

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**

OCT 09 2015

**SC Court of Appeals**

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

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 REPLY TO APPELLANT'S RETURN TO  
LANDGRAFF'S MOTION TO DISMISS**

Pursuant to Rule 240 of the South Carolina Appellate Court Rules, Respondent Frank A. Landgraff ("Landgraff") files this Reply to Appellant Carol Simpson's ("Simpson") Return to Landgraff's Motion to Dismiss filed July 20, 2015 (the "Motion"). Landgraff reiterates that the Court of Appeals should dismiss Simpson's appeal, or alternatively issue an Order mandating Simpson's compliance with the South Carolina Appellate Court Rules and requiring her to submit a revised and appropriate Initial Brief of Appellant and Designation of Matter of Appellant as argued in the Motion and hereinbelow.

**I. Simpson's Appeal Should Be Dismissed For Inappropriate Citation.**

In the Motion, Landgraff detailed the complete failure of Simpson to comply with the appellate court rules concerning the proper citation of averments made in the Statement of Facts and Argument sections of the Initial Brief of Appellant filed June 22, 2015 (the "Initial Brief"). (Motion pp. 2-6.) Simpson failed to interpose a persuasive Return in response.

As an initial matter, Simpson continues in her fundamental misapprehension of the mechanics of civil litigation. She apparently believes that filing<sup>1</sup> a document with the clerk automatically makes that document not just evidence, but dispositive of a given issue, even if: (a) the document was not filed before the trial court ruled; (b) she never served the document on opposing counsel or provided the document to the Court or drew attention to it; and (c) the document would not be admissible even if timely presented. Simpson's entire appeal is undergirded by this mistaken belief, and this Court should reject her attempt to have a "do over" on appeal.

**A. "Case Statement"/Incident Report/State Office of Victim Assistance Letter/Family Court Documents**

Simpson argues that the "Case Statement" upon which she based her entire fact section in the Initial Brief is not the "Statement of the Case" appearing at pp. 1-4 of that brief but rather an attachment to her Return titled "Case Statement." This does resolve some confusion about what Simpson cited in her Initial Brief; nevertheless, the Initial Brief cannot rely on this "Case Statement" for the very reason stated by Judge

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<sup>1</sup> Throughout her Return, Simpson refers to filing discovery responses. Filing discovery responses without reason is not appropriate pursuant to Rule 26(g)(1), SCRCP.

Hill in the Order Granting Plaintiff's Motion To Reconsider In Part And Denying It In Part And Denying Plaintiff's Motions To Strike filed February 27, 2015 (the "Reconsideration Order"):

Also on January 27, 2015, [Simpson] filed her Response to Defendant Sutton's First Request for Production, which contained two documents also **making their debut in the record**: a copy of an Incident Report and what is evidently a portion of the Solicitor's internal Prosecution Memo [the so-called "Case Statement"]."

(Reconsideration Order p. 2) (emphasis added.) Simpson glosses over this explicit identification of her untimely filing by the trial court by asserting "[t]he trial court noted that the ["Case Statement"] became part of the record . . ." (Return p. 5, ¶ 2) but fails to mention that the Reconsideration Order is not on appeal.

To explain further how Simpson's explanation differs from what actually happened, one only need review the footnote Judge Hill included regarding these two new documents:

It is important to note that these documents were filed in the Clerk's Office, and [Simpson's] counsel did not send copies to the judge. Nor did the court ever see them before reviewing the file upon receipt of this Motion to Reconsider.

(*Id.*)

That is, Simpson purports to base her entire fact section of her brief on documents not produced until well after the Court had already granted summary judgment<sup>2</sup>, and, even then, the documents were filed but not distributed. Moreover, this Case Statement is inadmissible even if it were timely and properly distributed – it is

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<sup>2</sup> As described in the Motion, the Court originally granted summary judgment by Form 4 filed December 5, 2014 (attached to the Motion as Exhibit A).

of unknown origin, prepared by an unknown draftsman (for all we know, Simpson, a lawyer, could have drafted it herself), based on unknown information, unauthenticated, not sworn, and stuffed to the gills with multi-layer inadmissible hearsay. Even if the Court of Appeals does not dismiss the appeal, allowing the "Case Statement" to appear in the Record and to be cited anywhere in Simpson's brief is to allow Simpson to submit new (unvetted, inadmissible) support for her appeal subsequent to the entry of summary judgment. This is anathema to the appellate process and would represent a sea change in the way appeals are conducted.

This exact same analysis applies to Simpson's citation to a document titled Incident Report<sup>3</sup>, the letter from the State Office of Victim Assistance ("SOVA"), and the supposed Family Court filings.

Regarding the Incident Report, Simpson claims "the trial court mentioned the 'Incident Report' at least 8 times in the two orders that filed on February 27, 2015. (Return p. 6, ¶ 5). Simpson conveniently leaves out what the trial court actually said:

The Incident Report . . . was not furnished to the court or made part of the record until over two months after the summary judgment hearing, 54 days after the court issued a Form 4 granting [Landgraff] summary judgment, and a month after [Landgraff] submitted a proposed order noting the lack of any evidence regarding the recording.

(Amended Order Granting Summary Judgment to Defendant Landgraff pp. 2-3.). The trial court included similar language about the Incident Report in the Reconsideration Order. Simpson never challenged any of the lower court's rulings in this regard.

Regarding the SOVA letter, Simpson claims "this letter was an exhibit to the same filing that contained the Incident Report referenced in the trial court's orders.

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<sup>3</sup> This document was not attached to Simpson's Return to Motion so Landgraff cannot be completely sure as to which document she is referring.

(Return p. 6, ¶ 6). Again, this filing was not made until January 27, 2015, months after the entry of summary judgment. (Reconsideration Order p. 2). These responses were also not served until that late date. (*Id.*)

The Incident Report and SOVA letter, like the “Case Statement”, are untimely, unauthenticated, not sworn, and not admissible.<sup>4</sup>

Again, the above analysis matters tremendously to the fairness of this appeal.

Simpson reveals as much by stating:

[Simpson] alleges that the Greenville County Sheriff’s Office fully investigated and did not contradict her claims. The Incident Report and the Solicitor’s Internal Prosecutor Memo [the “Case Statement”] substantiate this claim. [Simpson] correctly stated that SOVA determined she was a victim of a crime. The payment of benefits substantiates this claim since being a crime victim is a prerequisite to receiving payments from SOVA for being a crime victim. Finally the [“Case Statement”] concludes with “Based on the above analysis, warrants should issue for Suspect [Landgraff] and Private Investigator [Sutton] for two counts of aggravated voyeurism.” Aggravated voyeurism is a felony.

(Return pp. 6-7, ¶ 7).

These claims are many things – wildly inaccurate, borderline defamatory, and Simpson’s self-serving attempt to portray herself as aggrieved with the cloak of authority, among others – but for purposes of the Court’s analysis of the Motion these claims simply cannot be supported at the appellate level because there was no admissible evidence of same at the trial level.

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<sup>4</sup> Landgraff notes that had Simpson timely offered such materials, he would have objected under Rule 56(e), SCRPC that such materials fail to constitute admissible evidence. Allowing Simpson to interject such evidence on appeal unfairly prejudices Landgraff and infects the appeal with alleged facts not timely presented, sworn, or tested for admissibility.

As to the Family Court documents, Simpson claims the trial court acknowledged these filings by citing to page two of the Reconsideration Order. Upon review of the Reconsideration Order at page two, there is no such reference. Further, even if there were, it would no doubt relate to Simpson's attempt to "introduce new matter to avoid summary judgment." (Reconsideration Order p. 1). Simpson then revealed her true mean-spirited strategy to sully Landgraff by attaching Landgraff's ex-wife's affidavit to her Return and then quoting from it extensively in her Return. Simpson continued her denigrating *ad hominem* attacks before descending into a bizarre paragraph that could only be described as a last-gasp rant culminating with this baseless conclusion: "[Landgraff] has not contradicted one fact presented by [Simpson]." (Return p. 9.) Even a cursory review of the documents in this matter shows the futility in this statement.

#### **B. Requests to Admit**

The Motion points out that Simpson should not be able to cite to her Responses to Landgraff's Request to Admit because 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, SCRCP but rather her own attempt to bootstrap her opinion as a fact." (Motion p. 2, ¶ 2.)

In response, Simpson argues her Responses to Landgraff's Request to Admit are appropriate to cite since Landgraff attached those responses to his Motion to Compel dated August 28, 2015. Simpson's argument fails due to the provisions of Rule 56(e), SCRCP:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

## **II. Simpson's Appeal Should Be Dismissed For Improper Argument.**

The Motion explains why the Initial Brief improperly presents argument and/or evidence made for the first time after the entry of summary judgment. (Motion pp. 6-7, ¶¶ 15-18). Simpson again displays a fundamental misunderstanding of the court process by responding “[Landgraff] did not raise the issue before the trial court . . .” (Return p. 10, ¶ 14.) Landgraff assumed Simpson understood the black letter law that one cannot make an argument (or submit evidence) for the first time after the entry of judgment, and Landgraff is not required to make that argument to the trial court. Simpson appears to misconstrue Landgraff's defense. Landgraff is not arguing it was improper for Simpson to make an argument at the reconsideration stage when it was first made before the entry of judgment, because that is not what happened in the trial court. Rather, Landgraff points out that Simpson first made the argument and/or submitted evidence at the reconsideration stage. That there were two separate reconsideration motions makes no difference.

## **III. Simpson's Appeal Should Be Dismissed For Improper Designation.**

Simpson did not respond in any fashion to the Motion's significant argument regarding the inappropriate and improper Designation, and the Court should take that section of the Motion as admitted. This is an important admission, as

The task of designating is highly significant because it defines the scope of the record to be considered on appeal. Because only matters

contained in the record will be considered by the appellate court, the resolution of the case on appeal depends to a considerable extent on what is, or is not, included in the record.

Jean Hoefler Toal, et al., *Appellate Practice in South Carolina* 132 (2nd ed. 2002)<sup>5</sup>.

At the very least the Court should require Simpson to excise the challenged documents from her Designation and correspondingly remove reference to, or reliance upon, those documents from the Initial Brief of Appellant.

### CONCLUSION

Rather than acknowledge the litany of mistakes made in the conduct of the underlying litigation, ranging from untimely filings to unsupported documents to inadmissible evidence, Simpson doubles down in her Return by trying to muddy Landgraff and bolster her credibility while at the same time shoehorning new documents into her appeal. This is wrong and but more importantly her conduct undermines the appellate process and its important limitations.

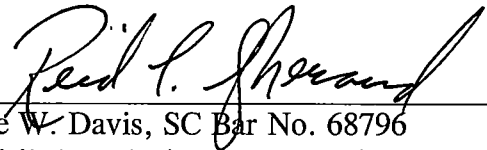
In summary, Simpson's Return "tracks the disturbing pattern of [Simpson's] counsel's questionable filings in this matter." (Reconsideration Order p. 3). The appeal should be dismissed, or alternatively the Court should require that Simpson: (a) delete all factual statements unsupported by proper record 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 timely 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

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<sup>5</sup> The South Carolina Supreme Court and this Court have cited the Chief Justice's seminal book with approval dozens of times.

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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October 7, 2015

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APPEAL FROM GREENVILLE COUNTY  
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D. Garrison Hill, Circuit Court Judge

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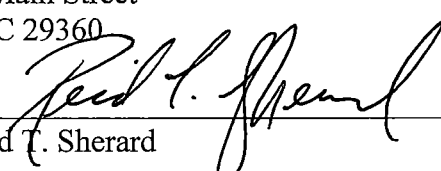
PROOF OF SERVICE

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 REPLY TO APPELLANT'S RETURN TO LANDGRAFF'S MOTION TO DISMISS

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October 7, 2015

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SC Court of Appeals

October 7, 2015

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

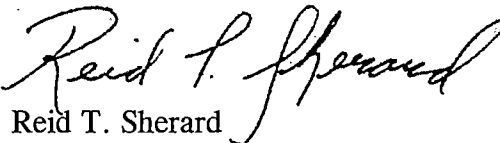
RE: Carol Simpson v. Frank A. Landgraff, Carol Sutton, Sutton & Associates  
Investigations, Inc.  
Case No. 2013-CP-23-01762  
Appellate Case No. 2015-000778

Dear Ms. Kitchings:

In connection with the above captioned matter, enclosed please find an original and nine (9) copies of Frank A. Landgraff's Reply to Appellant's Return to Landgraff's Motion to Dismiss and an original and three (3) copies of a Proof of Service.

By copy of this letter I am serving opposing counsel.

Very truly yours,

  
Reid T. Sherard

RTS:kmj  
Enclosure

Cc: Frank Landgraff  
William G. Mayer  
H. Spencer King  
Joseph A. Mooneyham

Hasier

PRIORITY MAIL

10/07/2015

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