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
Appellate Case No. 2015-000367

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.

RESPONDENT'S RETURN TO APPELLANTS' MOTION TO STRIKE PORTIONS OF RESPONDENT'S DESIGNATION AND INITIAL BRIEF

Robert L. Widener
Paul D. Harrill
McNAIR LAW FIRM, P.A.
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800

Attorneys for Respondent

INTRODUCTION

This is a mortgage foreclosure case. Appellants have moved to strike two paragraphs from the "Background Facts and Procedural History" section in the Initial Brief of Respondent and the materials cited in those paragraphs. Those paragraphs recite the undisputed facts that establish the current status of this foreclosure action, including the sale of the mortgaged property:

> Debtors [*i.e.*, the Appellants] appealed in February 2015 and thereafter moved before the trial court in April 2015 to stay the foreclosure sale. (Notice of Appeal; Motion to Stay Foreclosure Sale). The only bond or undertaking offered by the Debtors was their "affidavits of undertaking," wherein they personally promised to pay all amounts due if their appeal was unsuccessful. (Affs. att'd to Motion to Stay). The trial court denied this motion. (Order Denying Motion to Stay Sale). Debtors did not seek an order of supersedeas or stay from this Court. Debtors do not appeal the denial of their motion to stay the sale, thereby making it the law of this case. *Transportation Ins. Co. v. South Carolina Second Injury Fund*, 699 S.E.2d 687, 691-692 (S.C. 2010).
>
> The foreclosure sale was scheduled for May 4, 2015, but Appellant Simpson filed a Chapter 13 Bankruptcy Petition on May 1, 2015, thereby staying the foreclosure sale. The Trustee ultimately abandoned any interest in the subject property in this third bankruptcy, and the foreclosure sale was scheduled for December 7, 2015. Before that sale could be held, Appellant Kelly filed a Chapter 13 Bankruptcy Petition on December 2, 2015. This fourth bankruptcy was ultimately dismissed in June 2016, and the foreclosure sale was held on August 1, 2016. The successful bidder was Leonard Taylor, the husband of Appellant Simpson's sister and Appellant Kelly's daughter.

(Init. Resp. Br. at 6). Appellants do not dispute the accuracy of the foregoing paragraphs, nor do they claim any prejudice from them. (Apps. Motion, *passim*). Rather, they argue these undisputed facts are irrelevant to the appeal and should therefore be stricken from Respondent's brief and designation.[1]

[1] Appellants' individual bankruptcies also caused this appeal to be stayed on two separate occasions. (See this Court's file).

ARGUMENT

I. The challenged paragraphs are relevant, and any "relevancy" objection is premature, because such objections pertain to the recovery of costs after the appeal for printing irrelevant matter in the Record on Appeal.

The challenged paragraphs and designations establish the current, undisputed status of the foreclosure action underlying this appeal. When, as here, the appeal does not automatically stay the underlying action, this Court and the Supreme Court often inquire at oral argument about the status of the case. Thus, the challenged paragraphs are relevant.[2]

The current status of the foreclosure action is also relevant to the issue of what relief is available on appeal. Appellants ask this Court to reverse the foreclosure sale order[3] but, as established by the challenged paragraphs, the mortgaged property was sold after Appellants filed their Initial Brief of Appellant. It is thus unclear what relief Appellants seek on appeal and, at the very least, the fact that the property has been sold is relevant to this Court's consideration on what relief should be granted if Appellants prevail on appeal.[4]

In any event, as this Court knows, the question of whether designated matter is relevant is not a basis for striking the designation. Rather, relevancy objections are reserved to the end of the appeal in considering any award of costs for printing the Record on Appeal. If a respondent has caused an appellant to incur costs for printing irrelevant matter, then the appellant may recover those costs, even if the appellant does not prevail in the appeal.

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[2] Undersigned counsel has argued numerous cases before both state appellate courts over the past twenty years, and both courts routinely make this inquiry when the appeal does not stay the underlying action.

[3] Appellants conclude their Initial Brief of Appellant with the following request for relief: "[Appellants] request that the Orders denying the motion to stay and ordering the foreclosure sale be reversed, and this Court remand the case for a determination as to whether sanctions are appropriate." (Init. App. Br. at 18) (emphasis added).

[4] Appellants also seek a remand for a hearing on sanctions for alleged "bad faith."

II. The cited material is properly designated for the Record on Appeal, because it was presented to and decided by the trial judge in this case, and because it is relevant to this appeal.

It is undisputed that the challenged designations were presented to and decided by the same trial judge who issued the appealed orders, and the facts therein relate directly to the appealed orders. The designations therefore comply with the specific requirements of Rule 210(c), SCACR, which limits designations to matters that were "presented to" the trial court. Moreover, as shown earlier, the designations are relevant to this appeal. Thus, the designations are proper.

Appellants argue that these matters are not properly designated for the Record on Appeal, because they were not presented to the master for his consideration in issuing the appealed orders:

> Under Rule 210(c), SCACR, the "Record shall not, however, include matter which was not presented to the lower court or tribunal." The designated documents were *not "presented to the lower court* or tribunal" *for its review or consideration* in issuing the Orders on appeal. *Therefore*, they are not properly part of the Record on Appeal in this case.

(App. Motion at 3) (all emphasis added). Appellants, however, have already obtained the exact opposite ruling from this Court – in this appeal – that matters are "presented to the lower court" and therefore properly designated for the Record on Appeal, even if the matters "were not 'presented to the [trial judge]' for [his] review and consideration in issuing the Orders on appeal."

When Appellants filed their Initial Brief of Appellants, they designated several documents to which Respondent objected and moved to strike as being matters that were not presented to the master in reaching the appealed decisions. For example, Appellants designated the deposition of Appellant Kelly, even though it was undisputed that no part of the Kelly deposition had been presented to the master during the trial that led to the appealed orders. Kelly's deposition had been attached as an exhibit to a summary judgment motion filed by Respondent with the circuit court before the case was referred to the master. The circuit court never heard the motion and never

ruled on it before the case was referred to the master. The master never heard the motion and never ruled on it after the case was referred to him. No one presented any part of the Kelly deposition to the master at any time and, in particular, did not do so during any proceeding before the master, including the trial and post-trial proceedings.[5]

Appellants, however, successfully argued to this Court that the filing of the deposition with the circuit court prior to the reference to the master satisfied the "presented to" requirement of Rule 210(c), SCACR – so that the deposition could be designated for the Record on Appeal in an appeal from orders issued by the master – even though the deposition was never presented to the master for his consideration and review in issuing the appealed orders. Having obtained this relief from this Court in this appeal, Appellants cannot be permitted to make a contrary argument and obtain contrary relief in the same appeal.[6]

In footnote 4 of their Motion, Appellants correctly note that Respondent made the same argument in support of its earlier motion to strike that Appellants now make, *i.e.*, that designations are limited to matters presented to the trial court for its review and consideration in issuing the appealed order. Appellants argue that Respondent therefore cannot contest Appellants' use of the same argument in their current motion to strike. (App. Mot. At 3-4, n.4). Appellants miss the relevant point. Respondent lost this argument and its motion. This Court accepted Appellants' opposite argument that merely being filed with the circuit court made a designation proper, even if it was not actually presented to the master for his review in issuing the appealed orders. That same ruling must be applied here and, therefore, Appellants' motion to strike must be denied.

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[5] Appellants note that Respondent's designations were presented to the master after the appealed orders. They argue that their designations are different, because they presented their designations (which included the Kelly deposition) to the master before his appealed orders. (App. Mot. at 4, n.4). This is simply false. Appellants never presented any part of Kelly's deposition to the master at any time. Nothing shows that the master was presented with, reviewed, or considered Kelly's deposition at any time for any reason. See n.6, *infra*.

[6] This Court's file contains the following documents related to Respondent's earlier motion: (1) Respondent's Motion to Strike; (2) Appellants' Return; (3) Respondent's Reply; and (4) this Court's order denying the motion to strike.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny Appellants' motion to strike.

Respectfully Submitted,

Robert L. Widener
Paul D. Harrill
McNAIR LAW FIRM, P.A.
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800

ATTORNEYS FOR RESPONDENT

Columbia, SC
Jan. 3, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
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Joseph M. Strickland, Master In Equity

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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,

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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 Return to Appellants' Motion to Strike Portions of Respondent's Designation and Initial Brief**, by placing true and correct copies in the U.S. Mail, sufficient postage pre-paid to Appellants' counsel at the addresses shown below, on January 3, 2017:

Kathleen C. Barnes, Esquire
BARNES LAW FIRM, LLC
Post Office Box 897
Hampton, SC 29924

Brian L. Boger, Esquire
Phillip A. Curiale, Esquire
THE LAW OFFICE OF BRIAN L. BOGER
Post Office Box 65
Columbia, SC 29202

Ann Shuler

McNAIR
ATTORNEYS

January 3, 2017

Robert L. Widener
SC Bar No. 6089

rwidener@mcnair.net
T 803.799.9800
F 803.753.3278

Honorable Jenny Abbott Kitchings
Clerk of Court
S.C. Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Royals Portfolio, LLC -v- Charlie Kelley and Dorothy Simpson
Appellate Case No. 2015-000367

Dear Madam Clerk:

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

Thank you for your assistance in this matter.

Respectfully yours,

McNAIR LAW FIRM, P.A.

Robert L. Widener (as)

Robert L. Widener

RLW/as
Enclosures

cc: Kathleen C. Barnes Esquire
Brian L. Boger, Esquire

McNAIR LAW FIRM, P.A.
1221 Main Street
Suite 1800
Columbia, SC 29201

Mailing Address
Post Office Box 11390
Columbia, SC 29211

mcnair.net

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MCNAIR ATTORNEYS

McNair Law Firm, P.A.
Post Office Box 11390
Columbia, SC 29211
www.mcnair.net

Honorable Jenny Abbott Kitchings
Clerk of Court
S.C. Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

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