

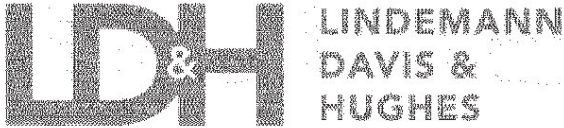
FAX COVER SHEET

TO	The Honorable Daniel E. Shearouse
COMPANY	Supreme Court of South Carolina
FAX NUMBER	18037341499
FROM	Jennifer Baker
DATE	2020-05-22 19:44:23 GMT
RE	Case No. 2020-000667 CIMC v Martin and Frey

COVER MESSAGE

Please find attached a filing sent by facsimile only.

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May 22, 2020

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Via Facsimile Only 803-734-1499

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court

RE: The Callawassie Island Members Club, Inc. v. Gregory L. Martin
The Callawassie Island Members Club, Inc. v. Michael J. Frey
Appellate Case Number: 2020-000667
Civil Action Number: 2012-CP-07-3218
Our File Number: 79.20032 and 79.20033

Dear Mr. Shearouse:

Please find enclosed for filing the **Motion to Strike Petition for Writ of Certiorari and Supporting Memorandum** in the above referenced matter. The \$50.00 filing fee for this motion will be sent to the Court under separate cover. By copy of this letter, I am serving a copy on all counsel of record by email only pursuant to Section of (g)(3) the Court's Order RE: Operation of the Appellate Courts During the Coronavirus Emergency Appellate Case No. 2020-000447.

If you have any questions, please advise. Thank you for your assistance in this matter.

Sincerely,

LINDEMANN, DAVIS & HUGHES, P.A.

A handwritten signature in black ink, appearing to read 'Andrew F. Lindemann', is written over a faint, light-colored signature line.

Andrew F. Lindemann

AFL/jmb
Enclosure

The Honorable Daniel E. Shearouse
May 22, 2020
Page Two

cc: (w/ Enclosure)

Via Email Only

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
J. Ernest Kinard, Jr., Circuit Court Judge

Appellate Case No. 2020-000667
Case No. 2012-CP-07-3218

The Callawassie Island Members Club, Inc., Respondent,
v.
Gregory L. Martin and Rebecca L. Martin, Defendants,
and
The Callawassie Island Members Club, Inc., Respondent,
v.
Michael J. Frey and Grace I. Frey, Defendants,
and
The Callawassie Island Members Club, Inc., Respondent,
v.
Mark K. Quinn and Sherry B. Quinn, Defendants,
Of Whom, Gregory L. Martin and Michael J. Frey are Petitioners.

**MOTION TO STRIKE PETITION FOR WRIT OF CERTIORARI
AND SUPPORTING MEMORANDUM**

The Petitioners Gregory L. Martin and Michael J. Frey have filed a Petition for Writ of Certiorari. The Petitioners attached to that Petition, as Exhibit 1, a newspaper article from the *Hilton Head Island Packet* titled “The ‘Hotel California’ of the Lowcountry.” In addition, the Petitioners cite to four other newspaper articles from the *Hilton Head Island Packet*. See, Petition for Writ of Certiorari, p. 4. The Petitioners also refer in the Petition to “the Club’s most recent invoice to Greg Martin, dated February 29, 2020.” See, Petition for Writ of Certiorari, p. 6. The Respondent Callawassie Island Members Club, Inc. (“CIMC”) moves for an Order striking the Petition for Writ of Certiorari for its references to and reliance on “evidence” and legal theories that are outside of the appellate record and were not presented to the Circuit Court prior to the entry of the orders on appeal.¹

Rule 210(c), SCACR, using the mandatory term “shall,” provides that “[t]he Record shall not, however, include matter which was not presented to the lower court or tribunal.” This same premise is affirmed in Rule 209(b), SCACR, which provides that “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)].” There is no provision in the South Carolina Appellate Court Rules allowing a party to file “exhibits” or attachments to an appellate brief or a petition for writ of certiorari. The Appellate Court Rules and this Court’s precedent clearly require that an appeal, or in this case a petition for writ of certiorari, be determined strictly based on the record from the court below. See, *Whisonant v. Belue*, 7 S.C. 483, 121 S.E.

¹ The Respondent CIMC is compelled to file this motion rather than raise these objections initially in its return to the Petition for Writ of Certiorari because in order to properly file a return CIMC needs a proper understanding of the record on which the Petition will be judged. Furthermore, if the Court permits the Petitioners to rely on “evidence” outside of the appellate record, CIMC will need to be able to supplement the record with rebuttal evidence outside of the appellate record. However, CIMC will not do so without proper authorization from the Court.

360, 362 (1924) (“certiorari is heard on the record below”). Certainly, even if there may be a valid basis for supplementing the record below,² that should not be achieved by the unilateral act of attaching an “exhibit” to a brief or petition. Rather, the Petitioners should do so by filing for leave of court, a process that comports with due process and allows for opposing parties to be heard before the “new evidence” is accepted.

The Petitioners have not sought leave of court to supplement the Circuit Court record. They have simply attached a newspaper article to their Petition for Writ of Certiorari as an “exhibit” and referenced other articles in the Petition itself. Additionally, the Petitioners cite to a CIMC invoice dated February 29, 2020, which was never submitted to the lower court. The orders granting summary judgment in these cases were filed June 27, 2014. (Martin R. 11; Frey R. 4). Clearly, the newspaper articles, which are dated in 2015, 2016, 2018, and 2020, all post-date those entries of judgment in the lower court, and thus were not available to the Circuit Court. The same is true for the CIMC invoice which is dated February 29, 2020.

Additionally, the Petitioners have not even presented or cited to admissible evidence. It is well settled that newspaper articles are not admissible evidence. In *Trustees of Erskine College v. Central Mut. Ins. Co.*, 270 S.C. 118, 241 S.E.2d 160 (1978), this Court held that newspaper articles “are unsworn statements and contain hearsay evidence” and thus “are not to be considered in a motion for summary judgment.” 241 S.E.2d at 162-163. *See also*, *Gantt v. Whitaker*, 57 Fed. Appx. 141, 150 (4th Cir. 2003) (“newspaper articles are inadmissible hearsay to the extent they are introduced to prove the factual matters asserted therein”); *Greene v. Scott*, 637 Fed. Appx. 749, 752 (4th Cir. 2016) (“[n]ewspaper articles are rank hearsay”; *Carolina*

² Post-judgment supplementation of the record may be appropriate where an issue on appeal has been rendered moot by subsequent events or where there may be a challenge to a party’s continued standing to bring suit, both of which impact Court’s continued jurisdiction as well as matters of justiciability.

Buggy Tours, LLC v. Gay, 2008 WL 2690237, *2 (D.S.C. 2008) (“a newspaper article is hearsay ... [and] is not evidence”).

The Petitioners have taken this unilateral and unprecedented action deliberately and in bad faith. They are attempting to influence this Court with inadmissible hearsay and commentary contained in the newspaper articles as well as the CIMC invoice. They seek to re-shape their legal theories from those presented in the Circuit Court which framed the summary judgments granted in June 2014.³ This tactic stems from the companion case of *Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 821 S.E.2d 667 (2018), where the dissent *sua sponte* raised the issue of “perpetual liability” causing a “harsh result,” a theory not asserted in the lower courts. In *Dennis*, this Court explained that “the summary judgment we affirm is for less than four years of unpaid dues. We are *not* deciding whether the governing documents could support perpetual liability under these or any other facts.” 821 S.E.2d at 672. (Emphasis in original). This Court, in fact, recognized that “[t]he Dennises have not asked the circuit court, the court of appeals, nor this Court to decide the case based on any alleged harshness of having to pay dues.” *Id.* The same is true for the Petitioners Martin and Frey in the cases at bar. Nonetheless, the Petitioners are now pressing unpled and unpreserved theories of unconscionability and perpetual liability. They seek to unilaterally supplement the record with inadmissible hearsay and other documents to transform the cases from what was actually litigated and decided in the Circuit Court.

Given the Petitioners’ deliberate, blatant, and unprecedented attempt to assert matters beyond the appellate record, the Respondent CIMC respectfully requests that the Court strike the Petition for Writ of Certiorari filed by Martin and Frey. In the alternative, should the Court deny

³ See, *Gurganious v. City of Beaufort*, 317 S.C. 481, 454 S.E.2d 912, 916 (Ct. App. 1995) (a litigant is prohibited from “chang[ing] his theory on appeal”).

this motion and allow the Petitioners to unilaterally supplement the record with the post-judgment materials, CIMC would respectfully request that the Court allow it the opportunity to similarly present matters outside the Circuit Court record to defend its position.

Respectfully submitted,

LINDEMANN, DAVIS & HUGHES P.A.

BY: s/ Andrew F. Lindemann

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Counsel for Respondent
The Callawassie Island Members Club, Inc.

May 22, 2020

CERTIFICATE OF SERVICE

Pursuant to Section (c)(13) of the Supreme Court's Order Re: Operation of the Trial Courts During the Coronavirus Emergency (As Amended April 22, 2020), the undersigned employee of Lindemann, Davis & Hughes, P.A., counsel for the Respondent The Callawassie Island Members Club, Inc., does hereby certify that service of the **Motion to Strike Petition for Writ of Certiorari and Supporting Memorandum** was made upon all counsel of record by email only this the 22nd day of May 2020:

Via Email Only

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s/ Andrew F. Lindemann

From: Jennifer Baker
Sent: Friday, May 22, 2020 3:26 PM
To: mdc@barnwell-whaley.com; jfletcher@barnwell-whaley.com; bbanias@barnwell-whaley.com; sphughes@hghpa.com; lan.Ford@FordWallace.com; neil.thomson@fordwallace.com; Sandie@FordWallace.com
Cc: Andrew Lindemann
Subject: CIMC v. Martin and Frey
Attachments: LTR-05-22-20 (filing-SCSC)(with enclosure) (00177053xECB18).pdf

Counsel:

Pursuant to Section (c)(13) of the Supreme Court's Order Re: Operation of the Trial Courts During the Coronavirus Emergency (As Amended April 22, 2020), please find attached and served upon you by email only the Motion to Strike Petition for Writ of Certiorari and Supporting Memorandum in these matters.

Thank you,

Jennifer



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