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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 MOTION TO STRIKE PORTION OF
APPELLANT/RESPONDENT'S DESIGNATION OF MATTER**

Respondent/Appellant Rosen Hagood, LLC (hereinafter "Rosen Hagood") hereby moves the Court for an Order striking a portion of Appellant/Respondent Albert T. Henson, Jr.'s (hereinafter "Henson") Designation of Matter to be Included in Record on Appeal ("DOM") that was filed on January 27, 2023 and further ordering Henson to file an amended or corrected Initial Appellant Brief of Appellant/Respondent which deletes his citations to and discussion of these items that cannot properly be included in the Record on Appeal. In support of the motion, Rosen Hagood shows as follows:

Henson's DOM improperly designates the *entire* deposition transcript of his discovery deposition taken on March 23, 2022, to be included in the Record on Appeal. This deposition transcript is Item 5 on Henson's DOM. Neither Henson nor Rosen Hagood filed the entire deposition transcript with the Circuit Court. Neither Henson nor Rosen Hagood presented the

entire deposition transcript to the Circuit Court for its consideration. Henson is improperly attempting to include documents in the Record on Appeal that were not presented to the Circuit Court. Henson's Initial Brief of Appellant also makes citations to and discusses these pages of Henson's deposition testimony that are not properly included in the Record on Appeal.

On April 7, 2022, Rosen Hagood filed a Motion for Summary Judgment and attached Exhibits 1 through 4 to the Motion. See Motion for Summ. Judg. & Exhs. 1-4. Exhibit 2 to the Motion comprises excerpts from Henson's deposition taken on March 23, 2022. These excerpts include pages 1, 2, 13, 14, 15, 16, 22, 23, 39, 40, 61, and 62 of Henson's deposition. On May 26, 2022, F. Truett Nettles, II's legal assistant (Debbie Hill) also emailed a copy of Rosen Hagood's Memorandum of Law in Support of Motion for Summary Judgment to the presiding Circuit Judge in advance of the motion hearing. See Hill email to Judge Dickson 5.26.22 with attachment. The attachments to this memorandum include pages 16 and 17 from Henson's deposition transcript.

On May 31, 2022, Henson filed his Opposition to Rosen Hagood's Motion for Summary Judgment. See Henson Opposition. Exhibit A to this filing includes a few excerpts from Henson's deposition transcript. Specifically, Henson filed pages 17, 18, 19, and 20 from his deposition transcript as part of his opposition to Rosen Hagood's motion.

Altogether, Henson and Rosen Hagood filed or submitted pages 1, 2, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 39, 40, 61, and 62 of Henson's deposition to the Circuit Court as part of its determination of Rosen Hagood's Motion for Summary Judgment. The parties did not file or submit any other pages from Henson's deposition transcript to the Circuit Court.

Despite the forgoing, Henson's DOM seeks to include his entire deposition transcript as part of the Record on Appeal. See DOM filed 1.27.23 Item 5. Henson's Initial Appellant Brief of

Appellant/Respondent also contains citations to numerous pages from Henson’s deposition that were never filed with or submitted to the Circuit Court for consideration and Henson’s Initial Appellant Brief makes arguments based on that deposition testimony. Specifically, page 9 of Henson’s Initial Appellant Brief cites to pages 24, 44, 52, 54, and 58 of Henson’s deposition transcript despite the fact these pages were never presented to the Circuit Court. 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. Henson should be further required to amend or correct his Initial Brief of Appellant to delete these improper citations and to eliminate his discussion of this deposition testimony.

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); Norris v. Ferre, 315 S.C. 179, 183, 432 S.E.2d 491, 493 (Ct. App. 1993) (Court denied motion to supplement the record on appeal with deposition testimony from an unrelated action “since the matters were not presented to the trial judge.”).

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.

Only pages 1, 2, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 39, 40, 61, and 62 of Henson's deposition were presented to the Circuit Court. The remainder of Henson's deposition transcript was not presented to the Circuit Court. Because these other pages 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. This Court should rely solely upon the evidence that was presented to the Circuit Court in deciding this appeal and should strike from the Record on Appeal all portions of Henson's deposition transcript (except pages 1, 2, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 39, 40, 61, and 62) that were not presented to the Circuit Court. This Court should further order Henson to file an amended or corrected Initial Appellant Brief deleting his citations to and discussion of these deposition pages that must be stricken.

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 from Henson's Designation of Matter to be Included in Record on Appeal filed on January 27, 2023, all portions of Henson's deposition transcript (except pages 1, 2, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 39, 40, 61, and 62) that were not presented to the Circuit Court and further ordering Henson to file an amended or corrected Initial Appellant Brief deleting his citations to and discussion of these deposition pages that must be stricken.

ROSEN HAGOOD, LLC

By: /s/ F. Truett Nettles, II

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February 24, 2023.