THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

Case No. 2020-CP-23-01669
Appellate Case No. 2020-001182

Sean Eric Roach ..... Respondent,

v.

Lee C. Yarborough ..... Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

(1) Whether the Circuit Court's decision vacating of the magistrate court's restraining order under the South Carolina Harassment and Stalking Statute is supported by any evidence?

(2) Whether Appellant's case in magistrate's court should have been dismissed under Rule 12(b)(8), SCRCP because of a parallel case pending in federal court regarding the same mailings allegedly sent by Respondent?

(3) Whether this appeal is moot because the underlying restraining order would have expired of its own terms ON March 9, 2021, exactly one year after its issuance on March 9, 2020?

STATEMENT OF THE CASE

Respondent submits his own Statement of the Case because Appellant omits several key events from her recitation of the procedural history of the case.

Respondent is not certain exactly how this case was formally commenced in the magistrate's court, because the initial filing appears to be missing from the copies of the case file received from both the magistrate's court and from Appellant's counsel. Respondent's first notice about the case was a Notice of Rule to Show Cause that was served on him on Friday, November 29, 2019, or Saturday, November 30, 2019, after his housekeeper found the papers shoved in his front door. (Dec. 2, 2019 Hearing Tr., at 3, l. 23 to 4, l. 11) (hereinafter "Tr. I"). During the call of the first hearing in this matter on Monday, December 2, 2019, Respondent appeared without counsel and stated to the magistrate judge, "Your Honor, the problem is I don't know what this case is about besides what I've heard from phone calls I've gotten from people." (Tr. I, at 8, ll. 19-21). In light of Respondent's late notice, without even having a full business day before the scheduled hearing, the magistrate judge granted Respondent two weeks to notify the magistrate's court about whether

he had retained counsel or would be proceeding pro se. The hearing on the temporary restraining order was supposed to be held during the first or second week of January, 2020. (Tr. I, at 17, l. 21 to 18, l. 4).

The magistrate judge specifically agreed that any no-contact order in the interim would be "mutual." (Tr. I, at 23, ll. 5-7); (Tr. I, at 10, ll. 15-18). Appellant's counsel was supposed to draft the proposed document effectuating the mutual no-contact order, using the form order from the Magistrate's Court Rules. (Tr. I, at 20, ll. 15-20). Appellant's counsel committed to emailing the proposed order to Respondent within 4-6 hours after the hearing. (Tr. I, at 16-20); (Tr. I, at 26, ll. 14-16; 26, ll. 20 to 27, l. 1) ("Your Honor, my plan is I'm going to have you something . . . I'll have an e-mail or walk over here with our version today. . . . It's not real complicated. Whatever [Mr. Roach] want to add into his . . . if he gets it to me today, I'll have it to you today."). Respondent never heard from Appellant's counsel about the proposed mutual no-contact order, not before the end of the day, as Appellant's counsel had promised the Court, or even by the end of the week, despite numerous attempts by Respondent to reach Appellant's counsel by phone and email and after leaving several voice messages. (Roach Affidavit of Mar. 9, 2020, at 5, ¶ 18). Instead, on December 5, 2019, Appellant's counsel filed a new, Verified Complaint and Motion for Protective Order, which is 26 pages long, with 116 paragraphs and 14 separate exhibits.

After not hearing back from Appellant's counsel for several days following the hearing on December 2, 2019, Respondent went to the magistrate's court and requested a copy of the court file, which the clerk refused to give him. The magistrate's clerk told Respondent that "something did come in on this case earlier that week" and that the magistrate judge had already entered his ruling, but the clerk would not give Respondent a copy of the order. Respondent was served with a copy

of the Ex Parte Temporary Restraining Order (dated Dec. 10, 2019)[1] on December 13, 2019. (Roach Aff., at 5, 18). The magistrate judge purported to leave the TRO in place for over three and a half months, until March 31, 2020, when he scheduled a hearing on the request for a restraining order. The original TRO did not include a single finding of fact regarding any underlying acts that allegedly constituted Harassment in the 1st or 2nd degree or Stalking, but actually left a blank space after the colon in Paragraph 6 of the TRO form. (See TRO of Dec. 10, 2019).

On January 10, 2020, the undersigned filed a Notice of Appeal to the Circuit Court, filing the notice in both the magistrate's court and the Circuit Court. (Case No. 2020-CP-23-00183). The first ground for the first appeal was that the magistrate court erred in allowing the ex parte TRO to remain in place longer than fifteen (15) days before holding a rule to show cause hearing, as required by S.C. Code Ann. § 16-3-1760(D). Respondent raised five other grounds for the appeal, including two of the identical grounds raised in the second appeal.

Circuit Judge Edward W. Miller held a hearing on the appeal on February 26, 2020, and issued a Form 4 order that same day remanding the case back to the magistrate judge with instructions to hold a hearing on the restraining order within ten (10) days. Judge Miller did not address any of the additional grounds for appeal raised by Respondent, nor did he address Appellant's Motion to Dismiss the Appeal.

On February 28, 2020, Respondent filed a Motion to Dismiss Appellant's case pursuant to Rule 12(b)(8), SCRCP, because Appellant was one of the named plaintiffs in a federal lawsuit

[1] Apparently, there are two versions of the TRO dated December 10, 2019. The first one had a hand-written time and date at 3:30 p.m. on December 10, 2019, but had the incorrect year (2019 instead of 2020) for the March 31 hearing date. The second version had type-written time and date, with the correct date of March 31, 2020, for the hearing.

involving the same underlying allegations, which case is captioned Propel PEO, Inc. et al. v. Sean Eric Roach et al., Civil Action No. 6:19-cv-03546-HMH-KFM and was filed on December 20, 2019 (hereinafter "federal case").

On March 9, 2020, the magistrate judge held a hearing on Appellant's motion for restraining order. The magistrate judge summarily denied Respondent's Motion to Dismiss under Rule 12(b)(8), SCRCP. Thereafter, Appellant's counsel called a single witness, Appellant, Lee Yarborough, who basically walked through the allegations in her Verified Complaint. Significantly, Appellant did not describe any conduct by Respondent directed specifically towards her that could remotely be considered harassment or stalking under the South Carolina statute. Nevertheless, the magistrate judge entered a restraining order against Respondent on March 9, 2020, at 2:30 p.m. Paragraph 7 of the Restraining Order merely provides, in part, "The Defendant has committed the following acts which constitute Harassment in the 1st or 2nd degree or Stalking: Harassment."

Respondent filed a Notice of Appeal to the Circuit Court on March 17, 2020. The magistrate's court failed to certify the record on appeal within thirty (30) days, as required by Rule 18 of the Magistrates Court Rules and Rule 75, SCRCP, and also failed to request an extension of the deadline. On May 15, 2020, the undersigned counsel for Respondent emailed the clerk of the magistrate's court to inquire why the return to the notice of appeal had not be filed with the Circuit Court. A copy of the email was sent to Court Administration. Bizarrely, on May 19, 2020, the magistrate judge filed with the Circuit Court a document entitled "Answer to Civil Appeal," which was a two-page document signed by the magistrate judge purporting to explain the underlying rationale for his restraining order. (Magistrate's Answer to Civil Appeal). This document states that Appellant's case was originally filed on November 18, 2019, yet no document bearing that date was

contained in the copy of the magistrate court's file provided to Respondent's counsel. Respondent is still not sure whether the true and complete record of the Magistrate's Court proceedings was filed with the Circuit Court or provided to Respondent's counsel after several requests.

On March 26, 2020, Respondent's counsel electronically filed with the Circuit Court the hearing transcripts from both proceedings in the magistrate's court–the initial meeting on December 2, 2019, and the hearing on March 9, 2020–the transcripts of which were prepared by a private court reporter from the recordings of the two proceedings.

The Circuit Court held a hearing on this matter virtually via WebEx on July 22, 2020, with the consent of all parties. By Order of July 24, 2020, the Circuit Court vacated the magistrate judge's restraining order and also ordered that all records and documents relating to the restraining order be destroyed within 30 days, pursuant to S.C. Code Ann. § 16-3-1760(E). The Circuit Court also entered an order on August 17, 2020, awarding costs of $942.51 relating to the second appeal only, but not the first appeal to the Circuit Court.

Appellant filed her Notice of Appeal on August 21, 2020. Appellant did not seek any type of expedited appeal or a stay or writ of supersedeas. In fact, Appellant's counsel eventually requested and received a thirty-day extension on the deadline to file Appellant's initial brief and designation of matter to be included in the record on appeal.

FACTS

This case and the pending federal case both arise out of the sudden termination of Respondent's one-year consulting contract with Propel HR, Inc. and related companies (hereinafter "Propel") in early May 2019. Appellant is an owner and officer of Propel. Both the magistrate's court proceeding and the federal complaint involve essentially the same allegations, accusing

Respondent of sending seven or eight different letters or postcards to customers of Propel, neighbors of Appellant, and business colleagues of Appellant's, which mailings were critical of Propel's business practices. The text messages that Responded sent to the owners of Propel in May and June 2019, shortly after his consulting contract was unexpectedly terminated, did not make any type of explicit threat towards Appellant or towards any other individuals associated with the company. As Appellant conceded during the restraining order hearing, Respondent's ire at being suddenly terminated was clearly directed at the company, not towards Appellant herself: "He just - - I think he - - he said many, many times he will do nothing to stop - - he's going to take Propel down. He told the employees, taking Propel down piece by piece, that he's going to - - he told us you'll have to kill me [referring to himself, Roach], because the game is on and I'll - - I'll win. I'm going to - - this is my mission (inaudible) is to take your company down." (Tr. of Mar. 9, 2020 hearing, at 46, ll. 4-10) (hereinafter "Tr. II") (emphasis added).

Importantly, Respondent's communications with the company and any owners or officers of the company stopped in mid-June of 2019, almost 6 months before the restraining order case was filed in magistrate's court. Appellant testified that they "had a cop go visit [Mr. Roach]" in June 2019, and that "[t]he communication to me and my father and [15% co-owner of Propel] Paul [Garrigan], that did stop." (Tr. II, at 46, ll. 20-21). Furthermore, Propel's employment lawyer sent a cease and desist letter to Respondent on June 18, 2019 (Exhibit 4 to Complaint), and Respondent complied with that request. (Tr. II, at 84, ll. 1-5) ("Q. But after your - - just to make sure, after your lawyer sent the letter - - do not contact anyone at Propel or any employees of Propel, he abided by that; isn't that correct. A. He abided.").

Even assuming, for the sake of this appeal, that Respondent was behind the seven or eight

mailings about Propel that were disseminated in October and November 2019, those mailings do not constitute harassment or stalking as defined by the statute. Appellant may have been genuinely embarrassed and upset by the mailings, as well as by her neighbors' and customers' bringing the mailings to her attention; however, the mailings were not directed to Appellant, nor did the mailings convey any type of threat to the safety or physical well-being of Appellant or anyone in her family. Appellant testified that after she had the City of Greenville police contact Respondent, "We stopped getting the threatening text messages, but I was still worried all the time." (Tr. II, at 71, ll. 4-10). When Appellant's own counsel asked her what, if anything, happened in July through October, she stated, "I don't know anything, but I just had this fear." (Tr. II, at 71, ll. 11-13). In over 80 pages of direct testimony and re-direct testimony, Appellant does not mention a single incident or episode that could be considered harassment or stalking; rather, at most, Appellant described "a pattern that [Respondent is] attempting to smear [Appellant's] image and the image of Propel HR, as he had stated his goal. He wanted to destroy Propel, and he wanted to take Propel down." (Tr. II, at 76, ll. 7-12). These are the precise allegations that plaintiffs (including Appellant individually) have made in the federal complaint.

On cross examination by the undersigned counsel for Respondent during the restraining order hearing, Appellant conceded that she had not seen Respondent in person since May 2019, other than at the first magistrate's court proceeding on December 2, 2019, when he appeared without counsel pursuant to a Summons and Notice of Rule to Show Cause. (Tr. II, at 80, ll. 16-22). During the hearing on the restraining order on March 9, 2020, Respondent's counsel went through each of the non-exhaustive examples listed in the Harassment and Stalking statute under the definitions of "harassment" and "stalking." Appellant testified that Respondent had not committed any such acts,

to her knowledge:

Q. Just to be clear, I think you testified earlier that you - - every time you go out on the town, you kind of are hyper vigilant.

A. Absolutely.

Q. You keep an eye out for Mr. Roach's car. You've never seen him following you from a location to location?

A. I did see him one time on Roper Mountain Road. I was in a lane and he was in front of me. I took a picture at that time to make sure that - - because I've never seen him follow me, no, if that was your question, but I saw him, and I was kind of behind him, and I took a picture to make sure that I - - I knew where he, you know, was just in case.

Q. Okay. So the fact that you were behind him indicates he wasn't - - . . . he wasn't following you.

A. That he was not following.

(Tr. II, at 84 l. 10 to 85, l. 3).

Q. And to your knowledge, with all your surveillance equipment and everything, Mr. Roach has not been to your house or approached your door in any way, has he?

A. To my knowledge, he's not.

(Tr. II, at 81, ll. 14-18).

Q. In fact, the last communication you had with Mr. Roach was a group text that was sent to you, your father, and Mr. Garrigan, another co-owner of the business, on June 19; isn't that right?

A. Yes.

(Tr., II, at 81, l. 22 to 82, l. 2).

Q. And to your knowledge, he's not engaged in any type of visual or physical contact with you or your family since this termination?

A. No.

(Tr. II, at 85, ll. 4-7).

Q. So you don't need an order from this court telling Mr. Roach to stop surveilling the business because y'all took care of that yourselves; isn't that right?

A. On the business.

Q. Right. Okay. You don't have any information that he's ever surveilled you in your home or your family; isn't that correct?

A. I - - I - - I'd like an order of the court to feel more secure in my own neighborhood and in my - -

Q. Mr. Roach has not committed any act of vandalism to your home or property; is that correct?

A. Right, not that I know of.

* * *

Q. Other than the postcard that was not sent to anyone in your family, he's not made a direct threat of physical harm or death to anyone in your family, has he?

A. He's not.

* * *

Q. And Mr. Roach has not committed any type of assault on you or any of your family

members?

A. No.

Q. Is that right? He's not threatened to kidnap you or any of your family members?

A. No.

Q. And he's not threatened to commit any damage to you, your family, or your family's property, has he?

A. No.

(Tr. II, at 86, l. 21 to 88, l. 1).

Appellant also acknowledged that the postcards at issue did not convey any actual, specific threat towards her or anyone in her family: "Q. And there's a difference between you feeling threatened and a threat being conveyed in the card, right? A. Accurate. Right. Q. But there's no threat that's conveyed in this postcard [specifically referring to Exhibit 9 of the Complaint, the Fourth Mailing]? A. There's no specific threat, no." (Tr. II, at 93, ll. 10-16). She testified the same with respect to Exhibit 10, the fifth mailing: "Q. There's no threat to you personally or to your family in connection with this care, is there? A. There's no threat, but the clients did not like this, nor did the neighbors." (Tr. II, at 95, ll. 5-8).

ARGUMENTS

1. THE CIRCUIT COURT'S FACTUAL FINDING THAT APPELLANT FAILED TO MEET HER BURDEN OF ESTABLISHING HARASSMENT OR STALKING, AS A NECESSARY PRE-REQUISITE TO A RESTRAINING ORDER UNDER S.C. CODE ANN. § 16-3-1750, IS AMPLY SUPPORTED "BY ANY EVIDENCE" IN THE RECORD.

As an initial matter, Appellant cites to the wrong standard of review for this appeal. The

Circuit Court properly noted that an appeal from magistrate's court to Circuit Court is governed by the standard of review found in S.C. Code Ann. § 18-7-170: "Upon hearing the appeal, the [circuit court acting as the] appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits. In giving judgment, the [circuit] court may affirm or reverse the judgment of the court below, in whole or in part, as to any or all the parties and for errors of law or fact." S.C. Code Ann. § 18-7-170 (emphasis added). The Circuit Court correctly applied the standard of review articulated by the South Carolina Court of Appeals in Vacation Time of Hilton Head Island, Inc. v. Kiwi Corp., 280 S.C. 232, 312 S.E.2d 20 (Ct. App. 1984), which recognized that "the Circuit Judge, sitting in an appellate capacity [has] the ability to make a determination in the same manner as Circuit Courts in trials without a jury and to reverse a judgment for errors of fact even though the Circuit Judge may not have had the opportunity to observe the demeanor of the witnesses." Id. at 234, 312 S.E.2d at 21.

Although the Circuit Court's scope of review on an appeal from the magistrate court is "broad," the court of appeals applies a much more limited standard of review on the second level of appeal. Bowers v. Thomas, 373 S.C. 240, 244, 644 S.E.2d 751, 753 (Ct. App. 2007) ("'[U]nless we find an error of law, we will affirm the [circuit] judge's holding if there are any facts supporting his decision.'") (quoting Hadvield v. Gilchrist, 243 S.C. 88, 94, 538 S.E.2d 268, 271 (Ct. App. 2000)).

Appellant incorrectly cites to S.C. Code Ann. § 18-7-170 as the applicable standard of review here, (App. Br., at 7), which applies only at the first level of appeal from the magistrate's court to the Circuit Court, not on the second level of appeal from the Circuit Court to the Court of Appeals.

The fact that the Vacation Time case involved an ejectment proceeding, for which the Circuit Court also had concurrent jurisdiction, is not significant, contrary to Appellant's assertion otherwise.

(App. Br., at 8, 9). In fact, the Vacation Time case specifically noted that "the Circuit Courts still have appellate jurisdiction over ejectment cases initially heard by a Magistrate." 280 S.C. at 234, 312 S.E.2d at 21.

There is also no indication that the holding of Vacation Time is "factually limited" as argued by Appellant. (App. Br., at 9). Less than four months after the decision in Vacation Time was published, the Court of Appeals applied the same standard of review in Burns v. Wannamaker, 281 S.C. 352, 315 S.E.2d 179 (Ct. App. 1984), which was an appeal from a magistrate's court case against a dentist for breach of contract and breach of warranty. The Burns case actually cited Vacation Time favorably in stating that "Section 18-7-170 confers authority upon the Circuit Court to reverse a magistrate's findings of fact when exercising appellate jurisdiction in an appeal from a magistrate's judgment." Id. at 357, 315 S.E.2d at 182.

The fact that Respondent did not testify at the restraining order hearing, but only cross-examined Appellant, is also not significant. Appellant had the burden of proving her entitlement to a restraining order under the Harassment and Stalking Statute, which requires a showing of a threat of continuing harm or a "present danger of bodily injury." S.C. Code Ann. § 16-3-1760(A). Respondent's decision not to testify during the hearing has no bearing on whether Appellant met her burden of proof in her case in chief.

Furthermore, the actions listed in the definitions section of the Harassment and Stalking Statute as examples of proscribed "harassment" in the first and second degree and "stalking" are not "optional" as argued by Appellant (App. Br., at 9); rather, the list is simply not exhaustive, which means that the defined terms "may include, but [are] not limited to" certain listed conduct. The types of conduct listed in the statute all involve some conduct or action involving a threat of serious

physical or psychological harm directed toward the plaintiff victim or her family.

The magistrate judge's restraining order did not identify any specific conduct that constituted harassment or stalking, but instead simply used the tautology "harassment" in describing the allegedly offending conduct. As the Circuit Court found, even in the "Answer to Civil Appeal" which was erroneously filed by the magistrate judge instead of the required return, the magistrate judge did not describe any underlying harassment or stalking, but merely stated that the restraining order "'was needed to keep all parties from contacting each other.'" (Order, at 2) (quoting Magistrate Judge's "Answer"). The return required by S.C. Code Ann. § 18-7-60, Rule 75, SCRCP, and Rule 18(b) of the SC Magistrates Court Rules is merely the certification of the original record of the evidence and testimony from the proceedings below, not an attempted explication, explanation, or defense by the magistrate judge of his or her decision.

The Circuit Court reviewed the record of admissible evidence from the hearing of March 9, 2020 and properly concluded that Appellant failed to meet her burden of proof on whether any type of harassment or stalking occurred at the hand of Respondent directed towards Appellant. The mailings at issue lampooned the business where Respondent previously worked, but "did not appear to target [Appellant]." (Order at 3). Even if the record established a "pattern" of mailings, demonstrated that Appellant was upset and embarrassed by the mailings, and proved that Respondent had "no legitimate purpose" in allegedly sending the mailings, Appellant failed to prove the type of "intrusion" into her private life contemplated by the Harassment or Stalking Statute, which requires a showing of some type of abuse, threat of abuse, or molesting of the plaintiff or members of the plaintiff's family, before a restraining order should be issued. See S.C. Code Ann. § 16-3-1770.

Appellant argues that S.C. Code Ann. § 18-7-170 does not give a Circuit Court the power

to "vacate" a magistrate court's judgment, but only allows a Circuit Court to affirm or reverse the magistrate judge's decision. Vacating a lower court's judgment is merely a sub-set of reversing a judgment; only with the vacating of the judgment, as here, there is no need for remand to the lower court for further proceedings. Because the Circuit Court is specifically permitted under S.C. Code Ann. § 18-7-170 to make its own findings of fact from the record of the proceedings before the magistrate court, there is no need for the Circuit Court to remand the case to the magistrate's court for further proceedings. Appellant had her "one bite at the apple" to try to establish a basis for a restraining order, but she failed to do so with any competent evidence.

Next, Appellant asserts that the Circuit Court did not follow the statutory procedure for a defective record from the magistrate court's return, as contemplated by S.C. Code Ann. § 18-7-80. The Circuit Court here did not request an amended return from the magistrate court because the complete transcripts of the proceedings were filed by Respondent's counsel prior to the appeal hearing, even though the magistrate judge or his clerk apparently misconstrued requirement of the return. The Circuit Court's reference to the magistrate judge's "Answer" was not an indication that the return need to be amended or supplemented, but instead was cited as further evidence that the magistrate judge never actually made any factual findings necessary to support a restraining order under the Harassment and Stalking Statute.

The Circuit Court's references to the procedural irregularities of this case and to the fact that two specific documents were improperly contained in the magistrate court's file in this case did not warrant a remand to the magistrate court, as asserted by Appellant. (App. Br., at 15). The Circuit Court was obviously concerned that such highly prejudicial and inadmissible evidence may have been considered by the magistrate judge at the outset of this case, creating a false first impression

about Respondent in the magistrate judge's mind that may have unfairly tainted the magistrate's view of Respondent: "it almost seems as through Appellant had a presumption against him from the start and a very difficult burden to overcome." (Order, at 3). The Circuit Court did not "erroneously place[]" a burden on Respondent, as asserted by Appellant. (App. Br., at 15). Appellant incorrectly states that "[Respondent's] only burden was to show that there was no evidence to support a finding of Harassment in the 2nd Degree." (App. Br., at 15). Of course, Respondent, in defending against the restraining order on its merits, did not have any burden of proof or persuasion with respect to the underlying facts. As discussed in detail above, on an appeal to the Circuit Court, a magistrate judge's factual findings are not entitled to any presumptive weight; the Circuit Judge is permitted to make his or her own de novo factual findings based on his or her reading of the record evidence. The Circuit Court properly evaluated the record from the restraining order hearing and determined that there was no legitimate basis for the issuance of the restraining order by the magistrate court.

2. AS AN ADDITIONAL SUSTAINING GROUND, THE ACTION FOR RESTRAINING ORDER SHOULD HAVE BEEN DISMISSED UNDER RULE 12(b)(8), SCRCP, BECAUSE OF THE PENDING FEDERAL COURT ACTION SEEKING ESSENTIALLY THE SAME RELIEF.

Rule 12(b)(8) of the South Carolina Rules of Civil Procedure allows a defendant to have a case against him dismissed where "another action is pending between the same parties for the same claim." Rule 12(b)(8), SCRCP. Here, Appellant is a co-Plaintiff along with her companies, Propel PEO, Inc. and Propel HR, Inc., in a federal case against Respondent, his company, Idea Catapult, LLC, and two other former employees of Propel, Angela Renea Tyler and Arron Drye. The federal complaint was filed on December 20, 2019. Propel PEO, Inc. et al. v. Sean Eric Roach et al., Civil Action No. 6:19-cv-03546-HMH (D.S.C.). A copy of the federal complaint was attached to

Respondent's Motion to Dismiss Pursuant to Rule 12(b)(8), SCRCP, before the magistrate's court. The federal complaint raised eighteen causes of action under state and federal law, all primarily arising out of the same seven or eight alleged mailings that are at issue in the magistrate's court case. Plaintiffs' complaint in the federal case contains a request for injunctive relief, both preliminary and permanent. The exact same 14 Exhibits from Appellant's magistrate's court complaint are also attached to the federal complaint.

After remand from the first appeal of the TRO, at the beginning of the hearing on March 9, 2020, the magistrate judge recognized, "as far as I'm concerned and the way I'm looking at it as of right now, we're at day one with this." (Tr. II, at 6, ll. 19-21). Although Appellant's counsel argued that because the magistrate case includes a request for a restraining order under the South Carolina Harassment and Stalking Statute, which is not specifically pleaded in the federal case, the testimony of Appellant herself demonstrates that the cases are really seeking the same remedy and involve the same underlying subject matter:

> Q. And you never gave permission to Mr. Roach to use your company trademark, did you?
>
> A. No, never.

(Tr. II, at 70, ll. 10-12).

> Q. Paragraph 50 [of the magistrate's court complaint] states that these actions by Mr. Roach show a pattern that he's attempting to smear your image and the image of Propel HR, as he had state his goal. He wanted to destroy Propel, and he wanted to take Propel down.
>
> A. Yes.

(Tr. II, at 76, ll. 7-12).

A. What he had done is decided to do a smear campaign and defame me and my company and has used all sorts of confidential information. He has used people's private information, and he has gone way (inaudible) so the there's - - and threatened me because they're all insinuated toward me.

(Tr. II, at 88, ll. 10-15).

A. I - - I think it was defaming. I think it's - - there's a - - not at - - there's no legitimate business need for this, so. And then when you couple that with the things that he sent to us in June and in May, I felt that this was very threatening. I felt that this was - - he - - he had said he was playing a game, and he said this is level two. I'm going there.

(Tr. II, at 91, ll. 4-11).

Most tellingly, Appellant herself expressly admitted on cross examination to a Rule 12(b)(8) violation:

Q. And you filed two - - you filed a lawsuit against Mr. Roach and two other former employees of Propel HR for the same thing; isn't that correct?

A. Correct.

(Tr. II, at 91, ll. 15-18) (emphasis added).

The magistrate judge should have dismissed the underlying case under Rule 12(b)(8), SCRCP, because of the pendency of the federal action attacking the same mailings. Although the Circuit Court did not reach the Rule 12(b)(8) argument because he vacated the restraining order on other grounds, the duplicity of actions here provides additional sustaining grounds for dismissing

Appellant's appeal.

3. AS A SECOND ADDITIONAL SUSTAINING GROUND, THIS APPEAL SHOULD BE DISMISSED ON THE GROUND OF MOOTNESS BECAUSE THE RESTRAINING ORDER WOULD HAVE EXPIRED OF ITS OWN TERMS ON MARCH 9, 2021; THEREFORE, AND THIS APPEAL CANNOT AFFECT THE LEGAL RIGHTS OF THE PARTIES WITH RESPECT TO THE RESTRAINING ORDER IN QUESTION.

As a second additional sustaining ground, this appeal has clearly become moot because the Court of Appeals cannot possibly change the legal status of the parties with respect to the restraining order post-March 9, 2021, the date the restraining order was originally set to expire of its own terms.

The South Carolina Supreme Court has long recognized that "A case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy. This is true when some event occurs making it impossible for reviewing court to grant effectual relief." Mathis v. South Carolina State Highway Dep't, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973). The Mathis case involved an appeal by the South Carolina State Highway Department from the lower court's order revoking the suspension of the respondent's driver's license and reinstating respondent's driving privileges after his license was suspended the Department for a period of one year almost two years after his initial conviction for driving under the influence of intoxicating liquor. By the time the appeal was heard by the South Carolina Supreme Court in the March 1973 term, respondent already would have been entitled to have his license returned under the terms of the original suspension. Accordingly the Court ruled that the issues on appeal had been rendered "moot and academic." Id. at 346, 195 S.E.2d at 714.

In the recent case of South Carolina Coastal Conserv. League v. Dominion Energy S.C., Inc., 432 S.C. 217, 851 S.E.2d 699 (2020), the South Carolina Supreme Court relied on Mathis to hold

that an appeal from a Public Service Commission order setting rates for an electric utility to purchase solar and other renewable energy from producers was moot because the rates in question had expired by the time the appeal was heard. Id. at 223, 851 S.E.2d at 702 ("The rates have expired. If we were to reverse the PSC, our ruling would have no effect on the only remaining appellant. The only effect our decision could have would be that a non-party to this appeal would earn additional revenue of $15.").

Similarly, in the case of South Carolina Retirement Sys. Inv. Comm'n v. Loftis, 402 S.C. 382, 741 S.E.2d 757 (2013), the South Carolina Supreme Court determined that a request for mandamus requiring respondent to authorize funding with a particular investment fund was rendered moot because at the time of oral argument, the funding of the investment had already occurred. Id. at 384, 741 S.E.2d at 758.

Under the well-established doctrine of mootness, this appeal should likewise be dismissed because nothing the Court of Appeals could do in this case would affect the legal status of the parties with respect to the vacated Restraining Order, which would have expired of its own terms on March 9, 2021, exactly one day after the Initial Brief of Respondent is being filed.

If Appellant were sincerely interested in preserving the protections of the Restraining Order pending further appeal, she should have petitioned the Circuit Court for a stay of its order or supersedeas or should have requested expedited review of this case or an emergency injunction from an appellate court judge. Instead of acting with urgency and dispatch, Appellant's counsel delayed filing the appeal and ordering the transcript until towards the end of the deadline and actually requested and received a 30-day extension to serve and file Appellant's initial brief an designation three days before the original deadline expired.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Court affirm the Circuit Court's order vacating the magistrate judge's restraining order and awarding costs to Respondent on the appeal to the Circuit Court.

Respectfully submitted,

March 8, 2021

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

Case No. 2020-CP-23-01669
Appellate Case No. 2020-001182

Sean Eric Roach ..... Respondent,

v.

Lee C. Yarborough ..... Appellant.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondent and Respondent's Designation of Matter to be Included in the Record on Appeal on Appellant, Lee C. Yarborough, by depositing a copy of the same in the United States Mail, postage prepaid, on March 8, 2021, addressed to Appellant's attorney of record, Wesley D. Few, Esq., Wesley D. Few, LLC, P.O. Box 9398, Greenville, SC 29604.

March 8, 2021

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March 8, 2021

Hon. Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Sean Eric Roach v. Lee C. Yarborough,
Appellate Case No. 2020-001182

Dear Ms. Kitchings:

Enclosed please find the original and one copy each of the Initial Brief of Respondent, Respondent's Designation of Material to be Included in Record on Appeal, and Proof of Service in the above-referenced case. Please file the original and one copy of each of these documents and return the extra copies, clocked in, to me via the enclosed return envelope.

By copy of this letter, I am hereby serving a copy of the Initial Brief of Respondent on counsel for Appellant.

Thank you in advance for your attention to this matter. If you have any questions or need anything else, please do not hesitate to call me or email me.

Sincerely yours,

David E. Rothstein

Enclosures

cc: Wesley D. Few

ROTHSTEIN LAW FIRM, PA
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