

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Oct 26 2020

SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2015-CP-10-3325 & Case No. 2017-CP-10-05055
Appellate Case No. 2018-001413

Phillip DeClemente, a/k/a Alec Rochford,Appellant,

v.

Assistive Technology Medical Equipment Services,
LLC; Jeffrey Reed; Murrell G. Smith,..... Respondents,

and

Phillip DeClemente, a/k/a Phillip Goodpaster,Appellant,

v.

Assistive Technology Medical Equipment Services, LLC
(ATMES); Jeffrey Reed; Murrell G. Smith, Respondents.

**MOTION FOR LEAVE TO SUPPLEMENT
THE RECORD ON APPEAL AND
SUPPORTING MEMORANDUM**

Appellant respectfully moves this Court, pursuant to SCACR 212(b), for leave to supplement the Record on Appeal with evidence that will clarify an issue presented in the Court’s Opinion. In support of this motion, Appellant shows this Court the following:

1. On September 20, 2017, Respondents filed a motion for summary judgment arguing, for the third time, that Appellant's lawsuit in Case No. 2015-CP-10-3325 was filed outside of the statute of limitations. (R. pp. 495-96).
2. A hearing on Respondents' motion was scheduled for December 11, 2017. In anticipation of the hearing, Appellant filed twelve documents with the Court supporting denial of summary judgment (hereinafter "documents in opposition").
3. Included in this filing was an email sent from Respondent Reed to Appellant DeClemente on December 14, 2011 (hereinafter "December 14th email") which confirmed Respondents' intent to continue making payments on their promissory note.
4. In addition to filing these documents with the clerk of court, Appellant's counsel also emailed these documents to both Judge Nicholson and Respondents' counsel on December 8, 2017. Judge Nicholson's Law Clerk confirmed receipt of these documents via email on December 11, 2017, prior to the hearing.
5. At the December 11, 2017 summary judgment hearing, Appellant's counsel brought these documents to Judge Nicholson's attention, confirming that they had been emailed to the court for review in consideration of Respondents' summary judgment motion. (R. p. 636, Lines 19-25).
6. After confirming that the documents in opposition had been received and were on the circuit court record, Appellant's counsel proceeded to discuss his other argument based on a prior ruling made by Judge Dennis on the statute of limitations. On February 19, 2016, Judge Dennis reinstated Appellant's first cause of action finding that the promissory note's maturity date established the statute of limitations expiration as March 1, 2016. (R. pp. 608-11).

7. At the time of the December 11, 2017 hearing, Respondents' counsel had not yet drafted a formal Order denying their motion to dismiss. (R. p. 640, Lines 9-21). Judge Nicholson informed the parties that he would make a ruling on Respondents' motion for summary judgment after reviewing the entire record and reading Judge Dennis's Order. (R. p. 640, Lines 22-25; p. 641, Lines 1-5).
8. Following the summary judgment hearing, Judge Nicholson considered the entire record, including Judge Dennis's formal Order, the December 14th email, and DeClemente's other filings. On July 2, 2018, Judge Nicholson granted summary judgment in Respondents' favor. (R. pp. 5-15).
9. The December 14th email is in the Record on Appeal, (R. p. 650), as evidence that service upon DeClemente of Respondents' 2011 lawsuit against DeClemente and others was not an expression of intent to breach Respondents' promissory note. In the subsequent December 14th email, Respondents confirmed their intent to satisfy the note in full. (Appellant's Brief, pp. 9-10).
10. The December 14th email filing's first page (time-stamped by the clerk of court on December 11, 2017, at 9:50am) and the filing's second page (the index page) were inadvertently omitted from the Record on Appeal.
11. The email correspondence between Appellant's counsel, Judge Nicholson, and Respondents' counsel – further proving that the court and all parties were in receipt of the December 14th email prior to the December 11, 2017 summary judgment hearing – was also not included in the Record on Appeal.
12. As a result, this Court's Opinion found "unpreserved Appellant's argument that the [December 14th email] demonstrated Respondents did not have clear intention to breach

the promissory note on December 1, 2011.” *DeClemente v. Assistive Tech. Med. Equip. Servs., LLC*, No. 2020-UP-263, 2020 WL 5412892 (S.C. Ct. App. Sept. 9, 2020).

SUPPORTING MEMORANDUM

A motion to supplement the record on appeal is not a matter of right. *Furman v. Nelson*, 208 S.C. 249, 37 S.E.2d 741 (1946). Parties are not permitted “to unilaterally add after-created evidence to the record.” *Williamsburg Water and Sewer Co., Inc. v. Williamsburg County Water and Sewer Authority*, 367 S.C. 566, 572, 627 S.E.2d 690, 693 (2006). The Court reviews “summary judgment issues using only the evidence presented to the trial court and included in the Record on Appeal.” *Id.* However, the Court may grant a motion to supplement the record on appeal as “a matter of grace.” 15 S.C. Jur. Appeal and Error § 68 (September 2020 Update).

Rule 212, SCACR, explicitly contemplates that a party may move for leave to supplement the Record on Appeal “after argument commences.” The fact that the rule permits supplementing the record after the case has been submitted shows its purpose is to find the truth and prevent miscarriage of justice. The appellate court’s authority to accept supplemental evidence continues so long as the court has jurisdiction over the matter. *See, Stogsdill v. S.C. Dep’t of Health & Human Servs.*, 415 S.C. 568, 784 S.E.2d 669 (2016) (dismissing a Rule 212 motion because “[t]he sending of the remittitur ended appellate jurisdiction over this case, and no further motions will be entertained after the remittitur is sent.”).

This Court’s Opinion establishes that the Court properly finds the December 14th email material to the issue of whether or not Respondents gave DeClemente notice of their alleged intent to breach their promissory note payment obligations. The December 14th email is included in the Record on Appeal (R. p. 650) but the Opinion states that the Court does not believe that the email was filed below and presented to Judge Nicholson at the summary judgment hearing.

In fact, however, the December 14th email (R. p. 650) was emailed to Judge Nicholson and Respondents' counsel on December 8, 2017 and filed with the circuit court on December 11, 2017 in anticipation of the summary judgment hearing. Judge Nicholson considered this email, amongst the other evidence the parties submitted to the court, prior to issuance of his summary judgment order. *See*, Rule 56(c), SCRCF. Inadvertently, Appellant did not include in the Record on Appeal the December 14th email's cover letter (time-stamped by the clerk of court), index page (identifying the December 14th email amongst other documents submitted in opposition of summary judgment), and email correspondence confirming the court's receipt of the December 14th email.

This Motion to Supplement the Record on Appeal is brought to correct the Court's misapprehension of the record below by proving that the email is preserved for this Court's consideration. Leave to supplement the Record on Appeal with proof that the December 14th email was considered by the circuit court and is preserved for appellate review will not prejudice Respondents, and its authenticity is not in dispute. The undersigned has consulted with Respondents' attorney, James Smith, regarding this Motion for supplementation of the Record on Appeal, and, Mr. Smith has declined to consent. Supplementation is needed so that this Court is able to consider the entire record below when deciding Appellant's Petition for Rehearing, and ruling on the merits of this appeal.

The specific evidence to be added to the Record on Appeal is:

1. Letter From Atty Marshall in Re: Documents for Hearing, *Phillip DeClemente v. Assistive Technology Medical Equipment Services, LLC*, No. 2015CP1003325 (S.C.Com.Pl. Dec. 11, 2017): Time-stamped cover page, and index page. (Attached hereto as Exhibit A); and,
2. Email Correspondence between the parties and Judge Nicholson regarding subject documents prior to the December 11, 2017 hearing. (Attached hereto as Exhibit B).

WHEREFORE, Appellant requests the Court grant this Motion in the interests of fairness and justice.

Respectfully submitted,



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Charleston, South Carolina

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below he served counsel for Respondents, Assistive Technology Medical Equipment Services, LLC, Jeffrey Reed and Murrell G. Smith, James E. Smith, Jr. with a copy of Appellant's *Motion to Supplement the Record on Appeal and Supporting Memorandum* by emailing the same to the following address:

James E. Smith, Jr.
1422 Laurel Street
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james@jamesmithpa.com



Cameron L. Marshall
Attorney for Appellant

October 26, 2020