



THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas  
Edgar W. Dickson, Circuit Judge

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Appellate Case No. 2022-001070  
Court of Common Pleas Case No. 2020-CP-18-02003

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ROSEN HAGOOD, LLC,  
Respondent/Appellant,  
v.  
ALBERT T. HENSON, JR.,  
Appellant/Respondent.

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**RESPONDENT/APPELLANT’S MOTION TO STRIKE  
APPELLANT/RESPONDENTS’S INITIAL BRIEF OF RESPONDENT AND  
RESPONDENT’S DESIGNATION OF MATTER**

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Respondent/Appellant Rosen Hagood, LLC (hereinafter “Rosen Hagood”) hereby moves the Court for an Order striking in whole and/or in part Appellant/Respondent Albert T. Henson, Jr.’s (hereinafter “Henson”) Initial Brief of Respondent and Designation of Matter to be Included in Record on Appeal that were filed on January 3, 2023. In support of the motion, Rosen Hagood shows as follows:

- 1. HENSON DID NOT TIMELY FILE OR SERVE HIS INITIAL BRIEF OF RESPONDENT OR DESIGNATION OF MATTER PURSUANT TO SCACR 208(A)(2) AND 209(A):**

Rosen Hagood filed and served its Initial Brief of Appellant in support of its cross-appeal in this matter on November 23, 2022. Pursuant to Rules 208(a)(2) and 209(a), SCACR, Henson’s Initial Brief of Respondent and Designation of Matter to be Included in Record on Appeal

became due thirty-five days later on December 28, 2022, given the intervening holidays and weekend. See Rules 208(a)(2) and 209(a), SCACR.

Henson did not timely file or serve an Initial Brief of Respondent or Designation of Matter by December 28. He also did not seek or obtain an extension of time to file and serve those documents.<sup>1</sup> Instead, on January 3, 2023, after the deadline had lapsed and after Henson had retained new legal counsel to represent him in the appeal, his new counsel then filed an untimely Initial Brief of Brief of Respondent and an untimely Designation of Matter on Henson's behalf. Henson's counsel did not seek or obtain leave of court to file these tardy documents.

Henson is not excused from compliance with the SCACR simply because he initially appeared *pro se*. See State v. Burton, 356 S.C. 259, 265, n.5, 589 S.E.2d 6, 9 n.5 (2003) (“A *pro se* litigant who knowingly elects to represent himself assumes full responsibility for complying with substantive and procedural requirements of the law.”); State v. Hollman, 232 S.C. 489, 498, 102 S.E.2d 873, 877 (1958) (“[E]stablished rules of procedure are not to be discarded, either in the trial court or on appeal, merely because the defendant has been his own lawyer.”), overruled on other grounds by Stevenson v. State, 335 S.C. 193, 516 S.E.2d 434 (1999).

Rosen Hagood respectfully submits that Henson's Initial Brief of Respondent and Designation of Matter should be stricken and not considered given Henson's unexcused failure to comply with the mandates of Rules 208(a)(2) and 209(a), SCACR. The Court should determine this appeal without considering the arguments that Henson makes in his untimely

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<sup>1</sup> On November 22, 2022, before Rosen Hagood had even filed or served its Initial Brief of Appellant in support of its cross-appeal, Henson did apply for and was eventually granted an extension of time to file his Initial Brief of Appellant involving his appeal of the Circuit Court's Order. However, once Rosen Hagood filed and served its Initial Brief of Appellant in support of its cross-appeal, Henson never requested or obtained an extension of time to file his Initial Brief of Respondent involving this cross-appeal.

Brief of Respondent. His untimely designation of matter for inclusion in the record on appeal should be stricken and disregarded.

**2. SPECIFIC ITEMS DESIGNATED BY HENSON WERE NOT PRESENTED TO THE CIRCUIT COURT AND ARE NOT PROPERLY INCLUDED IN THE RECORD ON APPEAL PURSUANT TO SCACR 210(C):**

Even setting aside the fact that Henson did not timely submit his Designation of Matter on January 3, 2023, his Designation of Matter designates multiple items (Items 2, 3, 4, 9, and 10) that were never presented to the Circuit Court in this case and, as such, they are not properly included in the Record on Appeal. These items should be stricken from the Record on Appeal for the reason they were not presented to the Circuit Court and are irrelevant to this appeal.

Rule 210(c) of the SCACR states in pertinent part that “[t]he Record on Appeal shall include all matter designated to be included by any party under Rule 209 and shall comply with the requirements of Rule 267” and that “[t]he Record shall not, however, include matter *which was not presented to the lower court or tribunal.*” Rule 210(c), SCACR (emphasis added). Material must have been “presented to” the lower court to be included in the Record on Appeal. It is improper to include material in the Record on Appeal that was not submitted to the lower court. State v. White, 372 S.C. 364, 387, 642 S.E.2d 607, 619 (Ct. App. 2007) (holding witness statement was not presented to lower court and could not be included in Record on Appeal).

Items 2, 3, 4, 9, and 10 of Henson’s Designation of Matter involve materials that were never presented to the Circuit Court in this matter. Instead, those materials involve pleadings and orders that were filed in separate litigation in a separate court (the Dorchester County Probate Court), which materials are not part of the Circuit Court’s record in this litigation. Because these pleadings and orders were never submitted to the Circuit Court in this matter, they cannot be included in the Record on Appeal pursuant to Rule 210(c), SCACR.

Henson may claim that Items 2, 3, 4, 9, and 10 can be included in the Record on Appeal in this case because they are matters of public record or because Rule 201, SCRE, provides that judicial notice of adjudicative facts “may be taken at any stage of the proceeding.” However, this rule does not allow Henson to augment the appellate record with material that he never presented to the Circuit Judge and which the Circuit Judge never considered or even had an opportunity to consider when ruling on Rosen Hagood’s summary judgment motion. It does not allow Henson to circumvent the centuries old rule that an appellate court “is bound by the record made in the trial court.” Irby v. S. Ry. Co., 92 S.C. 490, 75 S.E. 793 (1912).

It is settled law that “if an issue was not raised to and ruled upon by the trial court, it will not be considered for the first time on appeal.” State v. Porter, 389 S.C. 27, 37-38, 698 S.E.2d 237, 242 (Ct. App. 2010). “Imposing this preservation requirement is meant to enable the trial court to rule properly after it has considered all the relevant facts, law, and arguments.” Id.

When a court takes judicial notice of a fact it “admit[s] into evidence and consider[s], without proof of the facts, matters of common and general knowledge.” Moss v. Aetna Life Ins. Co., 267 S.C. 370, 377, 228 S.E.2d 108, 112 (1976) (citation omitted). Appellate courts generally do not take judicial notice of evidence not presented to the trial court because when reviewing the correctness of a trial court’s judgment, an appellate court will consider only matters which were part of the record at the time the judgment was entered.

As this Court cautioned in Masters v. Rodgers Dev. Grp., 283 S.C. 251, 321 S.E.2d 194 (Ct. App. 1984):

Appellate courts are generally reluctant to notice adjudicative facts even when those facts may be absolutely reliable. Notice of “facts” for the first time on appeal may deny the adverse party the opportunity to contest the matters noticed; it may also violate the general principle that appellate review should be limited to the record.

Finally, appellate courts, limited to the “cold” record, cannot be as sensitive to the appropriateness of judicial notice as the trial judge. For the foregoing reasons we hold that original judicial notice of adjudicative facts at the appellate level should be limited to matters which are indisputable.

Id. at 256, 321 S.E.2d at 197 (citations omitted).

“A court can take judicial notice of *its own records, files and proceedings* for all proper purposes including facts established in its records.” Freeman v. McBee, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct. App. 1984) (emphasis added). However, “[t]he general rule is that a court will not travel outside the record of the case before it in order *to take notice of proceedings in another case*, even between the same parties and in the same court, unless such proceedings are put in evidence, since the decision of the cause must depend upon the evidence introduced.” 30 S.C. JUR. EVIDENCE § 13 (2022) (citing Wilson v. Volkswagen of Am., Inc., 561 F.2d 494, 510 n.38 (4th Cir. 1977)) (emphasis added); see also In re Asbestosis Cases 78-CP-06-105, 274 S.C. 421, 432, 266 S.E.2d 773, 778 (1980) (In appeal from Circuit Court order, our state supreme court held it could not take judicial notice of an order entered in another Circuit Court case when that order had not been placed in the record in the case appealed from, either by way of the trial judge, stipulation, or otherwise.), abrogated on other grounds by Whaley v. CSX Transp., Inc., 362 S.C. 456, 609 S.E.2d 286 (2005).

Henson is not asking this Court to take judicial notice of the records in this same case. To the contrary, he is asking this Court to take judicial notice of records from another court involving different litigation. Henson’s request for this Court to take judicial notice on appeal should be denied because he never asked the Circuit Judge to take judicial notice of any of the pleadings, orders, or other documents that were of record in the separate litigation in the Probate Court. Those materials were never presented to the Circuit Judge when he ruled on the summary judgment motion. The Circuit Judge never took judicial notice of any of those pleadings, orders,

or documents and they were never entered into evidence or made part of the Circuit Court record in this case.

In Croft as Tr. of James A. Croft Tr. v. Town of Summerville, 428 S.C. 576, 597, 837 S.E.2d 219, 230 (Ct. App. 2019), vacated other grounds, 433 S.C. 473, 860 S.E.2d 352 (2021), the appellants had challenged the validity of an agreement in a separate civil action in the Circuit Court and had designated for inclusion in the record on appeal several items that were part of the record in that separate action. However, those items had not been presented to the lower court in the case that was on appeal. Accordingly, based on Rule 210(c), SCACR, this Court granted a motion striking those items from the record on appeal. Id. at 597 n.5, 837 S.E.2d at 230 n.5.

In L. Firm of Paul L. Erickson, P.A. v. Boykin, 375 S.C. 204, 214, 651 S.E.2d 606, 611 (Ct. App. 2007), rev'd other grounds, 383 S.C. 497, 681 S.E.2d 575 (2009), the appellant argued on appeal that the Circuit Court had erred in failing to take judicial notice of numerous documents and facts from a prior action in North Carolina and requested that this Court take judicial notice of the same on appeal. 375 S.C. at 213, 651 S.E.2d at 611. However, this Court rejected the appellant's argument and declined to take judicial notice of the materials. The Court observed that the appellant "did not submit these documents or make his request for the circuit court to take judicial notice until after the circuit court had granted the Boykins' motion for relief." Id. at 214, 651 S.E.2d at 611. The Court held judicial notice was not appropriate due to "the time at which the documents were submitted and the request made ...." Id.; see also Hemingway v. Small, 284 S.C. 42, 46, 324 S.E.2d 335, 338 (Ct. App. 1984) (declining to take appellate judicial notice of value of land); Sanders v. Salley, 283 S.C. 458, 460, 322 S.E.2d 829, 830 (Ct. App. 1984) (declining to take appellate judicial notice of recorded mortgage).

The same situation exists in this case. Henson never presented Items 2, 3, 4, 9, and 10 to the Circuit Court in this case. The Circuit Judge never took judicial notice of any of those pleadings, orders, or documents and they were never made part of the Circuit Court record in this case. It would be improper to take judicial notice of these materials at the appellate stage. Moreover, to take judicial notice of additional records at this stage of the litigation would deprive Rosen Hagood of any opportunity to respond, either by offering additional evidence or by tailoring its arguments to address these new facts. Therefore, this Court should rely solely upon the evidence that was presented to and considered by the Circuit Court.

Further, Henson's request for the Court to take judicial notice of pleadings, orders, or other documents from the separate Probate Court litigation should also be denied because Henson's Initial Brief fails to demonstrate that these materials are relevant to the issues in this appeal. Rule 209(b), SCACR, mandates that "[a] party shall not include any matter in his Designation which is not relevant to the appeal." Henson's counsel must also affirmatively certify "that the Designation contains no matter which is irrelevant to the appeal." Rule 209(c), SCACR.

Items 2, 3, and 4 of Henson's Designation of Matter involve copies of Orders of the Probate Judge that were entered in the separate litigation in the Dorchester County Probate Court in March, April, and November of 2020. These Orders occurred many months *after* Rosen Hagood had been relieved as Henson's counsel in that case by Order entered November 25, 2019. See Blanchard Aff. ¶4 & Exh. C. Henson's Initial Brief utterly fails to explain how or why these Orders have any relevance to the issues in this current appeal, which involves Rosen Hagood's action against Henson to enforce the representation agreement and to recover the attorneys' fees and costs the firm had earned prior to its withdrawal as Henson's counsel. In fact,

Henson's Initial Brief does not even discuss or allude to these Probate Court Orders at all. Items 2, 3, and 4 are not relevant to this appeal.

Likewise, Items 9 and 10 of Henson's Designation of Matter involve two pleadings that had been filed in 2015 in the separate litigation in the Probate Court *before* Henson had even retained Rosen Hagood to represent him in that matter. Henson did not engage Rosen Hagood until May 25, 2016. See Blanchard Aff. ¶2 & Exh. A. Items 9 and 10 are dated April 29, 2015 and June 8, 2015, respectively. Henson's Initial Brief nowhere explains how pleadings that Rosen Hagood was not involved in preparing and which predated its involvement in the litigation could be relevant to the issues in this current appeal. Again, Henson's Initial Brief does not even discuss these pleadings at all. Items 9 and 10 are not relevant to this appeal.

Rosen Hagood's counsel has consulted with Henson's counsel prior to filing this motion, but the matter could not be resolved by agreement.

Based on the foregoing, Rosen Hagood respectfully requests an Order of the Court striking Henson's Initial Brief of Respondent and Designation of Matter to be Included in Record on Appeal that were filed on January 3, 2023. Alternatively, should the Court not strike these documents in their entirety, then Rosen Hagood respectfully asks the Court to strike Items 2, 3, 4, 9, and 10 of Henson's Designation of Matter for the reasons discussed above and for such other relief as the Court should deem just and proper. Should the Court not strike Items 2, 3, 4, 9, and 10, then Rosen Hagood requests the opportunity to amend or supplement its Designation of Matter to designate additional or other pleadings, orders, or materials from the other litigation referenced in Henson's Designation of Matter.

ROSEN HAGOOD, LLC

By: /s/ F. Truett Nettles, II

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January 12, 2023.