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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

M4061

R. Knox McMahon, Circuit Court Judge

Case No. 2013-CP-20-55

Court of Appeals Case No.: 2014-001567

Caitlin Elisabeth Braun, Appellant

v.

The Ben Arnold Sunbelt Beverage Company of South Carolina, L.P.,
Two Heels, Inc. d/b/a State Street Pub and Sunbelt Golf Development,
Inc. d/b/a Indian River Golf Course, Defendants,

Of whom The Ben Arnold Sunbelt Beverage Company of
South Carolina, L.P. is the Respondent, Respondent,

MOTION TO STRIKE CERTAIN ITEMS FROM APPELLANT'S DESIGNATION OF
MATTER TO BE INCLUDED IN THE RECORD

John E. Cuttino (S.C. Bar No. 1519)
Jessica A. Waller (S.C. Bar No. 100256)
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ATTORNEYS FOR RESPONDENT THE
BEN ARNOLD SUNBELT BEVERAGE
COMPANY OF SOUTH CAROLINA, L.P.

Pursuant to Rules 240, 209, and 210 of the South Carolina Appellate Court Rules, Respondent Ben Arnold Sunbelt Beverage Company of South Carolina, L.P., moves this Court for an order striking certain matters from Appellant's Designation of Matter to be Included in the Record on Appeal. Appellant has included in her Designation of Matter an item that is not properly included in the Record as it was never presented and filed with the trial court. Rule 209(b) of the South Carolina Appellate Court Rules provides that "the Designation may only propose to include portions of the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal [See Rule 210(c)]." Rule 210(c) of the Appellate Court Rules expressly provides that "[t]he Record shall not, however, include matter which was not presented to the lower court or tribunal." The following item does not appear to have been presented and filed with the lower court at any point, including in connection with the defendants' motions for summary judgment, the hearing on those motions, or in connection with motions for reconsideration:

- (1) Transcript of the Deposition of Caitlin Braun in *Devin Shumate v. Braun, et. al*, 2011-CP-20-301, and *Devin Shumate, as PR for Gabriella Shumate's Estate v. Braun, et. al*, 2011-CP-20-302;

This deposition transcript was generated in an entirely separate civil proceeding. In fact, the unsealed, original transcript of this deposition transcript remains in the possession of the undersigned counsel for Respondent and was never filed with the circuit court at any stage of these proceedings.

Because this original transcript item was never filed with the lower court, it did not become part of the record nor could it have formed the basis for any rulings made by the lower court, from which Appellant now appeals. The plain language of Rule 210(c), SCACR, therefore requires that these matters be excluded from the Record and not be considered by this Court. *See Windham v. Honeycutt*, 290 S.C. 60, 63-64, 348 S.E.2d 185, 187 (Ct. App. 1986) (noting the burden is on the appellant to furnish a sufficient record on appeal from which this court can make an intelligent review and an appellate court will not consider facts that do not appear in the transcript of record); *See also State v. White*, 372 S.C. 364, 642 S.E.2d 607 (agreeing with the position taken by the State that the Appellate Court should not consider a co-defendant's written statement because it was not raised to or ruled on by the trial court and, therefore, was not properly before the Appellate Court).

Furthermore, Appellant has apparently made no attempt to procure the transcript of the summary judgment motions hearing from the court reporter, nor designated the transcript of the summary judgment hearing as a matter to be included in the record on appeal. *See Windham*, 290 S.C. at 63-64, 348 S.E.2d at 187 (Ct. App. 1986) (noting the burden is on the appellant to furnish a sufficient record on appeal from which this court can make an intelligent review and an appellate court will not consider facts that do not appear in the transcript of record). Appellant has not met her burden to provide the Court with a sufficient record on appeal from which this Court can properly review the issues before it.

Wherefore, Respondent respectfully requests issuance of an order striking the deposition from Appellant's Designation of Matter and any other relief the Court deems just and proper in light of the insufficient record on appeal.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'J. Cuttino', with a long horizontal flourish extending to the right.

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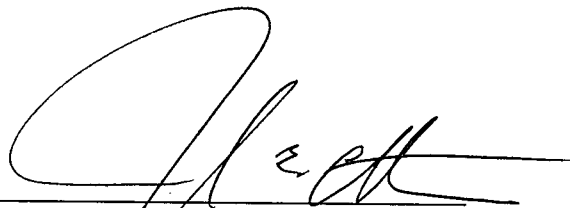
The Ben Arnold Sunbelt Beverage Company of South Carolina, L.P.,
Two Heels, Inc. d/b/a State Street Pub and Sunbelt Golf Development,
Inc. d/b/a Indian River Golf Course, Defendants,

Of whom The Ben Arnold Sunbelt Beverage Company of
South Carolina, L.P. is the Respondent, Respondent,

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that the Motion to Strike Certain Items from Appellant’s Designation of Matter to be included in the Record complies with Rule 208(a)(2), SCACR and the August 13, 2007, Order from the South Carolina Supreme Court titled “Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in the Appellate Court Filings.”

(SIGNATURE ON FOLLOWING PAGE)



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South Carolina, L.P. is the Respondent, Respondent,

PROOF OF SERVICE

I certify that I have served Motion to Strike Certain Items from Appellant's Designation of Matter to be Included in the Record, and Certificate of Compliance on Caitlin Elisabeth Braun by depositing a copy of the same in the United States Mail, postage prepaid, addressed to the following:

H. Ronald Stanley
Post Office Box 7722
Columbia, South Carolina 29202

Jerry Leo Finney
2117 Park Street
Columbia, South Carolina 29201



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November 4, 2014

VIA HAND DELIVERY

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

Re: *Caitlin Elisabeth Braun vs. The Ben Arnold Sunbelt Beverage Company of
South Carolina*
Court of Appeals Case No.: 2014-001567
Case No.: 2013-CP-20-55

Dear Ms. Kitchings:

Please find enclosed the original and six copies of *Motion to Strike Certain Items from Appellant's Designation of Matter to be Included in the Record*. Please file these documents and return clocked copies to this office via our courier.

By copy of this letter, and as evidenced on the attached Proof of Service, I am serving counsel of record with the same.

With kind regards, I remain

Very truly yours,

John E. Cuttino
Direct Dial: 803-724-1714
E-Mail: jcuttino@gwblawfirm.com

JEC/kle

cc: H. Ronald Stanley, Esq.
Jerry Leo Finney, Esq.

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