina 29401

Martin S. Driggers, Jr.  
Sweeny, Wingate & Barrow, PA  
P.O. Box 12129  
Columbia, South Carolina 29211

Christopher J. Daniels  
Nelson Mullins Riley & Scarborough, LLP  
PO Box 11070  
Columbia, South Carolina 29211

Joseph M. McCulloch, Jr.  
Kathy R. Schillaci  
McCulloch & Schillaci  
PO Box 11623  
Columbia, South Carolina 29211

Kenneth Allen Davis  
Tierney Felicia Dukes  
Boykin & Davis, LLC  
PO Box 11844  
Columbia, South Carolina 29211

Andrew E. Haselden  
Howser, Newman & Besley, LLC  
215 East Bay Street, Suite 300  
Charleston, South Carolina 29401

Mark Steven Barrow  
Sweeny, Wingate & Barrow, PA  
P.O. Box 12129  
Columbia, South Carolina 29211

Jason Phillip Luther  
SC Department of Revenue  
PO Box 12265  
Columbia, South Carolina 29211-9979

Joseph Kenneth Carter, Jr.  
Ross C. DuRant  
Turner Padgett  
PO Box 1473  
Columbia, South Carolina 29211

James Harold Goldin  
Nelson Mullins Riley & Scarborough, LLP  
PO Box 11070  
Columbia, South Carolina 29211

Jennifer Foulk Nutter  
Ryan T. Adams  
Hood Law Firm, LLC  
PO Box 1508  
Charleston, South Carolina 29402

Benjamin Parker Mustian  
BPM Law, LLC  
141 Pelham Drive  
Suite F, #108  
Columbia, South Carolina 29209

William H. Davidson, II  
Michael Brian Wren  
Davidson, Wren & Plyler, PA  
PO Box 8568  
Columbia, South Carolina 29202

Alan Grant Jones  
Turner Padgett  
PO Box 1509  
Greenville, South Carolina 29602

Mark V. Gende  
Brandon R. Gottschall  
Sweeny, Wingate & Barrow, PA  
P.O. Box 12129  
Columbia, South Carolina 29211

  
Beverly Mitton

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M. Dawes Cooke, Jr., Esquire  
mdc@barnwell-whaley.com  
Charleston Office

March 19, 2020

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

RE: Jefferson Davis, Jr. v. Ellen Weaver, et al.  
Appellate Case No. 2019-000648  
Our Matter No. 2026.116

Dear Ms. Kitchings:

Please find enclosed an original and seven (7) copies of *Respondent South Carolina Educational Credit for Exceptional Needs Children Fund's Return to Appellant's Motion to Strike* and *Proof of Service* in the above-referenced matter. Please file the originals and return a set of clocked copies to me in the enclosed envelope. By copy of this letter, I am also serving a copy of these documents upon all counsel of record.

Thank you for your assistance in this matter. As always, please do not hesitate to contact me with any questions or concerns.

Sincerely,

A handwritten signature in black ink that reads "Dawes Cooke".

M. Dawes Cooke, Jr.

MDC/bbm  
Enclosures

cc: Jefferson Davis, Jr., pro se  
Miles Edward Coleman, Esquire  
Douglas Walker MacKelcan, III, Esquire  
Martin S. Driggers, Jr., Esquire  
Christopher J. Daniels, Esquire  
Joseph M. McCulloch, Jr., Esquire

{Novak Letter to COA filing ECENCF Return to Motion to Strike.docx.1 }

[www.barnwell-whaley.com](http://www.barnwell-whaley.com)

SOUTH CAROLINA OFFICE:  
288 Meeting Street, Suite 200, Charleston, SC 29401  
P 843.577.7700 F 843.577.7708

NORTH CAROLINA OFFICE:  
201 N. Front Street, Suite 1003, Wilmington, NC 28401  
P 910.679.1388 F 910.679.4663

REPRESENTING CLIENTS IN ALL COURTS IN SOUTH CAROLINA AND NORTH CAROLINA AND IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Kenneth Allen Davis, Esquire  
Tierney Felicia Dukes, Esquire  
Andrew E. Haselden, Esquire  
Mark Steven Barrow, Esquire  
Jason Phillip Luther, Esquire  
Joseph Kenneth Carter, Jr., Esquire  
James Harold Goldin, Esquire  
Jennifer Foulk Nutter, Esquire  
Benjamin Parker Mustian, Esquire  
William H. Davidson, II, Esquire  
Michael Brian Wren, Esquire  
Alan Grant Jones, Esquire  
Mark V. Gende, Esquire  
Brandon R. Gottschall, Esquire  
Ryan T. Adams, Esquire  
Ross C. DuRant, Esquire

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PATTERSON & HELMS LLC

P.O. Drawer H | Charleston SC 29402-0197

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

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