

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Master-in-Equity
Joseph M. Strickland, Master

Case No. 2012-CP-40-7878
Appellate Case No. 2015-000367

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SEP 14 2016
SC Court of Appeals

Royals Portfolio, LLC, an assignee of Bank of America, N.A.,
formerly known as NationsBank, N.A., which is Successor by
Merger to NCNB South Carolina, Respondent,

v.

Charlie Kelly and Dorothy Simpson, Appellants.

REPLY TO RETURN TO
MOTION TO STRIKE PORTIONS OF APPELLANTS' DESIGNATION AND INITIAL BRIEF
AND
TO HOLD TIME FOR RESPONDENT'S BRIEF IN ABEYANCE PENDING A DECISION ON MOTION

Appellants make three arguments to support their designation of their entire depositions:

1. Everything in a Clerk's File has been "presented to the lower court" and, therefore may be considered by an appellate court in reversing an appealed order, even if no party specifically presented that matter or asked the court to review anything in the file, specifically or generally.
2. The master actually reviewed and considered everything in the Clerk's File.
3. The master actually reviewed and considered Simpson's entire deposition.

Each of these arguments is without merit, and all of these arguments violate the fundamental purpose of the "presented to" limitation in Rule 210(c), which is to limit appellate review to matters that were actually and specifically presented to the lower court in reaching the appealed decision.

ARGUMENT

The SCACR imposes two limitations on the Record on Appeal. First, only matter that was “presented to the lower court” may be included in the Record. Rule 210(c), SCACR. This limitation creates the “universe” of permissible matter for the Record. Second, only matter that is “relevant to the appeal” may be designated for inclusion in the Record. Rule 209(b), SCACR. This limitation culls irrelevant matter from the “universe” to further limit the matter that may be put in the Record. Here, the question is the meaning and application of the “presented to” limitation.¹

I. Rule 210(c), SCACR, limits the Record on Appeal to matters that were actually and specifically “presented to the lower court.”

The meaning of a court rule is determined by applying the same analysis for determining the meaning of a statute. *Fairchild v. South Carolina Dep’t of Transp.*, 727 S.E.2d 407, 416 (S.C. 2012) (meaning of SCRCPP). Thus, the cardinal rule for interpreting Rule 210(c) and its “presented to” limitation on the Record on Appeal is to determine and give effect to the intent of the Supreme Court. *Roche v. Young Bros.*, 504 S.E.2d 311, 314 (S.C. 1998) (applying statutory construction rules). If the plain and ordinary meaning of the words used in Rule 210(c) answers the question presented in the instant “Motion to Strike” (and it does), then there is no need to interpret Rule 210(c). *Fairchild*, 727 S.E.2d at 416. If the meaning of Rule 210(c) is unclear on the question presented here, then it is necessary to determine the Supreme Court’s intent on the question

¹ “Relevancy” issues under Rule 209(b) are “back-end” questions, *i.e.*, relevancy objections are considered after the appeal in deciding whether to award costs for reproducing the “irrelevant” matter in the Record. Thus, no “relevancy” objections are presented here, but it is noteworthy that Appellants designated 54 pages of depositions but cited only 5 of those page, except for a general reference to Kelly’s deposition in its entirety. If the remaining pages of those depositions are not “cite-worthy,” it is difficult to understand how all of those pages are “relevant” under the SCACR. The “presented to” issue presented here is a “front-end” question that must be answered before production of the Record on Appeal, because it affects what may be presented to and considered by the appellate court on appeal. See *Clements v. Young*, 425 S.E.2d 63, 75 n.1 (S.C. App. 1992) (court assuming that affidavits were “presented to the lower court” because they were included in the Record on Appeal – apparently without objection – but questioning the accuracy of the record, *i.e.* the inclusion of the affidavits in the record, because the trial judge never mentioned the affidavits.). Here, the master never mentioned the Appellants’ depositions, the Appellants never asked the master to consider anything in the depositions, and the Respondent has objected to the inclusion of the depositions in the Record.

presented here. That intent must be determined in the context of the “purpose” of the rule and “with reference to the whole system of law of which [it] form[s] a part.” *Roche*, 504 S.E.2d at 314.

The plain and ordinary meaning of “presented to” is to “*offer for* observation, *examination*, or *consideration*.” American Heritage Dictionary (5th ed.) (defining “present”) (emphasis added). Thus, to have been “presented to the lower court,” the matter must have been “offered” by a party to the court for examination or consideration. Here, the only parts of the Appellants’ deposition that were “offered” to the lower court were the page and line excerpts from Appellant Simpson’s deposition that the Respondent read into the record at trial. The Appellants never offered any other part of either deposition to the court. Thus, these “page and line excerpts” were the only matter that was “presented to the lower court” and, therefore, these excerpts are the only part of the depositions that may be included in the Record on Appeal. Any citation to those parts is limited to the trial transcript, so no part of either deposition may be included in the Record on Appeal.

The foregoing analysis dovetails precisely with how the phrase “presented to the lower court” is used in “the whole system of law of which [the SCACR] form[s] a part.” *Roche*, 504 S.E.2d at 314. South Carolina’s appellate “system of law” includes error preservation rules, all of which are bottomed on the fundamental requirement that any issue raised on appeal must have first been actually and specifically “presented to the lower court.” *E.g.*, *Busillo v. City of N. Charleston*, 745 S.E.2d 142, 144-145 (S.C. App. 2013) (appellate arguments on the admission of evidence not preserved for appeal because not actually and specifically presented to the trial court). Nothing in the SCACR indicates any intent by the Supreme Court to use “presented to” in Rule 210(c) in a different manner. Thus, the Appellants’ depositions cannot be included in the Record on Appeal.

The clear purpose of the “presented to” limitation on appellate review under the error preservation rules is to protect the finality of judgments from attacks that were never presented to

the trial court in reaching the appealed decision. The “presented to” limitation in Rule 210(c) serves the same purpose by limiting the Record (and thus appellate review) to matters that were actually and specifically presented to the trial court. To hold otherwise would allow collateral appellate attacks on final judgments based on material that was never presented or offered to the trial court. Thus, the Appellants’ depositions cannot be included in the Record on Appeal.

II. Appellants’ arguments for including their depositions in the Record have no merit.

A. Appellants’ “everything in the Clerk’s File” argument has no merit.

Appellants argue that everything in the Clerk’s File has been presented to the lower court and therefore may be included in the Record on Appeal:

Filings that are part of the lower court’s record and file are “presented to the lower court” and are properly designated in a record on appeal and cited in a brief. Rule 210(c), SCACR; Rule 208(b)(4), SCACR.

(Return at 2) (emphasis added).² Nothing in Rule 210(c) or Rule 208(b)(4) supports this sweeping assertion, and Appellants cite no other authority for it. Moreover, acceptance of this argument would necessarily impose a duty on every judge in every case to review and consider every page in the Clerk’s File before issuing every order in the case. This will impose an impossible burden on an already-overburdened judiciary, and it violates the fundamental appellate practice principle that a party must actually and specifically present matters to the trial court for its consideration.³

² See also Return at 3, stating that: (1) documents filed in a case are “presented to the lower court”; and (2) matter that is “plainly part of the filed court record” may be designated for the Record on Appeal.

³ Appellants also argue that the master had the “power” to review and consider everything in the Clerk’s File, because the order of reference placed no limitation on the master’s power. (Return at 3). This is true, and Respondent has never argued otherwise, but it is not the question presented here. Rather, the question is whether the Master in fact considered the Appellants’ entire depositions or, more to the point, whether any party actually and specifically requested the master to do so. Nothing shows that the master actually considered the Appellants’ entire depositions, and no party requested the master do so. Therefore, the depositions are not includable in the Record on Appeal.

B. Appellants' "actually considered" argument has no merit.

Appellants also argue that the master actually considered the Appellants' entire depositions and, therefore, the depositions may be included in the Record on Appeal:

The Order Denying Defendants' Motion to Stay Foreclosure Action specifically states "the Court considered only **the documents filed in this case**, the testimony presented and the documents introduced at the hearing." The motion for summary judgment and attached exhibits [*i.e.*, the Appellants' depositions] are "documents filed in this case." As such, they were "presented to the lower court" and *according to [the] Order on appeal, were "considered" by the Court.*

(Return at 3) (boldfaced added in Return) (italics added). This argument is based on the boldfaced snippet from the order denying the motion to stay, and it is quoted completely out of context.

At the conclusion of the merits hearing, Appellants moved to stay the foreclosure action based "*exclusively* on the testimony at the foreclosure hearing of William Buland that the loan modification process was declined by [Respondent] because this was a 'commercial loan.'" (Order Denying Stay, Ret. Exh. D at 3) (emphasis added). After the hearing, Respondent submitted an affidavit in opposition to the motion. The master excluded this affidavit but denied the motion:

After the conclusion of the hearing, [Respondent] submitted the Affidavit of Robert Eisman in opposition to the [Appellants'] motion to stay. The Court notified the parties in a conference call on December 15, 2014, that it was excluding the Affidavit of Robert Eisman over the objection of [Respondent] and would not consider it in reaching a decision on this issue [*i.e.*, the motion the stay]. Therefore, this Court considered only **the documents filed in this case**, the testimony presented and documents introduced at the hearing. [T]he Court hereby denies the [Appellants'] motion to stay the foreclosure proceedings further.

(Return Exh. D at 1) (boldfacing by Appellants) (underlining added). In denying the motion, the master specifically relied on the "Counsel's Certificate" that was filed in January 2014. (*Id.* at 3). Nothing indicates the master considered the depositions that were filed in July 2013 as exhibits to the summary judgment motion made to the circuit court but never heard by the court or the master.

When the boldfaced snippet of “documents filed in this case” is considered in context, it is clear that the master was emphasizing that he had not considered the post-hearing affidavit filed by Respondent, and that he was considering only those matters that were relevant to the “loan modification process” demanded by Appellants. The only “filed” matter to which the master referred was the “Counsel’s Certificate.” Nothing indicates the master reviewed or considered the Appellants’ depositions in “reaching a decision on [the motion the stay].” (Return Exh. D at 1). No party ever requested the master to do so – the Appellants’ motion was based “*exclusively* on the testimony at the foreclosure hearing of William Buland.” (*Id.* at 3) (emphasis added).

In short, the boldfaced snippet quoted by the Appellants is argued by them in complete disregard of the context of that statement. When considered in context, nothing in the snippet shows that the master actually considered the Appellants’ depositions. Thus, the Appellants’ “actually considered” argument has no merit and affords no basis for including their depositions in the Record on Appeal.

C. Appellants’ “handed up” argument has no merit.

During the hearing, the Respondent published excerpts from Appellant Simpson’s deposition by reading them into the record. In doing so, the Respondent handed-up the original, sealed deposition so that the master could read along with the publication of those excerpts. This is a long-standing and time-honored process that ensures the published matter is accurate, and affords the opposing party the opportunity to publish other portions of the deposition for the court’s consideration. The Appellants, however, did not publish (or otherwise ask the master to consider) any other portions of the deposition.

Relying solely on the fact that the deposition was handed-up to the master, the Appellants argue that the entire deposition was therefore “presented to the lower court” and may be included

in the Record on Appeal. (Return at 4). This argument has no bearing on the inclusion of Appellant Kelly's deposition in the Record, because no part of his deposition was handed up or mentioned at the hearing. In arguing for the inclusion of Simpson's deposition, the Appellants argue only:

Respondent *did not provide* the Master with *only* those portions read and *did not request* that the Master consider *only* those portions read. That counsel for Respondent only read some lines of the deposition pages into the transcript *does not mean that the Master*, who followed along with a copy of the deposition transcript, *did not read or consider* other lines and pages of the deposition.

(Return at 4) (emphasis added). The Appellants have missed the point. As the proponent of including the depositions, it is the Appellants' burden to show that the entire depositions were actually and specifically "presented to the lower court." They have failed to do so. The Respondent specifically presented those portions that it wanted the master to consider. If the Appellants wanted the master to consider other portions, it was incumbent upon them to publish those portions or, at the very least, ask the master to consider the "unpublished" portions of the deposition. They did neither and, therefore, the other portions of Simpson's deposition were not "presented to the lower court" and cannot be included in the Record on Appeal.

The Appellants' argument includes the implicit assertion that the master may have read other portions of the deposition. This may be conceivable, but nothing shows the master did so, and nothing shows that a judge ordinarily would do so absent a request from a party. Thus, like their "everything in the Clerk's File" argument, the Appellants want this Court to assume that the master did so. Engaging in any such assumption necessarily imposes a duty on every judge to read the entire deposition every time any part of the deposition is published at a hearing. There is no authority for such a rule – the Appellants cite no authority for such a rule or assumption – any such rule will impose an impossible burden on an already-overburdened judiciary – and any such rule or assumption violates the fundamental appellate practice principle that a party must actually and

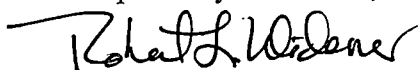
specifically present matters to the trial court for its consideration. (See also n.1, *supra*, discussing the decision in *Clements*, 425 S.E.2d 63).

In short, handing up an original deposition in conjunction with publishing excerpts from that deposition does not and cannot make the entire deposition includable in the Record on Appeal unless it is shown that that trial court actually considered the entire deposition or, at the very least, that a party asked the trial court to do so. Here, the only thing actually presented to the master were the excerpts published at the hearing. The Appellants did not publish any other portions of the deposition and did not ask the master to consider any other part of the deposition. Therefore, no part of the deposition may be included in the Record on Appeal – any citation to the published portions of the deposition should be by citation to the trial transcript, not the deposition.

CONCLUSION

The instant motion presents an important question on the scope of appellate review, and research reveals no published opinion directly on point. The plain meaning of “presented to” as used in Rule 210(c) limits the Record to matters that were actually and specifically presented to the lower court. This dovetails with the other “presented to” limitations imposed by appellate practice law, and nothing indicates the Supreme Court intended Rule 210(c) to have a different meaning. For this reason and the other reasons argued above, it is respectfully requested that this Court grant the motion and order Appellants to serve and file an amended designation and brief.

Respectfully Submitted,



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September 12, 2016
Columbia, SC

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
In the Court of Common Pleas
Joseph M. Strickland, Master In Equity

Case No. 2012-CP-40-7878
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v.


Charlie Kelly and Dorothy Simpson, Appellants.

CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of McNair Law Firm, certify that I served the **Respondent's Reply to Return to Motion to Strike Portions of Appellants' Designation and Initial Brief And to Hold Time for Respondent's Brief in Abeyance Pending a Decision on Motion**, by placing a true and correct copy in the U.S. Mail, sufficient postage pre-paid to Appellants' counsel at the addresses shown below, on September 12 2016:

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SC Court of Appeals

Honorable Jenny Abbott Kitchings
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Re: Motion to Strike Portions of Appellants' Designation and Initial Brief
And to Hold Time for Respondent's Brief in Abeyance Pending a
Decision on Motion

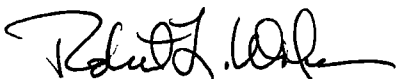
Dear Ms. Kitchings:

Enclosed for filing, please find the original and seven copies of the Respondent's Reply To Return to Motion to Strike Portions of Appellants' Designation and Initial Brief and to Hold Time for Respondent's Brief in Abeyance Pending a Decision on Motion. Please file the Reply in your office and return the file stamped extra copy to me in the return envelope provided. By copy of this letter, we are serving counsel for Appellants with a copy of the Reply.

Thank you for your assistance in this matter.

Respectfully yours,

McNAIR LAW FIRM, P.A.



Robert L. Widener

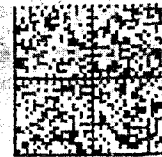
RLW/as
Enclosures

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