THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal No. 2016-001063

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

CASE NUMBER 2009-CP-26-3596

Ronald Jarmuth Appellant,

v.

The International Club Respondent

APPELLANT'S REPLY TO RESPONDENT'S RETURN TO APPELLANT'S MOTION TO LIMIT THE RECORD ON APPEAL

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1. Appellant Ronald Jarmuth replies to Respondent's return to Appellant's Motion to Limit the Record on Appeal – to exclude extraneous material never before the trial court and which is immaterial to the matter on appeal.

2. There is only Appellant's Appeal. There is no cross appeal. As Courts have consistently held the Record on Appeal must contain only material actually presented at the trial court level, and which is actually material to determining the issues set before the Court of Appeals by Appellant.

3, The Respondent has no burden to prove anything.

4. The Respondent is prohibited from raising arguments or citing documents not raised to / set before the trial court.

5. Respondent seeks to set before the Court of Appeals, in the Record on Appeal, twenty eight (28) documents never before the trial court. Six (6) of those documents are not even to be found in the Horry County Courthouse and are not to be found in the docket of the case below. Most of these documents were not even mentioned in Respondent's pre-hearing Memo, nor by anyone during the hearing, nor in the Order following the hearing. Amazingly, the last of those documents that Respondent seeks to include was excluded by the Judge at the Hearing – at the Request of the Respondent!

6. The fact that Respondent's Initial Response Brief does not cite to a single page, paragraph, or word of these twenty six (26) documents in support of Respondent's arguments makes Respondent's demand for their inclusion even more outrageous. In support of inclusion Respondent advances some theories which are diametrically opposed to the controlling rules of appellate procedure:

(a) That Respondent can designate anything that Respondent has a mind to state, citing a comment by Hon. Justice Toal which was not stated in a court opinion (Respondent at P.2 top, "Argument").

(b) That while the documents were not before the court at the hearing, they establish "I ... procedural history" (Respondent's Brief, p.2).

(c) That they are collaterally "II ... Related to 2012 Post-Trial Motions" although these were never before the Court at the 2016 hearing nor were they mentioned in Respondent's Pre-Hearing Memo, nor mentioned during the hearing, nor in the Order following the hearing which is under appeal.

(d) That the Respondent is allowed to introduce, for the first time at the appeal, impeachment evidence that was not before the trial court at the hearing, that was not in Respondent's Pre-hearing Memo, and that was absent from the Order following the hearing (Respondent, P3 "Oppose New Arguments").

7. In Respondent's Return, Respondent does not even attempt to show where Appellant was in the least bit incorrect about why any of the documents should be excluded. The Return does not even attempt to justify the inclusion of a single one for cause specific to any particular document. The argument is that "Respondent wants to include an additional 892 pages [1] which is almost triple the number of pages of documents which belong in the Record on Appeal and the Court should allow it "because Respondent says so".

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1 As a test, Appellant assembled a PDF including every one of the twenty eight documents to determine what the burden would be.

The Controlling Rule

8. a. SCRAP Rule 210 (c) provides that

> **"The Record shall not, however, include matter which was not presented to the lower court".**

Respondent's Return does not show where a single one of the twenty eight challenged documents was "presented to the lower court".

b. SCRAP Rules 209 (b) which provides that

> **"A party shall not include any matter in his designation which is not relevant to the appeal"**

The Twenty Eight Documents Were Never Before the Court

9. For the purpose of being able to compare this analysis with the Respondent's Designation and with Appellant's List of Documents to be Excluded, Appellant (below) includes documents (with the phrase "included in RoA by Appellant") which Appellant agrees belongs in the Record on Appeal. Thus the numbering is identical in this and the other two lists.

Here's why these twenty eight documents do not belong in the Record on Appeal:

ORDERS

a. Order transferring Case 201O-CP-26-11320 from Magistrate's Court to Circuit Court - December 1, 2010

> **No citation to a single word in this order in Respondent's trial court memo, at the hearing, nor in the final order. No conclusions of law nor findings of fact citing this Order.**

Respondent's Pre-Hearing Memo is silent on the Order Transferring.

Hearing: Respondent mentioned it existed, without citing how it has anything to do with the matter before the Court. Transcript Respondent P19 @7-9 "The Association moved to dismiss based on lack of subject matter jurisdiction, and the case was transferred to Circuit Court". [Respondent argued that Appellant's claim exceeded the statutory limit for a magistrate court].

Final Order: Mentioned in passing without assigning any factual or legal relevance:
P3 @ 6. "The Magistrate's Court transferred the 2010 Case to circuit court by order dated November 30, 2010 and filed on December 1, 2010."
P3 @7. "After the 2010 Case was transferred, it was consolidated with the 2009 Case by order dated August 29, 2011 and filed September 16, 2011."

The Order transferring was not in evidence at the hearing.

b. Order Consolidating Case 2009-CP-26-3596 ("2009 Case") & Case 2010-CP-26-11320 ("2010 Case") - September 16, 2011

No citation to a single word in this order in Respondent's trial court memo, at the hearing, nor in the final order. No conclusions of law nor findings of fact citing this Order.

Respondent's Pre-Hearing Memo is silent on the Order Transferring.

Final Order: Mentioned in passing without assigning any factual or legal relevance:
P20 @ 9-11 "After that case was transferred, the case was consolidated with 2009-CP-3596,"
P3 @ 7. "After the 2010 Case was transferred, it was consolidated with the 2009 Case by order dated August 29, 2011 and filed September 16, 2011."

The Order was not before the Court at the hearing.

c. Order granting HOA Leave to Amend Answers to Assert Counterclaims - October 11, 2011

Not a word about this in Respondent's pre-hearing memo nor in the final order. Not a word about this mentioned at the hearing.
The Order was not before the Court at the hearing.

d. [included in RoA by Appellant]

e. [included in RoA by Appellant]

f. [included in RoA by Appellant]

g. Order Denying Jarmuth's Post-Trial Motions - March 11, 2013

Not a word about this in Respondent's pre-hearing memo nor in the final order. Not a word about this mentioned at the hearing.
The Order was not before the Court at the hearing.

h. [included in RoA by Appellant]

i. [included in RoA by Appellant]

j. [included in RoA by Appellant]

k. Appellate Court Remittitur - January 21, 2016

Neither the Remittitur nor the Appellate Court Order were before the court at the hearing.

Respondent's pre-hearing Memo made did not cite anything in this Order that had any evidentiary or legal applicability. The Remittitur was mentioned in passing" Memo P.4: "The remittitur was issued on January 21, 2016" and at P5 "Upon the issuance of the remittitur, an appealed order becomes the law of the case "

Hearing: Respondent mentioned it as a historic occurrence without citing where there was any legal or factual relevance: Transcript –

P21 @ 19-21 "The case -- the final order in the two cases was affirmed on appeal and then the remittitur was issued on January 21st, 2016."

The Final Order likewise did not assign this any factual or legal significance

P5 @ 18. "The remittitur was issued on January 21, 2016."

P6 @ 2. "Upon the issuance of the remittitur, an appealed order becomes the law of the case"

P7 @ 7. "Because the findings in the Final Order were affirmed on appeal, they became the law of the case once the remittitur was issued"

l. [included in RoA by Appellant]

m. [included in RoA by Appellant]

PLEADINGS

a. [included in RoA by Appellant]

b. [included in RoA by Appellant]

c. 2009 Case Jarmuth's Reply to Counterclaim - May 15, 2009

Not a word about this in Respondent's pre-hearing memo nor in the final order. Not a word about this mentioned at the hearing.

The Reply was not before the Court at the hearing.

d. 2009 Case Jarmuth's Amended Complaint - May June 9, 2009

Not a word about this in Respondent's pre-hearing memo nor in the final order. Not a word about this mentioned at the hearing.
The Amended Complaint was not before the Court at the hearing.

e. 2009 Case HOA Answer to Amended Complaint and Answer - June 19, 2009

The HOA's 2009 Answer was not before the Court at the hearing.

Not a word about this in Respondent's pre-hearing memo. Not a word about this mentioned at the hearing.

The Final Order mentioned it as a historic fact without assigning it

any factual or legal significance.

P3 @ 2 "The Association filed an Answer on May 13,2009 and asserted a counterclaim for attorneys' fees and costs"

f. 2009 Case Jarmuth's Reply to Counterclaim - July 2, 2009

The Reply was not before the Court at the hearing.

Not a word about this in Respondent's pre-hearing memo nor in the final order. Not a word about this mentioned at the hearing.

g. [included in RoA by Appellant]

h. [included in RoA by Appellant]

i. 2009 Case HOA Motion to Amend Counterclaim - August 26, 2011

The HOA Motion was not before the Court at the hearing.

Not a word about this in Respondent's pre-hearing memo nor in the final order. Not a word about this mentioned at the hearing.

j. 2010 Case HOA Motion to Amend Counterclaim - August 26, 2011 (duplicate of #i)

The HOA Motion was not before the Court at the hearing.
Not a word about this in Respondent's pre-hearing memo nor in the final order. Not a word about this mentioned at the hearing.

k. [included in RoA by Appellant]

l. 2010 Case HOA Amended Answer and Counterclaim - October 24, 2011 (same as #k) thus [included in RoA by Appellant]

The HOA's 2010 Amended Answer was not before the Court at the hearing.

All references to the HOA's Counter – Claim and to Appellant's Answer to it relate to the HOA's Amended Answer (and Counter – Claim) to the 2009 Complaint.

Appellant's Exhibit #8 at the hearing, RoA P. 243, is an extract of the HOA's Counter – Claim in the 2009 Complaint. Appellant's Answer, RoA P.248, is to the 2009 Counter – Claim. All of Appellant's

testimony related to the 2009 documents.

At the hearing respondent referred to the counter – claim in generic terms:
P20 @ 16-17 "After that the answer was amended by the Association to, to assert a counterclaim and in -- two counterclaims"
P21 @ 102 "as asserted in paragraph 53 of the amended answer and counterclaim." this being the 2009 complaint. Never cited to a paragraph in Respondent's counter claim to the 2010 complaint.

The Final Order likewise referred to the 2009 documents:
P3 @ 8: "Thereafter, the Association filed an Amended Answer and Counterclaim, with leave by this court, on October 24, 2011 seeking a declaratory judgment"
P4 @10 " Jarmuth admitted paragraph 53 establishing that this Court has jurisdiction over the Counterclaim", The parallel allegation in the 2010 counter-claim was not at para 53 (in the counter – claim) thus no reference by respondent to the 2010 counter - claim.

m. [included in RoA by Appellant]

n. 2010 Case Jarmuth Reply to Amended Counterclaim - December 20, 2011 (same as #m).

This document was not before the Court at the hearing and no citations were made in Respondent's pre-hearing memo, in Respondent's testimony at the hearing, nor in the final order to any phrase in Appellant's Reply.

o. Jarmuth Post-Trial Motions - September 19, 2012

Jarmuth's Post-Trial Motion was not before the Court at the hearing. Not a word about this is to be found in Respondent's pre-hearing memo nor in the final order. Not a word about this was mentioned at the hearing.

p. **Jarmuth Memo in Support of Post-Trial Motion - January 22, 2013.**

Jarmuth's Memo was not before the Court at the hearing. Not a word about this is to be found in Respondent's pre-hearing memo nor in the final order. Not a word about this was mentioned at the hearing.

q. **[included in RoA by Appellant]**

r. **Jarmuth Final Appellate Brief - No. 2013-000614 - July 22, 2013**

No document from the Appeal was / is in the Horry County Courthouse. Jarmuth's Final Appellate Brief was not before the Court at the hearing.
Not a word about this is to be found in Respondent's pre-hearing memo nor in the final order. Not a word about this was mentioned at the hearing.

s. **Jarmuth Appellate Motion for Rehearing - March 12, 2015**

No document from the Appeal was / is in the Horry County Courthouse. Jarmuth's Appellate Motion was not before the Court at the hearing.
Not a word about this is to be found in Respondent's pre-hearing memo nor in the final order. Not a word about this was mentioned at the hearing.

t. **Jarmuth Trial Court Motion for Civil Contempt (Perjury of HOA Witness) - March 17, 2015 (pending)**

Jarmuth's Contempt Motion was not before the Court at the hearing. Not a word about this is to be found in Respondent's pre-hearing memo nor in the final order. Not a word about this was mentioned at the hearing.

The matter on appeal was heard by Hon. Benjamin Culbertson, Circuit Court Judge. The Civil Contempt matter was scheduled to be

heard at a later date by the Chief Administrative Judge, Hon. Steven John, but on May 31, 2016 Hon. Judge John entered an order that this matter will be deferred and was never heard.

u. Jarmuth Trial Court Amended Motion for Civil Contempt (perjury by HOA witness) - June 10, 2015 (pending)

Jarmuth's Amended Contempt Motion was not before the Court at the hearing.

Not a word about this is to be found in Respondent's pre-hearing memo nor in the final order. Not a word about this was mentioned at the hearing. It likewise has been deferred by Order of the Chief Administrative Judge.

v. HOA Appellate Return to Motion for Rehearing - March 24, 2015

No document from the Appeal was / is in the Horry County Courthouse. The HOA's Appellate Return was not before the Court at the hearing.

Not a word about this is to be found in Respondent's pre-hearing memo nor in the final order. Not a word about this was mentioned at the hearing.

w. Jarmuth Appellate Reply, Motion for Rehearing - March 27, 2015

No document from the Appeal was / is in the Horry County Courthouse. Jarmuth's Appellate Reply was not before the Court at the hearing.

Not a word about this is to be found in Respondent's pre-hearing memo nor in the final order. Not a word about this was mentioned at the hearing.

x. Jarmuth SC Supreme Court Petition for Writ of Certiorari - May 12, 2015

No document from the Petition was / is in the Horry County Courthouse. Jarmuth's Petition was not before the Court at the

hearing.

Not a word about this is to be found in Respondent's pre-hearing memo nor in the final order. Not a word about this was mentioned at the hearing.

y. HOA Return to SC Supreme Court Petition for Writ of Certiorari - June 12, 2015

No document from the Petition was / is in the Horry County Courthouse. The HOA's Return was not before the Court at the hearing.

Not a word about this is to be found in Respondent's pre-hearing memo nor in the final order. Not a word about this was mentioned at the hearing.

z. Jarmuth Rule 60(b)(2) and (3) Motion for Relief (Extrinsic Fraud by HOA Attorney) from Judgment - January 22, 2016 (pending)

Jarmuth's Rule 60(b) Motion was not before the Court at the hearing.

Not a word about this is to be found in Respondent's pre-hearing memo nor in the final order. Not a word about this was mentioned at the hearing.

The matter on appeal was heard by Hon. Benjamin Culbertson, Circuit Court Judge. The Rule 60(b) matter was scheduled to be heard at a later date by the Chief Administrative Judge, Hon. Steven John, but on May 31, 2016 Hon. Judge John entered an order that this matter will be deferred and was never heard.

aa. Jarmuth Amended Rule 60(b)(2) and (3) Motion for Relief (Extrinsic Fraud) from Judgment - February 1, 2016

Jarmuth's Rule 60(b) Amended Motion was not before the Court at the hearing.

Not a word about this is to be found in Respondent's pre-hearing memo nor in the final order. Not a word about this was mentioned at the hearing.

The matter on appeal was heard by Hon. Benjamin Culbertson, Circuit Court Judge. The Rule 60(b) matter was scheduled to be heard at a later date by the Chief Administrative Judge, Hon. Steven John, but on May 31, 2016 Hon. Judge John entered an order that this matter will be deferred and was never heard.

bb. William Frieboth's (HOA Witness) Memorandum in Opposition to Jarmuth's Motion for Civil Contempt - March 3, 2016 (pending)

Like the related pleadings, this Memo was never before the Court and was scheduled for hearing before a different Circuit Court Judge. By order, the matter has been deferred. No reference to this Memo is to be found in the HOA's pre-hearing Memo, in their testimony at the hearing, nor in the final order.

It would have questionable evidentiary value because Mr. Freiboth has absented himself from the state after having been served a civil contempt summons – naming him – by the Horry County Sheriff.

cc. [included in RoA by Appellant]

dd. HOA Memo in Opposition to Jarmuth Rule 60(b)(2) and (3)Motion for Relief from Judgment (Extrinsic Fraud) - March 3, 2016 (pending)

The HOA's Memo in Opposition was not before the Court at the hearing.

Not a word about this is to be found in Respondent's pre-hearing memo nor in the final order. Not a word about this was mentioned at the hearing.

The matter on appeal was heard by Hon. Benjamin Culbertson, Circuit Court Judge. The Rule 60(b) matter was scheduled to be heard at a later date by the Chief Administrative Judge, Hon. Steven John, but on May 31, 2016 Hon. Judge John entered an order that this matter will be deferred and was never heard.

ee. [included in RoA by Appellant]

ff. [included in RoA by Appellant]

gg. Jarmuth Memorandum in Support of Rule 12(b)l/Rule 60 Motion to Dismiss Counterclaim No Subject Matter Jurisdiction - April 27, 2016

> **The document was not before the court at the hearing. It was excluded at the request of Appellant (HOA):**
>
> **"Ms. Thompson: This morning Mr. Jarmuth provided me with a memorandum in support of his motion to dismiss that challenged 25 other conclusions of law in the final order in the 2009 and 2010 cases. I just ask that the motion this morning be limited to the arguments in the motion that was made and filed. ...**
> **THE COURT: All right. Let me look at his motion" Transcript p4.**
>
> **There is no reference to this document in Respondent's Pre-hearing memo, nor by Respondent at the hearing, nor in the final order.**

Applicable Case Law

10. The purpose of the Record on Appeal is not to give the Respondent a second chance to re-litigate the issues on appeal. Rather, the Record on Appeal brings the same documents (and no more) that were before the trial court to the Court of Appeals for consideration of the arguments set before it by the Appellant. The Court in Beverly S. v. Kayla R., 395 S.C. 399, 401-02, 718 S.E.2d 224, 225-26 (Ct. App. 2011 stated that the Record on Appeal provides "sufficient for intelligent review" of the decision by the trial court.

11. Respondent is mistaken when it argues that Rule 210(h) SCACR [2] means that Respondent can insert anything it wants. The Court has uniformly held that the rule should be read as if it says "so long as the matter was actually before the

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2 "The appellate court will not consider any fact which does not appear in the Record on Appeal."

trial court below". See Hill v. S.C. Dep't of Health & Envtl. Control, 389 S.C. 1, 21, 698 S.E.2d 612, 623 (2010) (stating "a matter may not be raised for the first time on appeal"). In Goldstandt v. Goldstandt 1924 OK 520 228 P. 770 102 Okla. 218 Case Number: 14749 Decided: 05/07/1924 Supreme Court of Oklahoma the court noted "and as this theory was not presented to the lower court, it is not available here".

The role of the Respondent is not to make a new argument proving that the trial court decided correctly but rather, using the documents that were before the trial court, disprove the argument of the Appellant. In Harkins v. Greenville County, 340 S.C. 606, 616, 533 S.E.2d 886, 891 (2000) the Court noted that the Record on Appeal is to decide the arguments raised by the Appellant. The Court held likewise in State v. Mitchell, 330 S.C. 189, 199, 498 S.E.2d 642, 647 (1998).

In Morris v. Tidewater Land & Timber 696 S.E.2d 599 (S.C. Ct. App. 2010 the Court held that where the Briefs do not contain a citation to a relevant portion of a document, the document is irrelevant to the determination by the Court of Appeals. In State v. White, 372 S.C. 364, 642 S.E.2d 607 (Ct. App. 2007 the Court held that "matter which was not presented to the lower court or tribunal ... cannot be properly included in the Record on Appeal." (affirmed on Certiorari by the S.C. Supreme Court).

A great number of reported cases in South Carolina for at least forty years have emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration before raising them in the Court of Appeals. Facts, issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court. 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."); Long v. Dunlap, 87 S.C. 8, 68 S.E. 801 (1910) (Supreme Court will not consider any point which was not presented and considered below unless it involves jurisdiction of the court); Gaffney v. Peeler, 21 S.C. 55 (1884) (question of law which was not presented to or passed upon by the trial court cannot be raised on appeal). See also Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). In Polson v. Burr 235 S.C. 216 (1959); 110 S.E.2d 855 the Supreme Court of South Carolina held that when "for some unexplained reason" a party does not include a controlling document as evidence actually before the trial court, it may not be provided to the appellate court in deciding the matter stating that in such an instance we can not "properly consider the merits" of the effect of the omitted (below) document at the appeal.

(continued on next page)

CONCLUSION

12. Conclusions.

a. The documents which Appellant seeks to exclude were never before the trial court at the hearing and thus must be excluded by virtue of SCRAP Rule 210 (c).

b. The Response Brief does not depend on any of the contested documents to state relevant facts or arguments and thus the contested documents must be excluded by virtue of SCRAP Rules 209 (b).

c. The contested documents do not relate to the arguments actually made in the pre-hearing briefs and at the hearing and thus constitute matters raised for the first time on appeal and thus must be excluded.

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