

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Appellate Case No. 2016-002487

RECEIVED

MAY 30 2017

SC Court of Appeals

Cassandra M. Myers and Bartholomew Myers
in their capacity as Co-Personal Representatives
of the Estate of Evan Morris Myers,Appellants,

v.

The Consolidated Employee Recreation Clubs, a
non-profit organization a/k/a Pine Island Club
at Lake Murray, South Carolina Electric and Gas
Holding Company, Inc.; SCANA Respondents.

**RESPONDENTS' REPLY TO
APPELLANTS' RETURN TO MOTION TO DISMISS APPEAL,
OR IN THE ALTERNATIVE, MOTION TO STRIKE**

TO: THE HONORABLE JUDGES OF THE SOUTH CAROLINA COURT
OF APPEALS:

Pursuant to Rule 231, SCACR, Respondents The Consolidated
Employee Recreation Clubs, a non-profit organization a/k/a Pine Island Club

at Lake Murray, South Carolina Electric and Gas Holding Company, Inc., and SCANA (“Respondents”) moved for an order dismissing the above-captioned appeal. In the alternative, Respondents moved pursuant to Rules 209(b) and 210(c), SCACR for an order striking from Appellants Cassandra M. Myers and Bartholomew Myers in their capacity as Co-Personal Representatives of the Estate of Evan Morris Myers (“Appellants”) certain materials designated by Appellants and requiring Appellant to file an amended initial brief omitting all references to the disputed items. Respondents further moved for an Order imposing sanctions upon Appellants based on Appellants’ continued failure to comply with the Appellate Court Rules.

On or about May 22, 2017, Appellants filed their Return to Respondents’ Motion to Dismiss or in the Alternative, Motion to Strike.

Respondents offer the following in reply.

I. Only Certain Interrogatories Are Part of the Circuit Court Record

Appellants aver their Initial Brief includes only references to interrogatory responses that were previously **stated** in their Memorandum of Law in Response to Respondents’ Motion to Summary Judgment. Appellants attached to their Return as Exhibits D & E their memorandum of law and

initial brief.

Appellants' contention abrogates the Court's rules regarding evidence and records on appeal. Appellants simply referenced interrogatories in their memorandum without including the interrogatory answers as exhibits. The Circuit Court never reviewed the interrogatories identified in Appellants' memorandum of law.¹ Indeed, Appellant did not even put into the text of their memorandum of law the interrogatories and responses.

Further, Appellants contend the trial court "incorporated the very same information provided by these answers in the Order from which this appeal is taken[,]" and, therefore, it is clear the Circuit Court reviewed and relied upon the interrogatories and responses cited in Appellants' Memorandum of Law. However, again, Appellants fail to recognize that the interrogatories and responses were never submitted to the Circuit Court as an exhibit for proper review by the Circuit Court. Indeed, the briefing alone provided the content upon which the Circuit Court relied in its Order.

¹ Respondents again concede that a limited number of interrogatories were submitted to the Circuit Court for review subsequent to the hearing on Respondents' motion for summary judgment. The interrogatories were submitted via email correspondence to the trial court in support of its argument made in response to the Circuit Court's inquiry on a specific matter.

It is clear from the record the Circuit Court never reviewed the interrogatories and responses because the same were not submitted as exhibits for the Circuit Court's review. Yet, Appellants now desire this Court to review evidence not considered by the Circuit Court—i.e., interrogatory responses. Such consideration is contrary the Court's rules. See Rule 210(c), SCACR (“The Record shall not, however, include matter which was not presented to the lower court or tribunal.”).

Accordingly, Respondents' maintain that with the exception of the limited number of interrogatories presented to the Circuit Court post-hearing, Appellants' have failed to comply with Rules 209 and 210, SCACR. Appellants continued failure to properly comply with the Court's rules and previous order warrants dismissal of the appeal. See Henning v. Kaye, 307 S.C. 436, 415 S.E.2d 794 (1992); see also Rule 260, SCACR.

II. Mandy Bellamy's Entire Deposition Transcript is Not Part of the Circuit Court Record

Appellants maintain that the entire deposition transcript of Mandy Bellamy was presented to the Circuit Court for consideration. Specifically, Appellants aver counsel presented a binder to the Circuit Court during the

hearing containing several documents, including the entire transcript of Mandy Bellamy's deposition.

However, the proper mechanism for submission of documents to be included in the Circuit Court record is by a party's exhibits or a Court's exhibit. The binder was never submitted nor identified as an exhibit by Appellant or as a Court's exhibit.

Accordingly, it is not clear the binder was in fact considered by the Circuit Court. Consequently, the binder and its contents are not part of the Circuit Court record. Any of the contents of the binder cannot now be considered by this Court.

III. The Consolidated Employee Recreations Clubs Bylaws Are Not Part of Circuit Court Record

Appellants contend that because the Consolidated Employee Recreations Clubs Bylaws were cited in their Initial Brief, and were originally designated in their Designation of Matter under "any other document cited in Appellants' Initial Briefs," such is part of the Record and should be considered by this Court.

As articulated above, simply referencing materials and documents in a memorandum of law or Initial Brief does not conclusively designate a matter

as part of the Record. See generally Norris v. Ferre, 315 S.C. 179, 432 S.E.2d 491 (Ct. App. 1993) (holding the record may not be supplemented with matters not presented to the trial judge). The Consolidated Employee Recreation Clubs Bylaws was not independently submitted to the Circuit Court for review as an exhibit to Appellants' memorandum of law or as a supplemental exhibit at the hearing. Such documents and matters not presented to the Circuit Court cannot now be given any substantive consideration on appeal. See Reed v. Becka, 333 S.C. 676, 511 S.E.2d 396 (Ct. App. 1999).

IV. Respondents' Motion is Meritorious and is Not a Delay Tactic

Finally, Appellants maintains that Respondents "are clearly taking every effort possible to delay this Court from reviewing the issues on their merits." (Appellants' Return, p. 4). Appellants further contend that Respondents' motions are meritless.

Despite Appellants' contentions, Respondents' desire is to ensure only proper matters are considered by the Court. An inclusion of matters not presented to the Circuit Court, but possibly considered by this Court, could gravely prejudice Respondents and is completely contrary to the rules of appellate practice in South Carolina.

Respondents initially filed a motion to strike certain matters in Appellants' designation of matter that were clearly not part of the Circuit Court record. The Court agreed with Respondents and granted the motion to strike. The Court directed Appellants to file an amended designation of matter removing certain matters.

Though this Court's April 6, 2017, Order provides clear direction to Appellants of what matters to include in their Amended Designation of Matter, Appellants have seemingly defied this Court's Order. Appellants continue to designate matters clearly not part of the Circuit Court record in direct contravention of Rules 209 and 210, SCACR.

Respondents desire to ultimately have the Court review the merits of Appellants' appeal. However, Appellants' continued violations of the appellate court rules—specifically Rules 209 and 210, SCACR—have prevented Respondents from moving forward with briefing on the merits and have prejudiced Respondents. Respondents have unnecessarily had to incur expenses while engaging in motions practice based on Appellants counsel's arguable lack of familiarity with the South Carolina Appellate Court Rules.

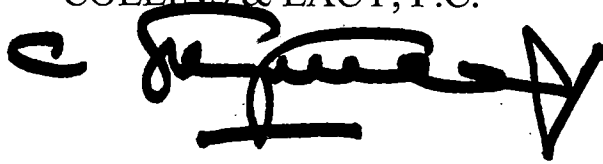
CONCLUSION

Based on Appellants' continued failure to comply with the Appellate Court Rules and this Court's Order, Respondents respectfully request the Court dismiss Appellants' appeal. In the alternative, Respondents respectfully request the Court strike those matters that are not part of the Circuit Court record, as well as any and all references to matters in Appellants' Initial Brief that are not part of the Circuit Court record. Further, pursuant to Rule 269, SCARC, Respondents respectfully request the imposition of sanctions, including, but not limited to, attorneys' fees and costs related to the continued motions practice.

[SIGNATURE PAGE ATTACHED]

Respectfully submitted,

COLLINS & LACY, P.C.



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ATTORNEYS FOR RESPONDENTS

**RESPONDENTS' REPLY TO
APPELLANTS' RETURN TO
MOTION TO DISMISS APPEAL, OR
IN THE ALTERNATIVE, MOTION
TO STRIKE**

Columbia, South Carolina
May 30, 2017

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Holding Company, Inc.; SCANA Respondents.

PROOF OF SERVICE

I hereby certify that I served Respondents' Reply to Appellants' Return to Motion to Dismiss Appeal or, in the Alternative, Motion to Strike upon all parties, by placing a copy in the United States mail, postage prepaid, to all counsel of record on May 30, 2017, addressed to the following:

COUNSEL SERVED:

Pedro E. Krompecher, III, Esquire
Krompecher Law Firm, PLLC
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Counsel for Appellants

Edward L. Graham, Esquire
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Post Office Box 550
Florence, SC 29501
Counsel for Appellants

Respectfully submitted,



Handwritten signature of Christian Stegmaier in black ink, written over the printed name and firm name.

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SC Court of Appeals

VIA HAND DELIVERY

The Honorable Jenny A. Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: *Cassandra M. Myers and Bartholomew Myers in their capacity as Co-Personal Representatives of the Estate of Evan Morris Myers, vs. The Consolidated Employee Recreation Clubs, a non-profit organization a/k/a Pine Island Club at Lake Murray, South Carolina Electric and Gas Holding Company, Inc./SCANA*

Civil Action No. 2014-CP-32-02210
Appellate File No. 2016-002487
Claim No. 683-411339
C&L File No. 000001-02078

Dear Ms. Kitchings:

Please find enclosed for filing the unbound original and seven (7) copies of the Respondents' Reply to Appellants' Return to Respondents' Motion to Dismiss Appeal in the above referenced matter. Please file the original and return a clocked copy of same via our courier.

By copy of this letter and enclosure, we are serving the same on counsel of record.

Thank you for your time and attention. Should you have any questions or concerns, please do not hesitate to contact us.

Respectfully,

Christian Stegmaier

CS/mmm.

Enclosures

cc: John Layton Ruffin, Esquire
Edward L. Graham, Esquire
Pedro E. Krompecher, III, Esquire



1330 Lady Street, Sixth Floor (29201) Post Office Box 12487 | Columbia, SC 29211

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The Honorable Jenny A. Kitchings
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