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

Carol Simpson, Appellant,

v.

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

Of Whom Frank A. Landgraff is the Respondent.

RESPONDENT'S RETURN TO APPELLANT'S MOTION TO STRIKE LANDGRAFF'S FINAL BRIEF

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Respondent Frank A. Landgraff ("Respondent" or "Landgraff") respectfully submits this Return opposing Appellant Carol Simpson's ("Appellant" or "Simpson") motion to strike Landgraff's final brief. The Court should deny Simpson's motion and allow the appeal to proceed. However, if the Court grants Simpson's motion in some fashion, it should likewise grant Respondent's pending motion to strike Appellant's final brief. This is true for the following reasons:

1. As an initial matter, the Court should summarily deny Appellant's motion to strike for failing to state its supporting grounds with particularity. Rule 240(c), SCACR ("Rule 240") requires "all motions...shall state the grounds thereof." (Id.)

a. Here, Appellant complains of what she characterizes as "almost 100 changes" to Respondent's final brief. While she obviously tallied what she portrays as improper changes, Appellant fails to provide any citation to the same in her motion. As a result, Appellant's motion proves facially defective as it fails to supply the Court with the requisite factual basis to grant the relief requested.

b. Appellant's failure to articulate the grounds supporting her motion with record citations prejudices Respondent. Here, Appellant asks the Court to grant the severest of sanctions by striking Landgraff's final brief and then issuing additional sanctions. Yet, nowhere does the motion even specify the alleged infractions to which Landgraff must respond. Motions to strike a pleading ought not be moving targets or a game of pin the tail on the donkey. Respondent should not be forced to resort to guesswork

when responding to a motion seeking to strip away his opportunity to be heard and defend himself.

c. Landgraff nonetheless endeavors to address such issues below. But, no matter how fully Landgraff responds it is almost a certainty that Appellant will shift to a new issue on Reply depriving Respondent of a full and fair opportunity to be heard. It is for this reason Rule 240(c) requires litigants to state their grounds fully in their motion. And, it is for this reason, the Court should simply deny Appellant's motion.

2. After comparing Respondent's initial brief to his final brief, the differences between the two primarily fall into three categories, as follows:

a. Record Citations.

Obviously, without knowing for certain, Landgraff surmises that Appellant's alleged "100 changes" errantly include proper record citations.

- As provided by Rule 211, SCACR ("Rule 211"), Landgraff replaced the citations from his initial brief with final record citations. Of note, however, the record was largely compiled without line numbering or easy to reference pinpoint cites. As a result, within his citations, Respondent included the quote or referenced the sentence or phrase cited parenthetically for the Court's ease of reference. Respondent hoped to avoid needlessly causing the Court to spend hours trying to identify what was

cited.[1] Respondent assumes most of what Appellant cites as new sentences constitute parenthetical citations to the actual record.

- By virtue of Appellant's reasoning, Simpson finds herself trapped in an inescapable logic box. If the Court accepts Simpson's logic, Appellant's brief must be struck. Appellant's final brief contains a slew of citations to the record nowhere appearing in her initial brief. (See e.g., 1, 8, 12, 14, 15, 19; see also Respondent's Motion to Strike)

- Unlike anything in Landgraff's brief, Appellant's omission of such citations from her initial brief actually prejudiced Respondent. In relation to a series of different factual statements, Respondent had no idea what Appellant cited to support the same. Indeed, Respondent had no opportunity to study and verify what Appellant only cited for the first time in her final brief.

- Respondent similarly lost the chance to interpose challenges to Appellant's record citations if they proved inaccurate. (See Respondent's Motion to Strike) Last, Simpson's inclusion of newly minted record citations allows Appellant to cure (albeit still ineffectively) her prior non-compliance with Rule 208(E)(4),

[1]Rule 211(b)(1), SCACR nowhere limits a party's ability to include parentheticals when revising record citations so as to aid the Court.

SCACR, as specifically raised by Respondent in opposition to Appellant's briefing. (See e.g., Fin. Br. p. 18, FN20)

- Accordingly, along with the instant filing, Respondent contemporaneously moves the Court to strike Appellant's final brief. (See Resp. Mot. to Strike) To the extent the Court grants Appellant's motion, it should likewise grant Respondent's motion and issue mirroring relief. Appellant should be held to exactly the same standards as Respondent.

b. Respondent's Treatment of Evidence Omitted by Appellant When Compiling the Record.

As discussed in Respondent's pending motion to supplement the record (filed June 17, 2016) and then conceded in Appellant's return, Simpson omitted from inclusion in the record six (6) different items which Respondent plainly listed in his designation of matter. Appellant filed no motion authorizing the omission of such materials. Instead, Appellant simply failed to include the materials and then claimed to give Respondent "notice" by operation of counsel's certification attached to the back of the Record. The omission of such items also impacted Respondent's final brief.

- As to four of the items, Respondent identified alternate record citations. For example, as to one such item, Appellant conceded the point in her Reply Brief. As a consequence Respondent's

Final Brief simply cites Appellant's Reply Brief instead of pursuing the omitted matter in the record. (See Fin. Br. p. 15, FN16)

- However, as to two (2) items, Respondent had to file a motion to supplement the record. The more important of the two items was an actual order of the lower court dated February 27, 2015 wherein the lower court found: "The conduct of Plaintiff's counsel in filing documents for the purpose of distorting the record may be most charitably described as reckless." The lower court proceeded to note it "may later deal with" such misconduct "pursuant to its inherent power." (See Resp. Mtn. to Supp., Ex. A)
- Due to the omission of the two items addressed in the motion to supplement, Respondent's Brief includes footnotes indicating the materials are included in Appendix A. (See Fin. Br. p. 10, FN10; Id. at 13, FN13)
- On yet another occasion, Appellant included her Motion for Temporary Restraining Order in the Record but inserted the affidavit supporting the same approximately 125 pages later. Landgraff included a footnote noting the supporting affidavit as having been separated from the motion to avoid confusion about an important piece of evidence. (See Fin. Br. p. 3, FN3)

c. Typographical or Scrivener's Errors.

Landgraff's final brief also corrects a number of inconsequential typographical and scrivener's errors.

- For example, on the bottom of page 2 and continuing to the top of page 3, Respondent's initial brief stated Appellant "actually withheld service until May 28, 2013, eleven days *after* the lower court ruled." (Init. Br. pp. 2-3) When adding record citations, Respondent noted an error in the date. Accordingly, the final brief reflects the correct date and notes Appellant: "actually withheld service until June 1, 2013, fifteen days *after* the lower court ruled on May 17, 2013." (Fin. Br. pp. 2-3)[2]

- On page 8 of the initial brief, Respondent wrote: "Appellant has not appealed the Pseudonym Order or any of its findings." (Init. Br. p. 8) As reflected directly above, however, the passage relates to what had been designated as the "Vacating Order." (Id.) As a result, Respondent's final brief corrects the errant designation. (Fin. Br. p. 8) The same correction appears again on page 9. (Id. at 9)

- Frequently, the initial brief switched between using numerical short-hand for dates (e.g., 1/16/2014) and full date descriptors (e.g., January 16, 2014. (Compare, e.g., Init. Br. p. 7 *with* Fin. Br. p. 9)

[2] All citations to briefs in this return reference Respondent's briefs. As a result, citations have been truncated to Init. Br. and Fin. Br.

Throughout his final brief, Respondent changed all instances of numerical short-hand to full date descriptors. (See, e.g., Fin. Br. pp. 3, 4, 5, 8, & *passim*) This resulted in a high number of inconsequential changes.

- On page 12, Respondent's initial brief omitted the word trial in front of the word court. Respondent's final brief includes the word "trial" to clarify the reference was to the lower court, not this Court. (Fin. Br. p. 14.)

- On page 14 of the initial brief, Respondent referenced Appellant's "thirty-five (35) page brief." (Init. Br. p. 14) However, Appellant's final brief only spanned thirty-two (32) pages. As a result, the number thirty-five was changed to thirty-two to reflect the correct page number of Appellant's final brief. (Fin. Br. p. 16)

- On page 14 of the initial brief, Respondent cited a "second Order granting summary judgment." (Init. Br. p. 14) The nomenclature used was a scrivener's error. More correctly, the lower court issued an amended order. To avoid any confusion, Respondent switched "second" to "amended," which was what the lower court actually titled the order. (Fin. Br. p. 16)

- On page 15 of the initial brief, Respondent wrote: "For these reasons, the lower court found..." (Init. Br. p. 15) However, the passage

inadvertently omitted the words "*inter alia*," since the lower court based its ruling on more than just the ground discussed in that paragraph. Respondent's final brief includes the words *inter alia* to avoid misstating the breadth of the lower court's ruling. (Fin. Br. p. 17)

- On page 18 of the final brief, Respondent corrected the duplication of the word record in the final sentence by replacing it in one instance with the word "factual." (Fin. Br. p. 18)

- In a footnote, Respondent cited a lower court order in his initial brief but omitted the date of the order referenced. Footnote 25 on page 22 of Respondent's final brief inserts the date to correct the omission and clarify what order is cited. (Fin. Br. p. 22, FN25)

- On pages 22 and 23 of Respondent's initial brief, Landgraff enumerated a series of arguments with ordinal numbers. However, Landgraff omitted the word "First" in relation to the initial argument and, by typo, included it in the paragraph above. The final brief corrects the omission and starts the numbered arguments with the word "first." (Fin. Br. p. 25)

- In Appellant's first initial brief (as opposed to her amended initial brief), she cited to page 26 of her *5 page* Verified Memorandum for the proposition that she had no time to conduct discovery. Appellant later corrected this statement. As a result, footnote 31 on page 28 of Respondent's brief makes the same substantive point but deletes reference to the argument Appellant abandoned. (Compare Init. Br. p. 26, FN27 *with* Fin. Br. p. 28, FN31)

- In Footnote 41 on page 37, Respondent's brief corrected a split infinitive.

- Page 37 of Respondent's initial brief contained a typo when it referenced "Appellant's claims." (Init. Br. p. 37) The paragraph only refers to a single claim—Appellant's conspiracy claim. Respondent's final brief changes the reference to "Appellant's conspiracy claim." (Fin. Br. p. 41)

- The last sentence on page 43 of Respondent's initial brief omits the final word and punctuation. Respondent's final brief includes the omitted word "married" and adds correct punctuation. (Fin. Br. 47)

- None of the above-referenced typographical corrections substantively changed any argument in Respondent's Brief. And, Rule 211(b)(2), SCACR specifically allows corrections of typographical miscues.

3. Notwithstanding the above, Respondent Does Acknowledge Certain Differences Do Limitedly Appear in Landgraff's Final Brief.

Separate and apart from the foregoing discussion and in all candor to the Court, Respondent did find certain, unintended differences existed between his initial brief and his final brief. The differences were not substantive and, in Respondent's view, fairly minor.

- In preparing the initial brief, it appears Respondent unwittingly experienced version control issues. Respondent appears to have filed an earlier iteration of his brief when he filed his initial brief. When preparing his final brief, Respondent then inserted record citations into a later iteration of Landgraff's brief saved as a separate file. Typing over the later version resulted in certain differences that Respondent did not even notice until authoring this Return.

- Importantly, at no time did Respondent intend to "display unmitigated audacity" as Appellant suggests. Indeed, the differing versions are substantially identical and advance no new arguments or substantive differences. In fact, the corrected typos, discussed above, were even the same.

- Examples of minor changes in word choice found in Respondent's final brief include: inserting the words "of note, however" on page 2; "by contrast" and "without hesitation" in FN9 on page 8; "purported to comply" on page 10; "as directed" on page 12; switching the word "while" to although on page 28; shortening a quote with brackets on page 33; including the word "valueless" in FN38 on page 34; and using the words "unsworn" and "hearsay" on page 42.[3]

- A limited number of new sentences appear in Respondent's final brief as well. However, none of the sentences advance new or substantive arguments that do not appear elsewhere in both the initial and final brief. For example, footnote 24 does not appear in the filed initial brief but repeats the same rationale as the string cite appearing on page 20 and footnote 23. Footnote 32 on page 29 in the Final Brief was re-written but restates the same point raised by footnote 28 on page 27. Footnote 36 on page 32 rewords footnote 32 on page 29 of the Initial Brief but makes the same point.

- Respondent apologizes for any confusion resulting from the filing of the wrong version of his initial brief and then unwittingly incorporating final citations into his later draft. It was wholly unintentional and Appellant's accusations of impropriety simply lack

[3] Respondent has endeavored to address as many differences as could be found. To the extent others exist, they similarly do not raise substantive issues.

any basis. Importantly, however, no substantive issues are raised by the final brief that do not appear in the initial brief and Appellant was not deprived of a full and fair opportunity to respond to all such arguments.

- If the Court views such changes as warranting attention, Respondent would respectfully ask the Court to grant it leave to correct the differences and interpose an amended final brief. The relief urged by Appellant proves extraordinarily harsh, inappropriate for an unintended mistake and unsupported by the facts.

- In addition, the Court should view both Parties' final briefs with the same lens. If Respondent needs to redo his final brief, Appellant should also be required to remove the record citations she intentionally inserted for the first time into her final brief. Given a choice, however, Landgraff would have neither party change their final briefs and simply move forward with the appeal so the case can move to a final resolution one way or another.

CONCLUSION

Supplying no citations, Simpson dramatically overstates the grounds supporting her motion. The facts simply do not support her contention. Nor does she specify any. And she assigns ill-motives where none existed.

Differences do exist between Respondent's initial and final brief. However, the overwhelming majority relate to the correction of typographical errors, updating record citations, and addressing evidence Appellant omitted from the record.

The remaining changes resulted from an honest, administrative error. They were both unintentional and not substantive. As a result, the Court should deny Appellant's motion.

To the extent the Court deems remedial action necessary, Respondent asks for a chance to correct and re-file his final brief. That is the proper remedy, if any, under the instant facts.

In such a scenario, however, turnabout is fair play. The same remedy should obtain as to both Parties. However, the entirety of such issues seem much ado about very little. Both Parties' final briefs should just remain the same and the case should simply move forward so the Court can reach the merits of the appeal.

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July 26, 2016

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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:

Respondent's Return to Appellant's Motion to Strike Landgraff's Final Brief

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July 26, 2016