

7/20/15

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

RECEIVED

JUL 20 2015

Appellate Case No. 2015-000778
C/A No. 2013-CP-23-01762

SC Court of Appeals

Carol Simpson,

Appellant,

v.

Frank A. Landgraff, Carol Sutton, Sutton & Associates
Investigations, Inc., Defendants,

Of Whom Frank A. Landgraff is the

Respondent.

FRANK A. LANDGRAFF'S MOTION TO DISMISS

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Attorneys for Respondent
Frank A. Landgraff

Pursuant to Rule 240 of the South Carolina Appellate Court Rules, Respondent Frank A. Landgraff (“Landgraff”) moves the South Carolina Court of Appeals for an Order dismissing the appeal of Appellant Carol Simpson (“Simpson”), or alternatively, for an Order compelling Simpson to comply with the South Carolina Appellate Court Rules.

From the inception of this case, Simpson has blatantly disregarded applicable procedural rules and Court orders. Landgraff has often had to incur the expense to compel compliance. This practice now persists on appeal. For example, Simpson improperly captioned¹ the matter on appeal. (April 20, 2015 letter from Court of Appeals to Simpson). Simpson also failed to timely order the transcript (April 29, 2015 letter from Court of Appeals to Simpson.) In the April 29 letter the Court stated the appeal “will be dismissed” if Simpson did not make a motion “within 10 days of the date of this letter” requesting permission to order the transcript outside of the filing deadlines. (*Id.*) Simpson did not make such a motion until more than 30 days later. (Motion Requesting Permission to Order Transcript Out of Time dated May 30, 2015.) Simpson also did not properly serve counsel, as noted in the Court’s letter of May 21, 2015.

Simpson’s ongoing inability to follow the rules has escalated with her Initial Brief of Appellant filed June 22, 2015 (the “Initial Brief”) and her Designation of Matter to be Included in the Record on Appeal filed June 22, 2015 (the “Designation”), to the point that dismissal is warranted.

¹ Simpson continues to use an incorrect caption on her filings despite the Court specifically detailing the caption to be used in the April 20, 2015 letter.

I. SIMPSON'S INITIAL BRIEF IS IMPROPER.

A. The Statement of Facts improperly contains references to facts not in the record, and does not contain proper citation.

1. The Initial Brief contains a recitation of materially inaccurate facts nowhere supported by the lower court's record. (Initial Brief, pp. 4-6.) For the vast majority of such claimed facts, Simpson cites her own "case statement," which, in turn, contains no record citations. (*See, e.g., Id.* at 4; "Statement of the Case" pp. 1-4.)

2. Simpson's omissions of correct citations prejudices Landgraff. First, Simpson includes an inaccurate factual portrayal without record support. Second, to the extent Simpson actually is referencing specific materials, the lack of proper citations forecloses Landgraff's ability to review what Simpson cites in order to demonstrate such materials were mis-cited. Third, it is improper and unfair to require Landgraff to guess what materials Simpson purports to rely upon.

3. Simpson only cited to one document in her fact section, that being her Responses to Landgraff's Request to Admit. First, that document was not before the lower court and is not properly referenced in any filing on appeal. Second, Simpson cannot cite her own discovery responses to provide any fact to the Court, particularly when that response (a) was never before the lower court, and (b) is not an admission or denial or other appropriate response to a Request to Admit as allowed for under Rule 36, SCRCF but rather her own attempt to bootstrap her opinion as a fact.

4. In summary, Simpson put forth an entire fact section devoid of even one single appropriate reference to the record on appeal. Simpson's filings are in violation of the following appellate court rules:

Rule 208(b)(1)(D), SCACR: “A party may also include a separate statement of facts relevant to the issues presented for review, with reference to the record on appeal . . .”

Rule 210(c), SCACR: “The Record shall not, however, include matter which was not presented to the lower court or tribunal.”

Rule 208(b)(4), SCACR: “The brief shall contain references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal.”

5. The Court should dismiss this appeal due to Simpson’s attempt to put forth facts which are unsupported.

B. The Argument improperly contains references to facts not in the record, and does not contain proper citation.

6. Simpson’s legal argument likewise contains repeated references to “documents” never properly before the lower court. For example, on page 10 of the Initial Brief (and then throughout), Simpson cites an incident report from the Greenville County Sheriff’s Office (“GCSO”), purporting to recite its contents. (Initial Brief, p. 10). No such report was ever properly before the lower court, let alone properly authenticated or admissible as evidence. Another example appears on the bottom of page 10 where Simpson cites a letter from the State Office of Victim Assistance (“SOVA”). (*Id.* at 10). No such letter was ever properly before the lower court, let alone properly authenticated or admissible as evidence. Simpson also continues the practice of citing to her own case statement, which, in turn, contains no record citations. (*See, e.g., Id.*, p. 12, ¶ 2.)²

² References to the GCSO and SOVA reports likewise appear throughout Simpson’s initial brief. (*See e.g.,* Initial Brief, pp. 12, 27.)

7. These are not merely inconsequential oversights. Simpson's Initial Brief, in particular the second argument, is founded upon the supposed results of investigations of law enforcement and a state entity, neither of which was ever properly presented to the lower court. Landgraff cannot imagine a more prejudicial posture on appeal than Simpson's poisonous attempt to boost her argument by cloaking her claims in the veil of government approval.

8. Simpson starts her flagrant assault by stating that law enforcement "investigated [Simpson's] account thoroughly . . . [a]fter a full investigation, [Simpson's] account was not contradicted." (*Id.* at 10.) She also purports to cite to a "crime victim award letter." (*Id.*) Emboldened as her brief deepens, she moves from stating her account was "not contradicted" to a claim that SOVA "determined that [Simpson] was the victim of a crime . . .", (*Id.*), to "[GCSO] and SOVA have clearly concluded that [Simpson] was the victim of video voyeurism committed by the Defendants." She peaks with an outrageous claim that "pursuant to the [GCSO] investigation and SOVA inquiry, [Landgraff] has committed the crime of aggravated voyeurism, which is a felony." (*Id.* at 27.)

9. Simpson is not simply shading facts to support an argument; she is presenting supposed facts claiming Landgraff has been determined to be a felon for the supposed conduct in issue in this case, when in fact those alleged facts are not properly before the Court, much less dispositive. Unsurprisingly, there is not a single piece of evidence regarding any criminal conduct by Landgraff because it is uncontested that not

only has he never been convicted for any such crime, he has never even been charged with such a crime.

10. Simpson further and improperly references findings of the Family Court nowhere appearing in the record below. (*See, e.g., Id.*, pp. 15-16.) To make matters worse, Simpson misstates the Family Court's ultimate rulings in a record that was sealed. Again, there is no citation to any document and no Family Court document is part of the Designation.

11. Simpson continues her improper conduct at page 20 of her Initial Brief. First, Simpson makes factual statements without reference to any evidence of record. These include the false accusations of connivance and distorted references to what occurred in the Family Court proceedings without any corresponding evidence to support the same. (*Id.*, p. 20.) On pages 20 and 21, Simpson tests the outer-bounds of litigation privilege by referencing sexual "fantasies" of Landgraff and accusing him of "extort[ion]". (*Id.* at 20-21.) No evidence of record supports such outlandish accusations and, more importantly, Simpson cites none.

12. Simpson again distorts the sealed Family Court record with no record citation on page 21 of her Initial Brief. On page 32 of Simpson's Initial Brief, Simpson once again cites Family Court materials nowhere appearing in the Record. Moreover, Simpson makes a gratuitous defamatory remark against Landgraff's counsel in the Family Court. (*Id.* at 32.) Besides being legally incorrect and factually baseless, Simpson improperly makes such an attack; without ever making such an argument below; and with no corresponding materials in the public record. (*Id.*)

13. Pages 32 and 33 of Simpson's Initial Brief continue referencing matters not in the record. For example, Simpson accuses Landgraff's counsel of drafting a "footnote" for the trial judge's signature and assigning both bizarre and imaginary ulterior motives. (*Id.* at 33.) Nowhere were these issues raised below; nowhere do they appear in the Record.

14. Again, Simpson's omissions of correct citations prejudices Landgraff. First, Simpson includes supposed facts supporting argument without record support. Second, to the extent Simpson actually is referencing specific materials, the lack of proper citations forecloses Landgraff's ability to review what Simpson cites in order to demonstrate such materials were mis-cited. Third, it is improper and unfair to require Landgraff to guess what materials Simpson purports to rely upon.

C. The Initial Brief improperly presents argument and/or evidence made for the first time after the entry of summary judgment.

15. On December 4, 2014, Circuit Judge D. Garrison Hill entered a Form 4 Judgment in a Civil Case stating "Defendants' Motion for Summary Judgment is granted. Defendants' Motion to Compel and Plaintiff's Motion to Strike are thus rendered moot. Mr. Lane Davis, Esq. [counsel for Landgraff] is requested to submit a short proposed order by December 10, 2014." (Form 4, attached hereto as Exhibit A). December 4, 2014 is thus the date after which the submission of new filings or "evidence" to the lower court became improper.

16. Thereafter, Judge Hill filed a more detailed order granting summary judgment to Landgraff on February 3, 2015. Simpson filed a Motion for

Reconsideration on February 12, 2015, and a second Motion for Reconsideration on March 16, 2015.

17. Simpson improperly cites to her Motions for Reconsideration for alleged facts and arguments. (pp. 8, 10, 17, 18, 26). For example, she cites to her second Motion for Reconsideration for substantive propositions and references documents not in evidence. (*Id.* at 10, 12.). A motion for reconsideration is not evidence. The efficacy of a motion to reconsider is to ensure an argument is raised to and ruled upon by the trial court. *See, e.g. Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.”) Additionally, it may be used to allow a party to ask the trial court to reconsider its decision. *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 21-22, 602 S.E.2d 772, 778-779 (2004). Critically, it is not a vehicle to present evidence to the trial court for the first time if that evidence already existed. *Spreeuw v. Barker*, 385 S.C. 45, 68-69, 682 S.E.2d 843, 855 (Ct. App. 2009) (citing *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990)).

18. Simpson cites to her multiple motions for reconsideration as if they are grounds for reversal, or even proper record citations. The Court should reject this attempt to backfill evidence, especially because the motions themselves are not evidence nor are any attachments (or referenced documents) presented for the first time.

II. SIMPSON’S DESIGNATION IS IMPROPER.

19. It is not appropriate to designate matters not presented to the lower court. Specifically, pursuant to Rule 209(b), SCACR, 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)]. A party shall not include any matter in his Designation which is not relevant to the appeal.” Rule 210(c), SCACR provides “[t]he Record shall not, however, include matter which was not presented to the lower court or tribunal.”

20. Throughout her Initial Brief, Simpson makes repeated reference to discovery responses. (Initial Brief pp. 6, 31, 32). First, discovery requests and responses (such as Interrogatories, Requests for Production, and Requests for Admission) are generally not filed. *See* Rules 33, 34, and 36, SCRCR, referencing the service of discovery requests and the service of discovery responses, and not providing for the filing of the requests or the responses.³ More importantly, Rule 210(c), SCACR requires presentation to the lower court, not merely filing. The rationale for this is simple – it prevents a party from unscrupulously interfering with judicial economy and fairness, for example by filing a document but never providing or calling attention to that document to opposing counsel or the trial court, and then later attempting to rely on that document.

21. Here, Simpson has listed at least ten separate sets of discovery requests or discovery responses in her Designation, several of which were never filed.⁴ (Designation, Nos. 30-39.) Other requests or responses were first filed on January 27, 2015, weeks after Judge Hill entered the Form 4 Order granting summary judgment,

³ The various clerks of court would very quickly run out of storage if every party in every case was to file discovery requests and any responses.

⁴ Of the 49 entries on her Designation, 47 do not have any filing date whatsoever, including all discovery entries.

and still others were first filed on March 14, 2015, weeks after the entry of the February 27, 2015 Amended Order Granting Summary Judgment to Defendant Landgraff (the order attached to the Notice of Appeal). In fact, it appears only two entries, No. 31 (Plaintiff's Supplemental Response to Frank A. Landgraff's First Interrogatories) and No. 34 (Plaintiff's Supplemental Response to Frank A. Landgraff's First Interrogatories) were filed prior to the entry of the Form 4 Order. Moreover, the simple act of filing does not mean these two entries are appropriate.

CONCLUSION

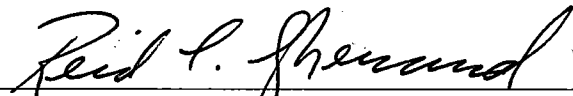
An appeal is not an exercise in catharsis whereby Simpson may unload emotional baggage – both real and imaginary – while forcing Landgraff to incur the expense of her accusations. It is not a chance to present unduly prejudicial arguments *du jour*. It is not an opportunity for Simpson to savage Landgraff with repeated and deliberate reference to improper and inflammatory “facts.”

South Carolina's appellate courts impose rules on litigants to ensure the fairness of the process and to ensure its propriety. It is not acceptable for Simpson – who is, along with her counsel, a member of the South Carolina Bar – to willfully disregard the appellate court rules. Accordingly the Court should dismiss Simpson's appeal due to her non-compliance.

In the alternative to dismissal, the Court should require Simpson to: (a) delete all factual statements unsupported by proper record citation, both those in the statement of facts and in the argument section of the Initial Brief; (b) delete all improperly designated materials, those not presented to the lower court; (c) delete all arguments that Simpson did not make to the trial court prior to her first motion for

reconsideration; and (d) admonish Simpson from repeating such conduct or risk the dismissal of her appeal. The Court should further toll Landgraff's time for responding until Simpson resubmits a proper designation of matter and a compliant brief with proper record citations.

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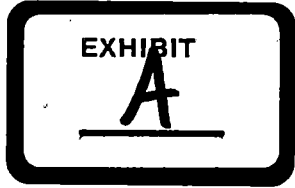
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Attorneys for Frank A. Landgraff

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July 16, 2015



FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER

FILED-CLERK OF COURT 13-01762

Jane Doe

GREENVILLE
PAUL B. WICKENS

Frank A Landgraff
Carol Sutton &
Associates Investigations

Carol Sutton

2014 DEC 5 11:30 AM

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: [] Plaintiff [] Defendant
[] Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- [] JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
[X] DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. [] See Page 2 for additional information.
[] ACTION DISMISSED (CHECK REASON): [] Rule 12(b), SCRPC; [] Rule 41(a), SCRPC (Vol. Nonsuit);
[] Rule 43(k), SCRPC (Settled); [] Other:
[] ACTION STRICKEN (CHECK REASON): [] Rule 40(j) SCRPC; [] Bankruptcy;
[] Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; [] Other:
[] DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
[] Affirmed; [] Reversed; [] Remanded; [] Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: [] See attached order; (formal order to follow) [X] Statement of Judgment by the Court:

Defendants' Motion for Summary Judgment is granted. Defendants' Motion to Compel and Plaintiff's Motion to Strike are thus rendered moot. Mr. Lane Davis, Esq. is requested to submit a short proposed order by December 10, 2014.

ORDER INFORMATION

This order [X] ends [] does not end the case.
Additional Information for the Clerk:

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Table with 3 columns: Judgment in Favor of (List name(s) below), Judgment Against (List name(s) below), Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2015-000778
C/A No. 2013-CP-23-01762

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SC Court of Appeals

Carol Simpson,

Appellant,

v.

Frank A. Landgraff, Carol Sutton, Sutton & Associates
Investigations, Inc., Defendants,

Of Whom Frank A. Landgraff is the

Respondent.

PROOF OF SERVICE


I, the undersigned Attorney of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent, 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:

Frank A. Landgraff's Motion to Dismiss

Counsel Served:

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118 West Main Street
Laurens, SC 29360


Reid T. Sherard

July 16, 2015

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July 16, 2015

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JUL 20 2015

SC Court of Appeals

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

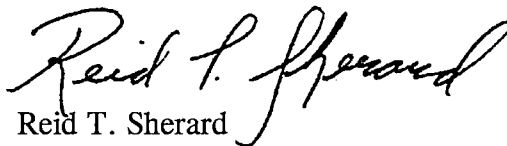
RE: Carol Simpson v. Frank A. Landgraff, Carol Sutton, Sutton & Associates
Investigations, Inc.
Case No. 2013-CP-23-01762
Appellate Case No. 2015-000778

Dear Ms. Kitchings:

In connection with the above captioned matter, enclosed please find an original and nine (9) copies of Frank A. Landgraff's Motion to Dismiss and Proof of Service.

Additionally, enclosed please find a check in the amount of \$25.00, which represents your filing fee.

Very truly yours,


Reid T. Sherard

RTS:kmj

Enclosure

Cc: Frank Landgraff
William G. Mayer
Joseph A. Mooneyham

Hasler

PRIORITY MAIL

07/16/2015

US POSTAGE

\$05.95⁰



ZIP 29601
011D11645516

Nelson Mullins

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File No: 35353/01502

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JUL 20 2015

SC Court of Appeals