

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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JAN 31 2024

SC Court of Appeals

Appeal from Horry County
Honorable Benjamin H. Culbertson, Circuit Court Judge
Appellate Case No. 2023-000703

KATRINA MORRISON,

Appellant,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

**MOTION TO STRIKE
AND
REQUIRE FILING OF
AMENDED INITIAL BRIEF OF APPELLANT
AND DESIGNATION OF MATTER**

Respondent (“the State”), through its undersigned counsel, would respectfully show unto the Court as follows:

I.

In July of 2022, Appellant Katrina Morrison was served with arrest warrants for trespassing and malicious injury to personal property in connection to an incident that had occurred roughly a month earlier. On January 12, 2023, a jury trial was commenced in the Horry County Magistrate Court located in Myrtle Beach, South Carolina, with the Honorable Margie B. Livingston, magistrate judge, presiding. At the conclusion of the one-day trial, the jury convicted Morrison as charged. Following the verdict, the trial judge sentenced Morrison to a fine and ordered her to pay restitution to her victim. Morrison then timely initiated an appeal to

the Horry County Court of Common Pleas.¹ On April 12, 2023, a virtual appellate hearing was held on the matter before the Honorable Benjamin J. Culbertson, circuit court judge. Neither Morrison nor Morrison’s defense counsel appeared at the appellate hearing, and, as a result, the circuit court judge dismissed the appeal for failure to prosecute. Subsequent to that, Morrison submitted a pro se notice of appeal dated April 20, 2023.

II.

On December 28, 2023, Morrison—after being directed by this Court to correct several deficiencies with an earlier brief—filed her Initial Brief of Appellant. Throughout her brief and as support for her various arguments and claims, Morrison recounts events that supposedly occurred at her defense counsel’s office around the time of the virtual appellate hearing conducted in her case.² (App. Br. pp. 4-5; p. 7). Likewise, Morrison discusses out-of-court communications she purportedly engaged in with defense counsel and defense counsel’s staff. (App. Br. pp. 4-5; pp. 6-7). Furthermore, Morrison references and relies upon an affidavit

¹ The records from the circuit court proceedings in Morrison’s case are presently available through the Horry County Public Index. Records for Katrina Morrison, Horry County Fifteenth Judicial Circuit Public Index, <https://publicindex.sccourts.org/horry/publicindex>.

² In addition to the issues with Morrison’s appellate brief that are presently being raised to this Court through the State’s motion to strike, the arguments Morrison is currently advancing on appeal—including one alleging her counsel was constitutionally ineffective—*also* do not appear to have actually been raised to or ruled upon by the circuit court judge, who dismissed Morrison’s appeal on purely procedural grounds, and, thus, those arguments were not properly preserved for appellate review and cannot appropriately be considered or addressed for the first time on appeal pursuant to well-established South Carolina law. See State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) (“Appellant is limited to the grounds raised at trial.”); State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004) (explaining an issue must have been raised by the appellant in a timely manner with sufficient specificity *and* ruled upon by the trial court in order for it to be preserved for appellate review); see also State v. Head, 330 S.C. 79, 87, 498 S.E.2d 389, 393 (Ct. App. 1997) (instructing an appellate court “cannot address unpreserved errors”).

prepared by an individual identified as Susan Flynn, whom she alleges accompanied her to defense counsel's office on the date of the appellate hearing. (App. Br. p. 4; p. 7).

III.

On the same date her brief was submitted, Morrison filed her Designation of Matter. Through it, Morrison identifies the following items for inclusion in the Record on Appeal: (1) the transcript from the appellate hearing conducted on April 12, 2023; (2) an "E-mail chain between attorney Timothy Kirk Truslow and Appellant;" and (3) an "E-mail to Judge Culbertson April 13th 2023." (App. DOM). Additionally, along with her Designation of Matter, Morrison included as attachments a copy of the appellate hearing transcript, various print-outs of emails, and a notarized affidavit from Susan Flynn, which is dated May 17, 2023—a date just short of a full month *after* Morrison's appeal was initiated. (App. DOM).

IV.

Under Rule 210(c) of the South Carolina Appellate Court Rules, the Record on Appeal "shall include all matter designated to be included by any party under Rule 209[.]" Critically, Rule 210(c) further provides the Record on Appeal "shall not . . . include matter *which was not presented to the lower court or tribunal.*" *Id.* (emphasis added). Based on that rule, only matter before the circuit court can be included in the Record on Appeal, and parties are precluded from including matter that does not satisfy that fundamental requirement in the appellate record and briefs. See State v. White, 372 S.C. 364, 387, 642 S.E.2d 607, 619 (Ct. App. 2007) ("Morris' statement was not presented to the lower court and cannot properly be included in the Record on Appeal."); see also Williamsburg Rural Water & Sewer Co., Inc. v. Williamsburg County 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."). And,

importantly, an appellate court will *not* consider any matter not properly included in the Record on Appeal when reviewing a case on appeal. See Rule 210(h), SCACR (“Except as provided by Rule 212 and Rule 208(b)(1)(C) and (2), the appellate court *will not consider* any fact which does not appear in the Record on Appeal.” (emphasis added)); see also Morris v. Tidewater Land & Timber, Inc., 388 S.C. 317, 333, n. 16, 696 S.E.2d 599, 608 (Ct. App. 2010) (“Under our appellate court rules, we may not consider any fact that does not appear in the record.”).

V.

Upon reviewing the record from the circuit court proceedings and the transcript from the appellate hearing conducted in Morrison’s case in preparation of the State’s brief, the State has been unable to locate any discussion of, arguments premised upon, or rulings from the circuit court judge concerning: (1) the events that were allegedly occurring at defense counsel’s office during the appellate hearing; (2) the contents of the out-of-court communications that have purportedly been exchanged between Morrison, defense counsel, and defense counsel’s staff; and (3) anything related to an individual named Susan Flynn.³ Nevertheless, Morrison has directly cited to and referenced such matter in her Initial Brief of Appellant as presently filed in support of the arguments she has advanced even though that matter does not appear to have ever actually been presented to or considered by the circuit court judge, and she has similarly designated such matter—including an affidavit that did not even exist until *after* her appeal had already been initiated and, thus, could not possibly have been considered by the circuit court judge—for inclusion in the Record on Appeal. Resultantly, pursuant to requirements of our appellate court rules, that matter could not and cannot properly be embodied in the appellate

³ Despite the fact the Record on Appeal has not yet been filed in Morrison’s appeal, the transcript from the appellate hearing is currently available for this Court to review because—as previously noted—Morrison attached it to her Designation of Matter. (App. DOM).

briefs or included in the Record on Appeal in Morrison’s case. See South Carolina State Highway Dep’t v. Meredith, 241 S.C. 306, 311, 128 S.E.2d 179, 182 (1962) (“[C]ounsel is prohibited from embodying in their briefs any fact which does not appear in the record.”); see also Henning v. Kaye, 307 S.C. 436, 437, 415 S.E.2d 794, 794 (1992) (“[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. It is incumbent upon counsel to provide material that complies with the Rules and facilitates appellate review.”). Likewise, this Court cannot properly consider that matter or the impermissible references to it contained in Morrison’s appellate brief in resolving Morrison’s case on appeal. See Roche v. South Carolina Alcoholic Beverage Control Comm’n, 263 S.C. 451, 455, 211 S.E.2d 243, 244 (1975) (“[A] trial judge will not be reversed for failing to act on a matter that was not submitted to him.”); cf. Tant v. Guess, 37 S.C. 489, 512-513, 16 S.E. 472, 480 (1892) (“ ‘According to the practice of the Court of Chancery from its earliest history to the present time, *no paper not before the court below can be read on the hearing of an appeal.*’ This court has, in numerous cases, recognized and affirmed this doctrine.” (emphasis added)).

VI.

Based on the foregoing, the State respectfully asks this Court to strike the portions of Morrison’s Initial Brief of Appellant citing to and referencing matter that cannot properly be referenced or considered on appeal, strike the portions of Morrison’s Designation of Matter identifying matter that cannot properly be included in the Record on Appeal, require the filing of an amended Initial Brief of Appellant omitting any improper references to matter that was not presented to or considered by the circuit court judge during the proceedings in Morrison’s case, and require the filing of an amended Designation of Matter that only identifies matter that can

properly be included in the Record on Appeal pursuant to the requirements of Rule 209 and Rule 210 of the South Carolina Appellate Court Rules. See Henning, 307 S.C. at 437, 415 S.E.2d at 794 (emphasizing parties must provide materials that comply with the appellate court rules). Furthermore, the State asks this Court to hold the time period for the filing and service of the Initial Brief of Respondent and Designation of Matter in abeyance until this motion has been finally ruled upon.

WHEREFORE, the State prays this Court will strike Appellant's Initial Brief of Appellant as presently filed that contains references to matter not actually before the circuit court; require the service and filing of an amended Initial Brief of Appellant omitting any reference to the improper matter; strike Appellant's Designation of Matter as presently filed that identifies for inclusion matter that cannot properly be included in the Record on Appeal; require the service and filing of amended Designation of Matter that complies with the mandates of our appellate court rules; hold the time period for service and filing of the Initial Brief of Respondent and Designation of Matter in abeyance pending a ruling on this motion; and for such other and further relief as the Court may deem just and proper.

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Senior Assistant Deputy Attorney General

By: 
Mark R. Farthing
S.C. Bar Number 76901

January 31, 2024

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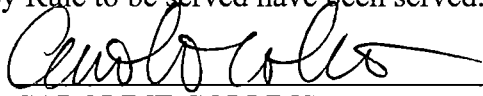
Respondent.

PROOF OF SERVICE

I, Caroline Collins, certify I have served the within Motion to Strike and Require Filing of Amended Initial Brief of Appellant and Designation of Matter on Appellant by sending a copy via the U.S. mail to the following individual:

Katrina Morrison
4530 Lighthouse Drive, 31E
Little River, South Carolina 29566

I further certify all parties required by Rule to be served have been served.
This 31st day of January, 2024.



CAROLINE COLLINS
Administrative Coordinator
Office of the Attorney General



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ALAN WILSON
ATTORNEY GENERAL

January 31, 2024

Katrina Morrison
4530 Lighthouse Drive, 31E
Little River, South Carolina 29566

Re: Katrina Morrison v. State of South Carolina
2023-000703

Dear Ms. Morrison,

Enclosed please find a copy of the Motion to Strike and Require Filing of Amended Initial Brief of Appellant and Desingation of Matter in the above-referenced case.

Sincerely,

Mark R. Farthing
Senior Assistant Deputy Attorney General

MRF/cc
Enclosure

cc: The Honorable Jenny A. Kitchings
Victim Services