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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph K. Anderson, III, Administrative Law Judge

Appellate Case No. 2020-001689

Case No. 2020ALJ300064AP

South Carolina Technical College SystemAppellant

v.

Carla Jackson and South Carolina Department of Administration..... Respondents.

Of whom, Carla Jackson is theRespondent.

RESPONDENT’S RETURN TO MOTION

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October 1, 2021
Columbia, South Carolina

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INTRODUCTION

On September 22, 2021, the Appellant, South Carolina Technical College System (“Appellant”), filed a Motion pursuant to Rule 60(b), SCRCP, and Rule 205, SCACR, for leave to file a Motion for Relief from Order or Judgment in the Administrative Law Court (“ALC”). “The Appellant’s Rule 60(b) motion is based on newly discovered evidence.” (Appellant’s Motion, p. 2). Respondent, Carla Jackson (“Respondent”), opposes Appellant’s Motion.

STANDARD OF REVIEW

Appellant’s Motion is brought under Rule 60(b), SCRCP, the Rule of Civil Procedure applicable to relief from judgment or order. Rule 60(b), SCRCP provides that “the court may relieve a party or his legal representative from a final judgment, order, or proceeding” for one of five listed reasons. One of those reasons is “newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b).” Rule 60(b)(2), SCRCP. The standard for granting relief under Rule 60(b) is rigorous. See *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 608, 681 S.E.2d 885, 888 (2009). “To obtain a new trial [under Rule 60(b)(2), SCRCP] based on newly discovered evidence, a movant must establish that the newly discovered evidence: ‘(1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching.’” *Lanier v. Lanier*, 364 S.C. 211, 217, 612 S.E.2d 456, 459 (S.C. Ct. App. 2005) (internal citations omitted).

The Appellant’s Motion also states it is brought under Rule 205, SCACR. Rule 205, SCACR provides the appellate court with exclusive jurisdiction over matters on appeal. *Arnal v. Fraser*, 371 S.C. 512, 518, 641 S.E.2d 419, 422 (2007).

ARGUMENT

I. Appellant's Motion is procedurally improper.

Appellant seeks to do here what has already been disallowed by the Supreme Court of South Carolina, under different but sufficiently similar circumstances, to prohibit the relief sought by Appellant. See *Stogsdill v. S.C. Dep't of Health & Hum. Servs.*, 415 S.C. 568, 784 S.E.2d 669 (2016). In *Stogsdill*, the petitioner filed a motion requesting that the court vacate its opinion pursuant to Rule 60(b)(3), SCRPC, and seeking leave to supplement the record in the matter pursuant to Rule 212(b), SCACR. Alternatively, the petitioner sought a rehearing pursuant to Rule 221(a), SCACR. In response to the petitioner's motion, the Court ordered:

Initially, to the extent Petitioner petitions the Court to vacate its opinion under Rule 60, SCRPC, we remind Petitioner that the South Carolina Rules of Civil Procedure are inapplicable in appellate proceedings. See Rule 73, SCRPC ("Procedure on appeal to the South Carolina Supreme Court or the South Carolina Court of Appeals shall be in accordance with the South Carolina Appellate Court Rules."); Rule 81, SCRPC (providing the SCRPC "shall apply to every *trial court* of civil jurisdiction within this state" (emphasis added)).

Stogsdill, 415 S.C. at 568, 784 S.E.2d at 670. Accordingly, this Court should deny Appellant's Motion.

II. Rule 210, SCACR prohibits the actions requested by Appellant's Motion.

The documents the Appellant seeks to add to the record are not in the Record on Appeal. Rule 210(h), SCACR, expressly limits an appellate court's review to the Record on Appeal. "Except as provided by Rule 212 and Rule 208(b)(1)(C) and (2), the appellate court will not consider any fact which does not appear in the Record on Appeal." Rule 210(h), SCACR. Appellant filed its Certification of Service of the Record on Appeal on June 23, 2021. Respondent filed her Final Brief on July 12, 2021. Appellant filed its Final Brief and Final Reply Brief on July 13, 2021. Thus, this case has a conclusive Record on Appeal, and all briefing was previously filed

with this Court.

There is no exception that allows Appellant to try to add to the Record on Appeal in this case. Rule 208(b)(1)(C) and (2), SCACR, delineate the requirements for the Appellant's and Respondent's briefing. Nothing in Rule 208, SCACR, allows for the relief requested by Appellant's Motion. Likewise, Rule 212, SCACR, does not allow for the relief requested by Appellant's Motion. Rule 212, SCACR, is the Rule applicable to supplementing the Record on Appeal. Respondent does not agree to supplementing the Record on Appeal; thus, the only relief available to Appellant is by leave of this Court.

This Court has held that evidence that does not appear in the record cannot be considered on appeal. *Spreeuw v. Barker*, 385 S.C. 45, 68, 682 S.E.2d 843, 854 (S.C. Ct. App. 2009)(citing Rule 210(h), SCACR)(stating an appellate court may not consider a fact which does not appear in the record). This has recently been reiterated in this Court's decision in *Adamson v. Jackson*, wherein this Court quoted Rule 210(h), SCACR, within the Opinion. *Adamson v. Jackson*, No. 2018-000060, 2021 WL 4077022, at *1 (S.C. Ct. App. Sept. 8, 2021); see also *Hall v. Hall*, No. 2014-001642, 2018 WL 2722792, at *1 (S.C. Ct. App. June 6, 2018). Likewise, Rule 208(b)(1)(B), SCACR, states "[o]rdinarily, no point will be considered [on appeal] which is not set forth in the statement of the issues on appeal." See *S.C. Dep't of Soc. Servs. v. Thomas*, No. 2019-000744, 2021 WL 4271916, at *1 (S.C. Ct. App. Sept. 20, 2021). Thus, these arguments are not preserved for appellate review. See *Spreeuw v. Barker*, 385 S.C. 45, 71, 682 S.E.2d 843, 856 (Ct. App. 2009).

III. Appellant cannot satisfy the elements for obtaining relief under Rule 60(b)(2), SCRCF.

Procedurally, the Motion is improper, but assuming arguendo the Court were to consider the merits of the Motion, the Appellant cannot satisfy the elements for obtaining relief under Rule 60(b)(2), SCRCF. "To obtain a new trial [under Rule 60(b)(2), SCRCF] based on newly discovered

evidence, a movant must establish that the newly discovered evidence: ‘(1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching.’” *Lanier v. Lanier*, 364 S.C. 211, 217, 612 S.E.2d 456, 459 (S.C. Ct. App. 2005) (internal citations omitted). The Appellant cannot satisfy these elements.

(a) The warrants will not change the result if a new proceeding is granted.

The arrest warrants are inadmissible evidence. “Precedent explains that newly discovered evidence must be such that it will probably change the result of trial.” *Country Properties, LLC v. Martin*, No. 2019-000569, 2021 WL 3401190, at *1 (S.C. Ct. App. Aug. 4, 2021) *Lanier v. Lanier*, 364 S.C. 211, 217, 612 S.E.2d 456, 459 (S.C. Ct. App. 2005). There is no such evidence here. The Respondent has not been convicted of any crime; therefore, there is no newly discovered evidence that is admissible for any court to consider as it relates to the Respondent’s grievance filed under the State Employee Grievance Procedures Act.

(b) The allegations underlying the warrants were known to Appellant before the State Employee Grievance Committee and the multiple reviews by the ALC.

The Appellant engaged in an abuse of process by filing an ethics complaint against the Respondent after it lost the hearing before the State Employee Grievance Committee. It has consistently engaged in a pattern of retaliatory conduct toward Respondent for her use of legal processes available to her. Her termination followed proximately after she complained about wage violations to the South Carolina Department of Labor, Licensing and Regulation. (See i.e. R. pp. 932, 934, 397, 540).

There can be no dispute of fact that the Appellant was on notice of these college tuition allegations long before filing its Motion with this Court on September 22, 2021, because it filed the State Ethics Commission complaint against the Respondent that led to the arrest warrants being

issued by the State Ethics Commission to the Respondent. The Appellant's Vice President and Chief Human Resource Officer filed the complaint against Respondent with the State Ethics Commission on April 5, 2018.¹ At absolute minimum, the Appellant was on notice of these allegations underlying the warrants when it initiated the underlying complaint on April 5, 2018.

The Appellant appealed that decision to the ALC on August 31, 2018, and it argued that the Respondent was not entitled to state employee grievance rights. By Order issued on June 25, 2018, the ALC remanded the case "for the Board to determine whether Jackson was an Interim Dean at the time of her termination (uncovered employee) or whether Jackson was also functioning in a covered FTE position." The parties and the South Carolina Department of Administration sought clarification from the ALC to confirm that the Board referred to in the ALC's remand Order was the State Employee Grievance Committee. The ALC confirmed that the State Employee Grievance Committee was the body that needed to make the determination on remand. Thereafter, on February 3, 2020, the State Employee Grievance Committee issued its decision that the Respondent was functioning in the covered full-time FTE position, Administrative Coordinator I, at the time of termination from the SCTCS.

Thus, the Committee's decision remained in the Respondent's favor. The Appellant thereafter initiated another notice of appeal to the ALC on March 9, 2020. Appellant and Respondent briefed the issues raised by Appellant in its second appeal. The ALC entered an Order upholding the decision of the Committee and granting relief to Respondent on September 23, 2020. On October 5, 2020, Appellant filed a Motion for Reconsideration. The parties briefed the repetitive arguments raised by Appellant in the Motion for Reconsideration. The ALC thereafter

¹ The Appellant's ethics complaint against the Respondent was stamped by the State Ethics Commission as being received on April 9, 2018.

entered an Amended Final Order, once again upholding the decision of the Committee and granting relief to Respondent. The parties have fully briefed their positions on appeal and now, after all of those steps, the Appellant wrongfully seeks to add allegations that it knew existed, at minimum, as of April 5, 2018.

(c) Appellant cannot assert that this purported new evidence could not have been discovered before the prior proceedings because it was the complainant at the source of the criminal charges.

The ethics complaint from Appellant against Respondent was filed shortly after the State Employee Grievance Committee overturned the termination. The hearing before the State Employee Grievance Committee occurred on November 28, 2017, February 1 and 2, 2018, and March 2, 2018. The Final Decision of the State Employee Grievance Committee in Respondent's favor was issued on March 22, 2018. The Respondent believes that the Appellant engaged in an abuse of process to file the complaint with the State Ethics Commission in a retaliatory manner because it lost at the hearing.

(d) The warrants are not material to whether Appellant violated Respondent's rights protected by the State Employee Grievance Procedures Act.

The State Ethics Commission issued no decisions about the Appellant's complaint against the Respondent for more than three years. The chronology speaks for itself that the State Ethics Commission did not take action against the Respondent until after the Respondent held her ground to fight for her win before the State Employee Grievance Committee and after Appellant filed its Notice of Appeal on December 29, 2020. The State Ethics Commission shares adjacent physical office locations with the Appellant. The Appellant's office is located at 111 Executive Center Drive, Columbia, South Carolina 29210. The State Ethics Commission's office is located at 201 Executive Center Drive, Columbia, South Carolina 29210.

The State Ethics Commission has not followed its own statutory requirements for the arrest warrants that the Appellant seeks to add to the record. The agency has not held a proceeding before the State Ethics Commission; instead, the investigator and other staff assisting the investigator skipped all the normal processes and sought criminal charges against the Respondent without a hearing before the Commission Panel.

The State Ethics Commission has not followed S.C. Code 8-13-320(10)(k). It is in violation of these statutory requirements that the State Ethics Commission would pursue criminal charges against the Respondent before a probable cause finding on the ethics front had even been noticed to the individual at issue and her counsel. Furthermore, as the statute indicates, if the agency finds probable cause, the hearing before the State Ethics Commission takes place, and no later than sixty (60) days after the conclusion of that hearing, the State Ethics Commission sets forth its written decision and the Commission Panel, where appropriate, can refer the matter to the Attorney General. None of that transpired as it relates to the Respondent. To date, no hearing before the State Ethics Commission has occurred.

Furthermore, S.C. Code 8-13-540(B)(3) states that if the State Ethics Commission finds evidence of willful violations with criminal penalty, the State Ethics Commission may forward the complaint and accompanying materials to the Attorney General or circuit solicitor. This did not happen, and thus the State Ethics Commission is exceeding its statutory authority in issuing these arrest warrants to the Respondent. A plain reading of the arrest warrants sought to be added by the Appellant show that the "Prosecuting Agency" is the "SC State Ethics Commission". Likewise, the "Prosecuting Officer" on the arrest warrants is "Kevin P Hinson – S00287", the State Ethics Commission investigator.

The Respondent's Brief defending the Respondent's win at the State Employee Grievance Committee twice and two appeals by Appellant to the ALC was due and filed on April 21, 2021. That very same day was the first time that the State Ethics Commission contacted the Respondent's counsel about Respondent in years. It was not until May 5, 2021, the State Ethics Commission only verbally relayed that it was pursuing criminal proceedings against the Respondent. At that time, the State Ethics Commission refused to provide any information and it refused to put anything in writing about these purported charges against the Respondent.

The warrants that Appellant seeks to add to the record are constitutionally concerning. General statutory provisions relating to arrest warrants may be found in S.C. Code Ann. §§17-13-10 through 17-13-160. As seen in the exhibits accompanying the Appellant's Motion, the arrest warrants were sought by Kevin Hinson, the State Ethics Commission investigator, on March 4, 2021. Respondent or her counsel had no knowledge of the existence of any arrest warrants until on May 5, 2021, when Respondent's counsel was informed by Mr. Hinson that he was seeking to arrest the Respondent. On May 5, 2021, and again on May 6, 2021, Respondent's counsel sought the grounds of any arrest warrant(s) and the charge(s) against the Respondent. During the first two telephone calls with Mr. Hinson about the arrest, he refused to answer Respondent's counsel's questions relative to the reason(s) for an arrest of Respondent, a single mother with a minor child. It was not until during a third telephone call, later in the afternoon of May 6, 2021, that the Respondent or her counsel were verbally given any reason for the arrest or charges being brought against the Respondent. The first written notice of any arrest warrant was an email sent on May 7, 2021, therein listing the four charges, without the arrest warrants attached. This is particularly concerning as S.C. Code §17-13-50 provides that it is a criminal offense for an arresting officer not to inform the arrested person of the grounds of the arrest. In summary, the warrants, that source

from the Appellant's allegations against the Respondent, are defective and inadmissible in this appeal.

(e) The criminal allegations are cumulative and impeaching.

A core principle of the American justice system is that every individual accused of a crime is innocent until proven guilty. The Respondent asserts her innocence as to the four charges brought against her by the State Ethics Commission. No finding of guilt has been made against the Respondent. The purpose of the Appellant seeking to add the arrest warrants into the record is for impeachment purposes. Therefore, the arrest warrants are inadmissible impeachment evidence.

Cumulative evidence does not support granting Rule 60(b) motions. *Jamison v. Ford Motor Co.*, 373 S.C. 248, 273, 644 S.E.2d 755, 768 (Ct. App. 2007). The accusations within the documents that the Appellant seeks to add to the record are cumulative. The termination notice issued to the Respondent, that was the center of the hearing before the State Employee Grievance Committee, states in relevant part to this issue, "The specific facts supporting this action include, but are not limited to, your receipt of tuition payments in the amount of \$26,000 for an educational program, which was unrelated to your position with the College, even though you signed a statement acknowledging the requirement that the program must be related to your position with the College." (R. p. 703). Thus, the allegations are cumulative, and the warrants should not be added to the record years after the State Employee Grievance Committee hearings and ALC proceedings.

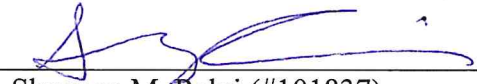
CONCLUSION

For the foregoing reasons, Respondent asks that the Appellant's Motion for Leave of Court to File Rule 60(b) Motion in the Administrative Law Court be denied.

Respectfully Submitted,

CROMER BABB PORTER & HICKS, LLC

BY: _____



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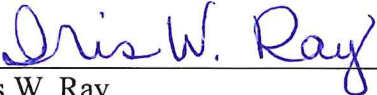
Carla Jackson and South Carolina Department of Administration,
Of whom, Carla Jackson is theRespondent.

PROOF OF SERVICE

I do hereby certify that, on October 1, 2021, in accordance with Section (b)(2) of the Supreme Court's Order RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court, I have served the Respondent's Return to Motion by electronic mail to Appellant's attorneys of record, at the following addresses:

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SC Court of Appeals

VIA EMAIL ONLY

Hon. Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
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ctappfilings@sccourts.org

Re: South Carolina Technical College System v. Carla Jackson
Appellate Case No.: 2020-001689


Dear Ms. Kitchings:

Enclosed for filing is a copy of Respondent's Return to Motion along with a Proof of Service on the above-referenced matter. By copy of this letter, I am serving all counsel for record with a copy of same.

Should there be any questions or concerns, please do not hesitate to contact our office.

With kind regards, I am

Sincerely,



Iris W. Ray
Senior Litigation Paralegal

/iwr

Enclosures

cc: Andrew F. Lindemann, Esq. (via email only)
Warren V. Ganjehsani, Esq. (via email only)