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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Appellate Case No.: 2022-000031

Royal Garden Resort Regime Homeowners Association, Inc.Respondent

v.

Sea Breeze Property Management & Contract Services, Inc.; Calvin Donaldson;
and Phoenix of the Strand, Inc. Appellants,

**APPELLANTS’ REPLY TO RESPONDENT’S BRIEF IN OPPOSITION TO
APPELLANTS’ MOTION TO STRIKE**

On June 6, 2022, Appellants, Sea Breeze Property Management & Contract Services, Inc., Calvin Donaldson, and Phoenix of the Strand, Inc. (“Appellants”), moved pursuant to Rule 240, SCACR, for an order striking Respondent Royal Garden Resort Regime Homeowners Association, Inc.’s¹ Statement of Facts and all other factual assertions set forth in Respondent HOA’s Initial Brief because they are either not supported by the matters designated by the parties to be included in the Record on Appeal, contain no citation to the matters so designated, or are not appropriate to be considered as part of the Record on Appeal because they were never presented to the lower court. On June 10, 2022, Respondent HOA filed a Brief in Opposition to Appellants’ Motion to Strike, wherein Respondent HOA argued: (1) it did not have a “Statement of Facts” within its

¹ Respondent Royal Garden Resort Regime Homeowners Association, Inc. shall hereinafter be referred to as “Respondent HOA.”

Initial Brief, (2) it supported the salient facts in its Initial Brief with proper citations, and (3) the “Prior Cable Communications Easement” to which Respondent HOA refers within its Initial Brief should be included in the Record on Appeal because it is presented as an “additional sustaining ground” in this matter. (See Resp.’s Brief in Opp. to Apps’ Motion to Strike). Each of Respondent HOA’s arguments is inaccurate and/or otherwise fails for the reasons set forth herein. Therefore, the Court of Appeals should grant Appellants’ Motion to Strike.

ARGUMENT

I. The Factual Assertions in Respondent HOA’s Initial Brief Are Not Properly Supported by Citations to the Record on Appeal, As Required By Rules 208 and 210, SCACR.

Despite Respondent HOA’s argument to the contrary, Respondent HOA has failed to properly cite and/or refer to the Record on Appeal within its Initial Brief. For this reason, the Court of Appeals should order that all statements of fact contained in Respondent HOA’s Initial Brief be stricken and then provide Respondent HOA with a period of time to file an amended Initial Brief supported by the record, as evidenced by proper citations thereto.

Respondent HOA first argues it has not included a “Statement of Facts” within its Initial Brief. (Resp.’s Brief in Opp. to Apps’ Motion to Strike, p. 1). Although Respondent HOA does not have a section labeled “Statement of Facts” within its Initial Brief, it is clear that the section of Respondent HOA’s brief to which Appellants refer in their Motion to Strike as a “Statement of Facts” is Respondent HOA’s “Statement of the Case” section that begins on page one (1) of Respondent HOA’s Initial Brief and concludes at the beginning of page four (4) of Respondent HOA’s Initial Brief. Both throughout Respondent HOA’s Statement of the Case and Argument

sections of its Initial Brief, Respondent HOA makes numerous factual assertions, yet fails to include proper citations supporting such purported factual assertions.²

Appellants still do not believe they should bear the burden of identifying each and every statement of fact proffered by Respondent HOA in its Initial Brief as supported or unsupported by the record, true or untrue, or contested or uncontested, and thereby subject to being stricken. It would be overly burdensome to do so, as such factual assertions comprise a significant portion of Respondent HOA's fifteen (15) page Initial Brief. However, for purposes of this Reply, Appellants shall provide further detail to their argument. For example, there is not a single citation throughout the entirety of Respondent HOA's "Statement of the Case" section of its Initial Brief. (See Resp's Initial Brief, pp. 1-4). Within the first page of its "Statement of the Case" section of its Initial Brief, Respondent HOA sets forth the following purported factual statements, including, without limitation:

- "[T]he new HOA manager noticed discrepancies in the accounting records and ordered a complete forensic audit of the records and accounts of the Association by the accounting firm of Cooper & Jaskot, CPA." (Id. at p. 1).
- "An audit determined there were serious discrepancies in the financial records..." (Id.).
- "During the course of its investigation, the HOA Board determined that Donaldson, Phoenix and Sea Breeze had entered into various sweetheart deals with prior HOA Boards

² In its Brief in Opposition to Appellants' Motion to Strike, Respondent HOA argues, "Appellants claim that Respondent has not identified the documents in the record which support its factual position." (Resp's Brief in Opp. to Apps' Motion to Strike, p. 2). However, Respondent HOA slightly misconstrues Appellants' position within their Motion to Strike. Appellants are not arguing that Respondent HOA has not listed particular documents it seeks to include in the Record on Appeal. What Respondent HOA has failed to do is to include citations after each of its factual assertions within its Initial Brief that demonstrate such factual assertions are supported by a document or material in the Record on Appeal. Further, Respondent's Initial Brief fails to set forth citations after its factual assertions that state the **particular** document or material within the Record on Appeal, and its relevant page number(s), which provide support for each of Respondent HOA's factual assertions. (See Resp's Initial Brief, pp. 1-15) (emphasis added).

or with HOA Board members individually concerning the use and leasing of certain common elements.” (Id.).

These are simply excerpts from one (1) page of Respondent HOA’s Initial Brief. Not a single one of these sentences contains a citation that evidences its support within the Record on Appeal. (See Id.).

Respondent HOA’s trend of failing to properly cite its factual assertions continues throughout the entirety of Respondent HOA’s Initial Brief. (See Resp’s Initial Brief, pp. 1-15). Respondent HOA provided a list of documents it allegedly presented to the circuit judge within its Initial Brief. (Resp’s Brief in Opp. to Apps’ Motion to Strike, pp. 2-3; see also Resp’s Initial Brief, pp. 6-10). However, listing documents is not the same as properly citing factual assertions within an initial brief. (See Resp’s Initial Brief, pp. 6-10). When referring to each of the documents Respondent HOA lists in its Initial Brief, Respondent HOA fails to include a proper citation to any of such documents. (Id.). As noted within Appellants’ Motion to Strike, the **only** purported citations Respondent HOA includes within its Initial Brief are occasional notations of“(R. ____).” (Id. at pp. 3, 4, 7, 8, 9, 10). Such blank “R.” citations are as useless as having no citation at all because they do not identify the document referred to, nor its page number. There is thus no way for Appellants or the Court of Appeals to determine whether such the factual assertions in Respondent HOA’s Initial Brief are supported by the record in this case.

Pursuant to Rule 208(b)(4), SCACR:

[A party’s initial] brief shall contain references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal to support the salient facts alleged...In the initial briefs, **these references should be to the page and line number of the transcript prepared by the court reporter or by the page of the material to be referenced; e.g., Answer p. 7, Motion for Judgment, p. 2, Transcript p. 231.** Intelligible abbreviations may be used. After the Record on Appeal

is prepared, these references shall be revised as provided by Rule 211(b)(1).

(emphasis added). Review of Respondent HOA’s Initial Brief demonstrates Respondent HOA has not complied with Rule 208(b)(4), SCACR. Respondent HOA has failed to include any citations within its Initial Brief, and then occasionally includes blank (R. ____) citations, which are inappropriate for an Initial Brief. See Rule 208(b)(4), SCACR. Rule 208(b)(4), SCACR, sets forth a clear and unambiguous standard, which is that, within Initial Briefs, parties should include citations to the actual documents and materials upon which they rely and which support their factual assertions. (Id.). Then, once the Record on Appeal is prepared, those citations are amended to reflect each document’s position within the Record on Appeal. (Id.).

Rule 210(h), SCACR, provides the Court of Appeals will not consider any fact which does not appear in the Record on Appeal. Rule 208(b)(E), SCACR, similarly provides that parties must support their factual statements by reference to the Record on Appeal. Therefore, review of Respondent HOA’s Initial Brief reveals Respondent HOA has failed to comply with Rules 208 and 210 of the South Carolina Appellate Court Rules. Therefore, the Court of Appeals should order that all statements of fact contained in Respondent HOA’s Initial Brief be stricken and provide Respondent HOA with a period of time to file an amended Initial Brief supported by the record, as evidenced by proper citations thereto.

II. The “Prior Cable Communications Easement” Respondent HOA Seeks to Include In the Record on Appeal Was Not a Part of the Record In the Underlying Case.

In its Brief in Opposition to Appellants’ Motion to Strike, Respondent HOA argues the Court of Appeals should include a “Prior Cable Communications Easement” in the Record on Appeal because Respondent HOA relies on such purported easement as an “additional sustaining

ground” on appeal. (See Resp’s Brief in Opp. to Apps’ Motion to Strike, pp. 3-5). Respondent HOA’s argument is without merit and should be disregarded by the Court of Appeals.

In Appellants’ Motion to Strike, Appellants argue the “Prior Cable Communications Easement” Respondent HOA refers to within its Initial Brief was not a part of the record in this case before the lower court, was never presented to the lower court, and was not considered by the lower court in rendering the decision that is at issue on appeal. (Apps’ Motion to Strike, p. 3). In response, Respondent HOA argues it did present the Prior Cable Communications Easement to the lower court and, under common law set forth in I’On, L.L.C., v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000), Respondent HOA is entitled to include such purported easement within the Record on Appeal. (See Resp’s Brief in Opp. to Apps’ Motion to Strike, pp. 3-5). Respondent HOA’s argument is inaccurate on both counts.

First, no party has ever presented to the Circuit Court and/or entered into the record in this case a copy of a November 18, 2005 easement. To allege otherwise is wholly untrue.³ On July 30, 2021, Respondent HOA filed a “Supplemental Affidavit of Daniel W. Stacy, Jr.,” which included a sentence stating Mr. Stacy was aware of a November 18, 2005 easement regarding cable communications.⁴ (See 07/30/2021 Supp. Aff. of Daniel W. Stacy, Jr. pp. 1-2, para. 3). During the hearing on Respondent HOA’s Motion to Allow Entry, counsel for Respondent HOA referred to such sentence within the aforementioned Supplemental Affidavit of Daniel W. Stacy, Jr. (See Hearing Transcript, p. 14, line 25, p. 15, lines 1-5). **However, at no time whatsoever has a copy of the purported “Prior Cable Communications Easement” ever been provided to the Circuit Court or otherwise been entered in the record in this case.** Therefore, it would be completely

³ In its Brief in Opposition to Appellants’ Motion to Strike, Respondent HOA states the “Prior Cable Communications Easement” “was in the record.” (Resp’s Brief in Opp. to Apps’ Motion to Strike, pp. 3). This is blatantly false.

⁴ A copy of the November 18, 2005 easement **was not** attached as an exhibit to Mr. Stacy’s Supplemental Affidavit. (See 07/30/2021 Supp. Aff. of Daniel W. Stacy, Jr.).

inappropriate to include in the Record on Appeal a document that has never before been entered in the record in this case.

Second, within its Brief in Opposition to Appellants' Motion to Strike, Respondent HOA relies upon the South Carolina Supreme Court's opinion in I'On, L.L.C., v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) in concluding the purported "Prior Cable Communications Easement" should be included as part of the Record on Appeal as an "additional sustaining ground" in this appeal. (See Resp's Brief in Opp. to Apps' Motion to Strike, pp. 3-5). In relying on the decision in I'On, Respondent HOA omits reference to important holdings therein, which render its argument meritless.

In the I'On case, the South Carolina Supreme Court held the prevailing party in an underlying decision at issue on appeal "may raise on appeal any additional reasons the appellant court should affirm the lower court's ruling, regardless of whether those reasons have been both presented to and ruled upon by the lower court." 338 S.C. at 420, 526 S.E. at 723. However, in doing so, the South Carolina Supreme Court in I'On further held, "[t]he basis for respondent's additional sustaining grounds **must appear in the record on appeal**" and "[a]n appellate court **may not rely upon Rule 220(c), SCACR, when the reason does not appear in the record, or when the court believes it would be unwise or unjust to do so in a particular case.**" Id. (emphasis added). The I'On case thus makes clear a respondent may rely on additional sustaining grounds on appeal that have not been directly **ruled upon** by the lower court; however, the holding in I'On **does not** give a respondent free reign to rely upon documents that were never a part of the record to begin with. 338 S.C. at 417-423, 526 S.E. at 721-725 (emphasis added).

Here, the document upon which Respondent HOA seeks to rely and include within the Record on Appeal (e.g., the alleged "Prior Cable Communications Easement") is not in the record

and was not entered into evidence before the Circuit Court. Therefore, under the I'On standard, it is inappropriate for the Court of Appeals to allow such document to be entered into the Record on Appeal and considered as an additional sustaining ground.

Moreover, even if the Court of Appeals were to allow the alleged Prior Cable Communications Easement to be entered into the Record on Appeal, such document does not establish or support the facts Respondent HOA has alleged within their Initial Brief and their Brief in Opposition to Appellants' Motion to Strike. There is no evidence an easement between **Respondent HOA** and Time Warner Cable, signed by Appellant Donaldson in his capacity as **property manager** for Respondent HOA, encompasses property owned by Appellants. At most, such easement may concern property owned by Respondent HOA. There is also no evidence in the record of what work, if any, Time Warner Cable performed pursuant to the purported November 18, 2005 easement. As a result, it is not only improper to allow the November 18, 2005 easement to be included in the Record of Appeal, but such easement is also irrelevant to the issues on appeal herein.

CONCLUSION

Respondent HOA has failed to include proper citations for any of the factual allegations it sets forth within its Initial Brief. Further, Respondent HOA has improperly sought to include a "Prior Cable Communications Easement" in the Record on Appeal, which was not included in the record in the lower court. Respondent HOA is thus in violation of Rules 208 and 210, SCACR. Therefore, for the reasons set forth in Appellants' Motion to Strike and in this Reply, Appellants respectfully request the Court of Appeals strike all statements of fact contained in Respondent's Initial Brief, prohibit the inclusion of the purported "Prior Cable Communications Easement" in the Record on Appeal, and then provide Respondent with a period of time to file an amended Initial

Brief supported by the record, as evidenced by proper citations thereto. Once an amended brief is filed, Appellants will then be able to file an appropriate Reply brief in response, addressing only those facts and issues addressed by the trial court prior to making its ruling. In furtherance of the foregoing, in the event the Court of Appeals grants Appellants' Motion to Strike, Appellants respectfully request they be allowed to file an amended Reply thereto accordingly.

Respectfully submitted,

s/Douglas M. Zayicek

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Royal Garden Resort Regime Homeowners Association, Inc.....Respondent

vs.

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and Phoenix of the Strand, Inc.....Appellants

PROOF OF SERVICE

The undersigned certifies that she is employed by the law firm of Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, P.A., attorneys for the Appellants, Sea Breeze Property Management & Contract Services, Inc.; Calvin Donaldson; and Phoenix of the Strand, Inc., that she has mailed and emailed a copy of the Appellants' Reply to Respondent's Brief in Opposition to Appellants' Motion to Strike, and Proof of Service to counsel listed below this 14th day of June, 2022, with proper postage attached thereto.

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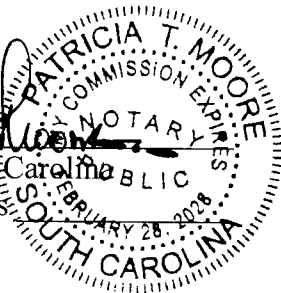
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SWORN TO AND SUBSCRIBED before
me this 14th day of June 2022.

Patricia T. Moore

Notary Public for South Carolina
My Commission Expires FEBRUARY 28, 2028



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Jun 14 2022

SC Court of Appeals

Re: Royal Garden Resort Regime Homeowners Association, Inc. v. Sea Breeze Property Management & Contract Services, Inc.; Calvin Donaldson; and Phoenix of the Strand, Inc.
Case No. 2018-CP-26-06033
Appellate Case No. 2022-000031

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter is a copy of Appellants' Reply to Respondent's Brief in Opposition to Appellants' Motion to Strike, together with Proof of Service thereof. By copy of this letter, and pursuant to the enclosed Proof of Service, I hereby serve the Respondent, through its attorneys of record, with the foregoing documents. At your convenience, please return clocked copies to us of the foregoing documents, via electronic mail. If the Court needs anything additional, please do not hesitate to let us know.

Sincerely,

Holly M. Lusk

Douglas M. Zayicek
Holly M. Lusk

Enclosures

cc: Gene M. Connell, Esq. (via U.S. Mail & Email)
Kirby Shealy, III, Esq. (via U.S. Mail & Email)
Luke M. Allen, Esq. (via U.S. Mail & Email)