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Nov 07 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

Jeffrey M. Tzerman, Master-In-Equity

Appellate Case No.: 2022-001041

Elizabeth A. Farmer..... Respondent,

v.

James Timothy Short.....Appellant.

MOTION TO STRIKE

Pursuant to Rule 240, SCACR, Appellant moves to strike Document #13 from Respondent’s Designation of Matter and any portions of Respondent’s brief referencing the same. The South Carolina Rules of Appellate Procedure provide: “The Record [on Appeal] shall not, however, include matter which was not presented to the lower court or tribunal.” Rule 210(c), SCACR. Document #13 is described as “September 19, 2021, email from Michael Wright to Jeffrey M. Tzerman in reply to Jeffrey M. Tzerman’s September 17, 2021 email advising both parties of his ruling in the case.”¹ The referenced email was not submitted to the lower court, is not on file with the Clerk of Court for Kershaw County, and is therefore extraneous and should not properly be considered by this Honorable Court.

¹ Document #13 is Exhibit A to this Motion.

It is important to understand the context in which this electronic mail message was sent. The aforementioned electronic mail message was sent after all pleadings were filed, discovery conducted, and a day's long hearing held with witness testimony and argument by counsel. The Honorable Jeffrey M. Tzerman was informing the parties of his ruling in this matter and asked Respondent's counsel to prepare an order. This electronic mail message was never admitted into the record before the trial court as an exhibit accompanied by testimony of a witness or argument by counsel. Moreover, the electronic mail message was not part of a brief or motion filed with the Clerk of Court for Kershaw County. In short, this electronic mail message was not presented in the underlying hearing itself nor as a part of the formal motions, briefs, or memoranda submitted to the Court or otherwise included in the record of this case. On the contrary, this electronic mail message is just one of numerous pieces of correspondence between the parties and the court post-trial. Notwithstanding the provisions of Rule 209(b),² SCACR, Appellant submits a decision to allow this electronic mail message would result in extraneous material such as scheduling matters with the Court being included in the Record on Appeal which may only tangentially address the subject matter of the legal arguments on appeal.

As Document #13 was not presented at the hearing in this matter and was never admitted into the record before the circuit court and is not on file with the Clerk of Court for Kershaw County, Appellant submits that it must be removed from Respondent's Designation as it is not proper for the Record on Appeal. See Rule 209(a), SCACR; Rule

² See Rule 209(b), SCACR, "The Designation must clearly identify what the party desires to have include in the Record on Appeal, and the Designation may only propose to include portions of the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal [See Rule 210(c)]. **A party shall not include any matter in his Designation which is not relevant to the appeal.**" (emphasis supplied).

210(c), SCACR; see also Williamsburg Rural Water & Sewer Co. v. Williamsburg Cty. Water & Sewer Auth., 367 S.C. 566, 571, 627 S.E.2d 690, 693 (2006)(“Nothing in the appellate court rules permits a party to unilaterally add after-created evidence to the record.”).

Accordingly, Appellant requests this Court strike Document #13 from Respondent’s Designation of Matter, strike any portions of Respondent’s brief referencing the same, mandate the Respondent serve a new initial brief with the necessary revisions, extend the date which this matter’s Record on Appeal is due, and award Appellant such other and further relief it deems just and equitable.

Respectfully submitted,

s/Michael D. Wright _____

Michael D. Wright
SAVAGE, ROYALL & SHEHEEN, L.L.P.
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November 7, 2022

Other Counsel of Record:

John W. Wells, Esquire
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Post Office Box 10
Lugoff, SC 29078
803-438-4200
jwells@baxleywells.com

Exhibit A

From: [Michael Wright](#)
To: [Jeffrey M. Tzerman](#); [John Wells](#)
Bcc: [Michael D. Wright \(mwright@thesavagefirm.com\)](mailto:mwright@thesavagefirm.com)
Subject: RE: Farmer v. Short
Date: Sunday, September 19, 2021 2:39:00 PM

Judge Tzerman:

Thank you for the email. If I might ask as a point of clarification, I do not see a value identified below to be included for ouster. Your Honor mentioned in a post-hearing discussion that damages for this cause of action would also likely be included in the court's decision.

I would respectfully submit that the uncontroverted testimony was that Mr. Short was turned out and kept excluded from any possession of the real property since February 2020. Our courts have held that when one individual has ousted another individual from jointly owned property, he is liable as a trespasser for the rental value of the property. *See Jones v. Massey*, 14 S.C. 292, 307–08 (1880). Additionally, the only testimony as to the monthly rental value of the property was from Mr. Short and he concluded that a fair monthly rental amount for a 55 acre tract in a good school district with good sportsman activities and the ability to board horses would be \$1500 a month for 19 months. Last, I would respectfully submit that the ouster has occurred since February 2020 and continued to occur for the duration of this litigation; there is no exception provided in our jurisprudence that ouster ceases when a partition suit is filed.

Thank you, in advance, for your consideration of this additional damage as plead in this matter.

Sincerely,
Michael W.

From: Jeffrey M. Tzerman <jeffreymtzerman@bellsouth.net>
Sent: Friday, September 17, 2021 12:00 PM
To: John Wells <jwells@Baxleywells.com>; Michael Wright <MWright@thesavagefirm.com>
Subject: Farmer v. Short

John and Michael;

As you know I have decided the property should be divided in kind. I am disappointed your clients were unable to agree on division.

It would be my decision to divide the property along the natural division of the creek into two parcels as shown on the Lackey field Survey with Ms. Farmer having the improved side. This will require some math to equalize this division.

For purposes of division, please use Ard's valuations as to agricultural or open land, uplands and bottomlands to arrive at the value of each Parcel. The value of Mrs. Farmer's share must be increased by the value of the improvements already made and the increase it would Have on her share. which I believe is \$85,000.00. which I calculate as \$55,000 in actual expenditures

Exhibit A

and \$30,000 in appreciation.

As for housekeeping, any additional surveying shall be equally divided between the parties. I would like Robbie Lackey to do any added Surveying as he has all the field work for both parcels already,. Also the cost of the court reporter should be equally divided.

John please draw a proposed order and send it by Michael for his review.

Jeff

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v.

James Timothy Short.....Appellant.

PROOF OF SERVICE

The undersigned certifies that, on November 7, 2022, a copy of Appellant's Motion to Strike has been served upon counsel of record for the Respondent via electronic mail using the email addresses listed in the Attorney Information System as set forth below:

John W. Wells, Esquire
Baxley, Pratt & Wells, P.A.
Post Office Box 10
Lugoff, SC 29078
803-438-4200
jwells@baxleywells.com

[Signature Page to Follow.]

Respectfully submitted,

s/Michael D. Wright

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November 7, 2022

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MOULTRIE B. BURNS, JR. - OF COUNSEL

*CERTIFIED MEDIATOR & ARBITRATOR

November 7, 2022

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SC Court of Appeals

VIA E-Filing to: ctapp@filings@sccourts.org

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

RE: Elizabeth A. Farmer v. James Timothy Short
Appellate Case No.: 2022-001041

Dear Mrs. Kitchings:

I hope this correspondence finds you doing well.

Pursuant to Rule 240, SCACR, please find Appellant's Motion to Strike content proposed to be included in the Record on Appeal by Respondent. I have enclosed my firm's check in the amount of \$50.00 for the filing fee for the aforementioned motion. As noted in Appellant's Motion to Strike, we are requesting an extension of the date for which Appellant is to submit the Record on Appeal until the Court rules on this matter.

By copy of this letter, we are serving all counsel of record of the same via electronic mail. If you have any questions, please do not hesitate to contact me.

Very truly,



Michael D. Wright

Enclosures as Stated

cc: John Wells, Esquire (via electronic mail)