

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2011-CP-23-06482

Appellate Case No. 2013-000329

71137

Harrison Partners, LLC, Appellant,
v.
Renewable Water Resources, Respondent.

RESPONDENT'S MOTION TO DISMISS, OR ALTERNATIVELY, TO REQUIRE
APPELLANT TO CONFORM ITS INITIAL BRIEF TO THE SOUTH CAROLINA
APPELLATE COURT RULES

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JAN 31 2014

SC Court of Appeals

Pursuant to Rule 240 of the South Carolina Appellate Court Rules, Respondent Renewable Water Resources ("ReWa") moves the Court for an Order dismissing the appeal of Harrison Partners, LLC ("Appellant" or "HP"). HP's Initial Brief simply ignores the South Carolina Appellate Court Rules ("SCACR"). As a consequence, the Court should dismiss HP's appeal. Alternatively, the Court should compel HP to cure the deficiencies of its Initial Brief.

A. IN OVER ONE HUNDRED (100) INSTANCES, HP CITES "FACTS" WITHOUT ANY CITATION TO THE RECORD.

HP failed to supply citations to "facts" it cited over one hundred (100) times in its Initial Brief. (*See* App. Initial Brief.) To make matters worse, throughout its filing, HP serially misstated the underlying facts of the case.¹ In instances where HP actually provided record citations, ReWa can review the cited evidence and demonstrate how HP misstated the same. Yet, in the hundred (100) or more places where HP supplied no citation, ReWa must comb a thousand-plus page record and resort to guesswork as to what evidence (if any) HP might be referencing. Such a result is unfair, violates the SCACR, and deprives ReWa of a meaningful opportunity to respond.

The SCACR make clear that factual statements must correspond to record citations. For example, SCACR 208(b)(1)(D) states: "A party may also include a separate statement of facts relevant to the issues presented for review, with reference to

¹ Unfortunately, this is not the first time when HP has misstated the facts of the case at bar. In earlier proceedings, HP misstated the evidence of record so badly that ReWa had to furnish the Circuit Court with an annotated version of HP's own legal memorandum in order to address all of HP's factual misstatements.

the record on appeal." SCACR 208(b)(1)(D)(emphasis added). SCACR 208(b)(4)

states:

References to Record. The brief shall contain references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal to support the salient facts alleged. References shall also be made to where relevant objections and rulings occurred in the transcript. In the initial briefs, these references should be to the page and line number of the transcript prepared by the court reporter or by the page of the material to be referenced; e.g., Answer p. 7, Motion for Judgment p. 2, Transcript p. 231. Intelligible abbreviation may be used. After the Record on Appeal is prepared, these references shall be revised as provided by Rule 211(b)(1).

SCACR 208(b)(4) (emphasis added). Accordingly, HP was required, but did not, furnish record citations over one hundred (100) times in its Initial Brief.

The SCACR requires record citations so as to achieve several truth-finding functions. First, record citations allow the Court itself to examine the record evidence and confirm the citation supports what HP claims. Second, record citations prevent parties like HP from asserting facts as established when, as is frequently the case here, they appear nowhere in the Record.

Third, record citations afford Respondents, like ReWa, a full and fair opportunity to respond to factual portrayals: by pointing out evidentiary mischaracterizations, by highlighting omitted aspects of cited evidence, and by rebutting the same with counter citations. When, as here, a party systematically flouts such requirements (*i.e.*, failing to provide citations for over one hundred (100) factual assertions), all such truth-finding functions fall away.

Importantly, HP's citation omissions concern pivotal issues in the case at bar. For example, on page 13 of its Initial Brief, HP asserted (without citation) that allowing a "private utility [to come] onto ReWa property...was standard practice to do so and no

objection had been raised previously." (Initial Brief p. 13.) This statement is altogether false.

The record evidence actually establishes the exact opposite. (See R. 444:3-6 (Orvin testifying they never had a private force main cross ReWa property and the situation "was very unique to us."); R. 579 at ll. 23-24 (Bishop testifying that Board approval was required to cross ReWa property because "we've never had a request like that before.").² Yet, to disprove the same, ReWa must comb the entire record, find the testimony misquoted by Appellant, and then spend ample discussion explaining the same.³

Another example appears on page 14 of Appellant's Initial Brief. Appellant stated (without any supporting citation) that ReWa conceded in the "administrative hearing that *Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals*, 342 S.C. 480, 536 S.E.2d 892 (Ct.App. 2000) was controlling in this case. (App. Brief at 14.) Again, absolutely untrue.

The only passage referencing *Vulcan* appears on page 127 of the administrative record. The passage directly contradicts Appellant's un-cited representations. In fact, in the passage, ReWa *objected* to testimony concerning the *Vulcan* decision and

² ReWa notes for the Court that this issue is critical in this case, as ReWa's Board never approved HP's crossing of its property. As the Circuit Court found, HP's entire case collapses without such approval.

³ If HP's Initial Brief had only missed a handful of citations, or if it had skipped only uncontroversial facts, the instant motion might not be necessary. But, here, the volume of un-cited, misstatements about critical facts compels ReWa to seek relief from the Court to avoid subversion of process.

nowhere discusses its applicability. (R. 127:12-25.)⁴ However, to respond, ReWa must analyze the entire administrative transcript to find the sole passage relating to *Vulcan*. HP's tactics in this regard are abusive and the Court should disallow the same.

Yet another example appears on page 16 of Appellant's Initial Brief. Appellant asserts (without citation): "Respondent had 'flagged' their application as early as August of 2007 and put a 'hold' on processing of Appellant's pump station and encroachment." (App. Initial Br. at 16.) False.

The record establishes beyond contest that ReWa did not even begin considering amendments to the disputed Sewer Use Regulation until November or December of 2007. (R. 465: 21-24 (Orvin testifying: "[I]t'd been the November Board meeting, the December Board meeting at the latest."))⁵ ReWa could not have instituted some sort of "hold" pending the amendment of a regulation it had not yet even conceived of amending.

ReWa has only provided three (3) examples from Appellant's Brief but over ninety-seven other examples remain. In short, ReWa should not have to: respond to evidence that does not exist in the record; comb a thousand-plus page record only to guess what evidence Appellant may be referencing; and exert enormous amounts of

⁴ HP's contention that ReWa concedes *Vulcan* applies likewise proves highly material. HP contends it gained vested rights and intimates ReWa has conceded the correct analysis regarding the same appears in *Vulcan*. HP's willingness to make such representations to both the lower court and, now, this Court is simultaneously telling and highly troubling.

⁵ The timing and sequence of events in this case has significant importance. In short, as the lower courts found, HP mismanaged its project for over eighteen (18) months and never supplied the data ReWa needed for its project to proceed. HP nonetheless now blames ReWa for its own chronic mismanagement. At any rate, such facts are vitally important to understanding what occurred in this case.

resources rebutting baseless accusations for which no evidence, let alone record evidence, exists.

The South Carolina Appellate Court Rules are meant to protect the integrity of the Court, the process, and also the litigants. Out of fairness, the Court should either dismiss HP's appeal or require HP to follow the appellate rules and furnish the required record citations. To hold otherwise unfairly prejudices ReWa.

B. HP'S BRIEF EXCEEDS THE REQUIRED PAGE LIMITATIONS.

HP's Initial Brief totals fifty-eight (58) pages. Yet, SCACR 208(5) states: "*Length of Briefs.* Except in cases in which a sentence of death has been imposed, principal briefs shall not exceed fifty (50) pages, and reply briefs shall not exceed twenty-five (25) pages." SCACR 208(5). HP did not seek leave of the Court to submit a brief in excess of fifty (50) pages. And, ReWa would have opposed the same if it had. Accordingly, the Court should dismiss HP's appeal for failing to conform with the appellate court rules. Alternatively, the Court should strike the last eight (8) pages from HP's brief. Alternatively, the Court should force HP to re-file its brief in conformity with the appellate court rules.

CONCLUSION

South Carolina's appellate courts have formulated rules to ensure fairness and to protect the appellate process. HP has ignored those rules. Accordingly, this Court should take measures to ensure its rules are followed whether by dismissal of this appeal or by requiring HP to resubmit its Initial Brief in conformity with the SCACR.

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Jan 27, 2014

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PROOF OF SERVICE

I, the undersigned Attorney of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondents, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Respondent's Motion to Dismiss

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The Honorable Jenny Abbott Kitchings
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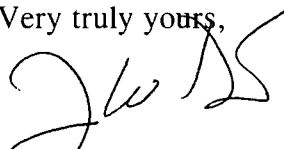
RE: Harrison Partners, LLC v. Renewable Water Resources
Case No. 2011-CP-23-06482
Appellate Case No. 2013-000329
Our File No. 06769/01511

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of Respondent's Motion to Dismiss, or Alternatively, to Require Appellant to Conform Its Initial Brief to the South Carolina Appellate Court Rules in the above-referenced matter. Also enclosed is a check for the filing fee.

Please return a file stamped copy in the self-addressed, stamped envelope provided.

Very truly yours,



Lane W. Davis

LWD:ap

Enclosures

cc: Robert C. Childs, III (w/enclosure)
J. Falkner Wilkes (w/enclosure)

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