

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

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

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 in Merger to NCNB South Carolina, Respondent,

v.

Charlie Kelly and Dorothy Simpson,..... Appellants.

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

Appellants Charlie Kelly and Dorothy Simpson ("Appellants") submit this Reply to Respondent Royals Portfolio, LLC's ("Respondent") Return to Appellants' Motion to Strike Portions of Respondent's Designation and Initial Brief. For the reasons stated below, and those stated in Appellants' motion, the Court should strike the designated documents¹ and all reference to or discussion of those documents in Respondent's brief.

I. The Designated Documents were Not "Presented to" the Lower Court within the Meaning of the Appellate Court Rules

Under Rule 210(c), SCACR, only documents "presented to the lower court" may be included in the record on appeal. Appellants maintain that "presented to the lower court" means documents presented to the court prior to its issuance of the order(s) on appeal. Respondent

¹ The phrase "designated documents" has the same meaning specified in Appellants' motion. (App. Mot. to Strike p. 3).

disagrees, arguing without citation to any authority, that any document filed with the lower court at any time after the issuance of the orders on appeal (and presumably up until a decision is issued by any appellate court) may be included in the record on appeal. This is incorrect and contrary to established appellate practice.

“A party should designate only those materials which are essential to understanding and deciding the issues on appeal.” Jean Hoefler Toal et al., Appellate Practice in South Carolina 406 (3d ed., South Carolina Bar 2016).

Contrary to Respondent’s assertion, this motion is unrelated to Respondent’s prior motion to strike in this case because the issue in Respondent’s motion was whether documents filed with the Court prior to the hearing at issue on appeal and the orders at issue on appeal were presented to the Court within the meaning of Rule 210, SCACR. In Appellants’ pending motion to strike, the issue is whether documents filed after the issuance of the orders on appeal and after the filing of the notice of appeal may be included in the record. The implications of an order permitting parties to designate documents filed after the issuance of the orders on appeal and after the filing of the notice of appeal are significant. For example, when filings in the lower court continue while a case is on appeal, some documents that may not be filed with the lower court when the appellant files its initial brief may be filed by the time the respondent files its initial brief, or documents may not be filed when the respondent files its initial brief but may be filed when the appellant files its reply brief. Under either of these scenarios the party filing later in time may designate and discuss matters which the other party did not have available to it when it filed its briefs. *See* Rule 209(a), SCACR (“***At the same time a party serves his initial brief(s)*** under Rule 208, to include a reply brief, he shall also serve on all parties to the appeal a Designation of Matter to be Included in the Record on Appeal”) (emphasis added). Taken a step further, a party may attempt to include

additional documents filed with the lower court after this Court issues its opinion but before the remittitur is sent down or the Supreme Court grants certiorari.

In the pending motion to strike, it is undisputed that the lower court could not have considered the designated documents at issue in coming to the decisions on appeal in this case. Therefore, they should not affect this Court's decision on the merits of the issue of the interpretation of Supreme Court Administrative Order No. 2011-05-02-01 and whether Respondent complied with that Order.

II. The "Relevancy" of the Designated Documents is Not Dispositive and, Regardless, They are Not Relevant to the Issues on Appeal

Whether the documents are relevant to the issues on appeal is not dispositive of whether they are permitted as part of the Record on Appeal. The first question is whether they are presented to the lower court. If not, then any alleged relevancy does not save the designation.

The relevancy reference in Rule 209(b), SCACR, refers to the parties' obligation to designate only those documents from the case below (presented to the lower court before the issuance of the orders on appeal) that are "absolutely essential" to this Court's decision. Jean Hoefler Toal et al., Appellate Practice in South Carolina 406 (3d ed., South Carolina Bar 2016).² There is no need to lengthen the record and force this Court to read documents that cannot affect its decision. *See Id.* at 423 ("[A]ppellate judges, justices, and their clerks read the entire record."). If the Court, upon reviewing the pertinent documents and briefs, desires to know the current status

² "This simple [relevancy] requirement is clearly set forth in the Rules, yet lawyers often take the so-called 'kitchen sink' approach, wherein they include every piece of information from the case below when they compile the record. Aside from violating the Rules, the 'kitchen sink' approach requires the reader to sort through items that have nothing to do with the appeal. . . . When the parties honor Rule 209(b)'s requirement to limit the record to what is absolutely essential, the readers—appellate court judges as well as their law clerks—are able to quickly ascertain the facts the parties view as critical to their respective positions." Jean Hoefler Toal et al., Appellate Practice in South Carolina 407 (3d ed., South Carolina Bar 2016).

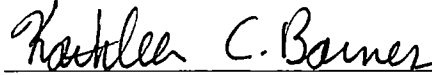
of the foreclosure, it may ask the parties for such information. Unless and until that happens, the designated documents are not properly part of the record, are irrelevant, and should be stricken.

CONCLUSION

For the reasons stated above and in Appellants' motion, Appellants request the Court grant their motion to strike and order that their reply brief and counter-designation shall be served and filed within 10 days after Respondent serves its amended designation and brief.

January 6, 2017

Respectfully submitted,



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v.

Charlie Kelly and Dorothy Simpson, Appellants.

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing *Appellants' Reply to Respondent's Return to Appellants' Motion to Strike Portions of Respondent's Designation and Initial Brief* has been served upon the following counsel of record by mailing one copy by United States Mail, addressed as shown below this 6th day of January, 2017.

Robert L. Widener
Paul D. Harrill
McNair Law Firm, P.A.
Post Office Box 11390
Columbia, South Carolina 29211

January 6, 2017


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Kathleen C. Barnes
Admitted: Georgia | South Carolina

January 6, 2017

The Honorable Jenny Abbott Kitchings
Clerk of Court for the Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RECEIVED
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Via U.S. Mail


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

Dear Mrs. Kitchings:

Enclosed for filing please find the original and seven copies of Appellants Charlie Kelly and Dorothy Simpson's Reply to Respondent's Return to Appellants' Motion to Strike in the above-referenced case. Also enclosed is proof of service. Please file the documents and return a file-stamped copy to me in the enclosed self-addressed, stamped envelope.

By copy of this letter, I am serving all counsel of record with a copy of the same. If you have any questions, please do not hesitate to contact me. Thank you.

Sincerely,



Kathleen C. Barnes

Enclosures

cc: Robert L. Widener
Paul D. Harrill
Brian Boger (via email only)
Phillip Curiale (via email only)

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