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Jan 27 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

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

ROSEN HAGOOD, LLC,

Respondent/Appellant,

v.

ALBERT T. HENSON, JR.,

Appellant/Respondent.

RESPONDENT/APPELLANT'S RETURN TO MOTION TO FILE BRIEF OUT OF TIME AND REPLY IN SUPPORT OF MOTION TO STRIKE

Respondent/Appellant Rosen Hagood, LLC (hereinafter "Rosen Hagood") hereby submits this (a) return to Appellant/Respondent Albert T. Henson, Jr.'s (hereinafter "Henson") Motion to File Brief Out of Time and (b) reply in Support of Rosen Hagood's Motion to Strike Henson's Initial Brief of Respondent and Designation of Matter to be Included in Record on Appeal. Rosen Hagood respectfully submits:

1. **HENSON'S MOTION FOR LEAVE TO FILE AN UNTIMELY BRIEF AND DESIGNATION OF MATTER SHOULD BE DENIED:**

Henson concedes that he failed to timely serve and file his Initial Brief of Respondent and Designation of Matter as required by Rules 208(a)(2) and 209(a), SCACR. His motion nevertheless argues his late filings should be accepted because his appellate counsel "mixed up" and miscalculated the due date. While he "acknowledges the responsive brief was late," he

claims it "was the product of confusion on the part of [his appellate counsel] upon retention on the eve of the relevant deadlines." See Motion pp. 2-3.

Henson filed his appeal on August 3, 2022. Rosen Hagood filed its cross-appeal the next day, August 4. These appeals have been pending for five months. Henson had the opportunity for over 4½ months to retain legal counsel to represent him in this appeal if he so desired. His motion indicates he did not decide to hire appellate counsel until December 27, 2022, which was the very day before his Initial Brief of Respondent and Designation of Matter were due to be filed. Although Rosen Hagood filed and served its Initial Brief of Appellant and Designation of Matter on November 23, Henson waited until the day before his response was due to retain appellate counsel. His dilatory conduct in retaining counsel at the last minute should not be rewarded.

"[T]he South Carolina Appellate Court Rules are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals in this State." Henning v. Kaye, 307 S.C. 436, 437, 415 S.E.2d 794, 794 (1992). Even if the real reason that Henson failed to timely file his Initial Brief of Appellant and Designation of Matter is the fault of his counsel, and not his own fault, our courts have consistently held that the negligence of a party's attorney is an insufficient excuse for a party's failure to timely comply with the Court's rules. Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 609, 681 S.E.2d 885, 889 (2009); Roberts v. Peterson, 292 S.C. 149, 151, 355 S.E.2d 280, 281 (Ct. App. 1987); Williams v. Vanvolkenburg, 312 S.C. 373, 375, 440 S.E.2d 408, 409 (Ct. App. 1994). The law is clear that an attorney's misconduct is imputable to the client. Id.

Rosen Hagood respectfully requests that Henson's Motion to File Brief Out of Time be denied.

2. HENSON'S DESIGNATION OF MATERIALS THAT WERE NOT PRESENTED TO THE CIRCUIT COURT SHOULD BE STRICKEN:

As discussed in Rosen Hagood's Motion to Strike, Henson's 8 untimely Designation of Matter designates multiple items (Items 2, 3, 4, 9, and 10) that were never presented to the Circuit Court in this case, thus they cannot be included in the Record on Appeal.

Henson does not assert these materials were ever raised to the Circuit Judge. In fact, he admits they were not. He relies upon Rule 201, SCRE, which is an evidentiary rule involving judicial notice of adjudicative facts, and claims that "[b]y taking judicial notice of these materials [at this late stage], the Court will be able to understand the full context of the issues *that were not disclosed to the circuit court when granting summary judgment to Respondent-Appellant*." See Motion p.4 (emphasis added).

Henson cites no law whatsoever supporting his claim that Rule 201, SCRE, overrides or supplants Rule 210(c) of the SCACR, which states that "[t]he Record [on Appeal] shall not … include matter *which was not presented to the lower court* or tribunal." Rule 210(c), SCACR (emphasis added). It is improper to include material in the Record on Appeal that was not "presented to" the lower court. State v. White, 372 S.C. 364, 387, 642 S.E.2d 607, 619 (Ct. App. 2007). Rule 201 of the SCRE does not vitiate the principle that appellate review should be limited to the record presented to the trial court. Masters v. Rodgers Dev. Grp., 283 S.C. 251, 256, 321 S.E.2d 194, 197 (Ct. App. 1984). It has also long been the law in this state 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).

Henson is improperly attempting to augment the record after the fact with materials he never presented to the Circuit Judge or asked the Circuit Judge to consider. The Circuit Judge did not consider those materials. It would be improper under Rule 210(c) of the SCACR and

prejudicial to Rosen Hagood at this late stage to permit Henson to include materials in the appellate record that were never part of the trial court record.

Items 2, 3, 4, 9, and 10 of Henson's Designation of Matter should be stricken. See Croft as Tr. of James A. Croft Tr. v. Town of Summerville, 428 S.C. 576, 597 n.5, 837 S.E.2d 219, 230 n.5 (Ct. App. 2019), vacated other grounds, 433 S.C. 473, 860 S.E.2d 352 (2021) (granting motion to strike from record on appeal several items that had not been presented to the lower court); 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) (declining to take judicial notice of documents and facts from a prior action in another state when 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.").

Rosen Hagood respectfully requests that the Court grant its Motion to Strike.

Respectfully submitted,

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PROOF OF SERVICE

I certify that on January 27, 2023, I have served a copy of the Respondent/Appellant's Return to Motion to File Brief Out of Time and Reply in Support of Motion to Strike on the following individuals by electronic mail using their email addresses listed in the Attorney Information System, addressed as follows:

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