

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE NEWBERRY COUNTY
Court Of Common Pleas

Frank R. Addy, Jr. Circuit Court Judge

Appellate Case No. 2013-002434
Trial Court Case No. 2013-CP-36-332

M3208

RECEIVED
AUG 13 2014
SC Court of Appeals

Raymond Hobby. Respondent,

v.

Mary T. Hobby. Appellant.

RESPONDENT'S MOTION TO STRIKE

Respondent Raymond Hobby, by and through his undersigned counsel, hereby moves pursuant to Rules 209, 210 and 240, SCACR, for an Order striking from the Record on Appeal certain matter Appellant designated which was neither presented to nor considered by the lower courts and which is irrelevant to this appeal.

This is an appeal from a judgment in the Newberry County Magistrate's Court. Mr. Hobby purchased the parties' former marital home located at 544 Crowder Road in

Kinards, South Carolina (“the Property”). After Appellant refused to move out, Mr. Hobby sought ejectment pursuant to S.C. Code Ann. §§ 15-67-610 to 640. On June 28, 2013, after a trial on the merits, the Magistrate entered judgment in Mr. Hobby’s favor. Appellant appealed, and the Circuit Court affirmed. Appellant then filed the appeal before this Court.

In her Designation of Matter, Appellant included (i) an Order Granting Defendant’s Motion to Dismiss filed January 7, 2013 in the Newberry County Family Court (“Family Court Order”) (R. at 3-9; Appellant’s Designation of Matter, Item 2) and (ii) portions of a hearing transcript which relate only to a motion to dismiss Appellant argued in a different case before the Circuit Court. (R. at 135-49; Appellant’s Designation of Matter, Item 11, pp. 21-34.) Despite Respondent’s objection to those items (Resp’t’s Designation of Matter), Appellant’s Counsel included them in the Record on Appeal filed and served on August 8, 2014. Respondent received the Record on August 11, 2014. Respondent, therefore, moves this Court to issue an Order striking that improper matter from the Record on Appeal.

The Court should strike the Family Court Order and transcript excerpts because they were not presented to the lower courts in this appeal and they are not relevant to the issues on appeal. Under Rule 209, SCACR, a party’s designation of matter may only include those “portions of the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal...A party shall not include any matter in his Designation which is not relevant to the appeal.” “The Record on Appeal shall not...include matter which was not presented to the lower court or tribunal.” Rule 210(c), SCACR.

The Family Court Order was issued in a separate lawsuit, not in the case before this Court. That Order dismissed claims by Appellant for relief that she never asserted in the case on appeal from the Magistrate's Court. More importantly, neither party presented the Family Court Order to the Magistrate or to the Circuit Court, nor did either of those courts consider the Order in rendering their respective orders. Therefore, the Family Court Order is not proper matter to be included in the Record.

Appellant also included portions of a transcript which should be stricken. (See R. at 135-149; App.'s Designation of Matter, Item 11.) On September 4, 2013, the Circuit Court held a hearing on Appellant's appeal from the Magistrate's judgment, C/A No. 2013-CP-36-339 ("Magistrate Appeal"), as well as a hearing on motions pending in a case before the Circuit Court in its original jurisdiction, C/A No.: 2013-CP-36-193 ("Circuit Court Case"). The Circuit Court heard arguments on the Magistrate Appeal first, then heard arguments on motions in the Circuit Court Case. (R. at 119-135.) As a result, the transcript from that one hearing contains matter which the parties properly may include in the Record on Appeal, as well as that which they may not. Specifically, pages 137 through 149 of the Record, as assembled by Appellant, contain arguments related *exclusively* to Appellant's motion to dismiss the amended complaint in the Circuit Court Case for lack of subject matter jurisdiction. (R. at 150 (Appellant's Motion to Dismiss in the Circuit Court Case); R. at 137-49.) The arguments the parties' attorneys made on pages 137 to 149 of the Record were not presented to the Magistrate, nor were they presented to the Circuit Court in its appellate capacity. Therefore, the matter in those pages is irrelevant to this appeal, improperly in the Record, and the Court should strike it from the Record on Appeal.

Appellant may contend this Court should take judicial notice of the objectionable matter. “For a fact to be subject to judicial notice, it must be so notorious that the court may properly assume its existence without proof.” Masters v. Rodgers Development Group, 283 S.C. 251, 255, 321 S.E.2d 194, 196 (Ct. App. 1984). “Unless the fact is either of such common or general knowledge that it is accepted by the public without qualification or contention, or its accuracy is capable of verification by reference to readily available sources of indisputable reliability, it is not subject to judicial notice.” Id. “Judicial notice takes the place of proof.” Id. A trial court may “take judicial notice of its own records, files, and proceedings for all proper purposes including facts established in those records.” Freeman v. McBee, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct. App. 1984) (emphasis added). However, “[n]otice 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.” Masters, 321 S.E.2d at 197. Therefore, “original judicial notice of adjudicative facts at the appellate level should be limited to matters which are indisputable.” Id.

The contents of the Family Court Order and transcript excerpts which Appellant included are not indisputable facts, nor is that matter so notorious that this Court may assume its existence without proof. To include this irrelevant matter, which pertains to two other lawsuits in two other courts, would prejudice this Respondent because it would allow Appellant to present, for the first time, evidence which she failed to present at trial. Furthermore, the improper matter is not necessary to determine the issues in this appeal under this Court’s scope of review, and allowing that matter to remain in the record would serve no purpose but to blur the issues before the Court. Therefore, original

judicial notice at this level would be improper, and the Court should restrict its review of the Circuit Court's Order Affirming the Magistrate to the cold record.

WHEREFORE, pursuant to Rules 209, 210 and 240, SCACR, Respondent prays that the Court issue an Order striking from the Record on Appeal the Family Court Order filed January 7, 2013, and pages 20 through 34 of the Transcript of Record from the September 4, 2013 hearing. The undersigned certifies that prior to filing this Motion, he consulted with opposing counsel in a good faith attempt to resolve this issue.



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August 12, 2014

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PROOF OF SERVICE

I, Bridget Steele, an employee of Bruner, Powell, Wall & Mullins, LLC, certify that a copy of *Respondent's Motion to Strike* was served by U.S. Mail, First Class, postage prepaid, on Pope D. Johnson, Esquire, 1230 Richland Street, Columbia, South Carolina 29201 this 12th day of August, 2014.

Bridget Steele
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August 12, 2014

VIA U.S. MAIL

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: *Raymond D. Hobby v. Mary T. Hobby*
Case No.: 2013-002434
BPWM File No: 1-04.141

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Dear Ms. Kitchings:

Please find enclosed for filing the original and seven (7) copies of the Respondent's Motion to Strike in the above-referenced matter. Also included is a check for the filing fee in the amount of \$25.00. Please file the original, clock-in the copies and return them to me via our self-addressed stamped envelope that is provided. By copy of this letter, I am serving the same on counsel of record. If you have any questions please do not hesitate to contact me.

With my kindest regards, I am

Sincerely yours,



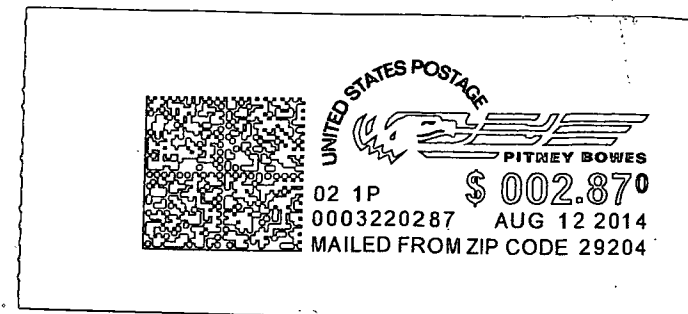
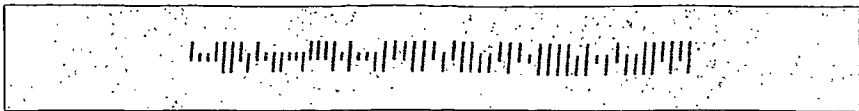
Bridget S. Steele

Legal Assistant to Benjamin C. Bruner

BCB:gh

/Enclosures

cc: Pope D. Johnson, Esquire (via u.s. mail w/ enclosures)



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