

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

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JUL 31 2017

SC Court of Appeals

Case No.: 2014-CP-26-7264
Appellant Case No.: 2017-000471

Gregory Duerk, Donald L. Duerk and Deborah Duerk Tiller,.....Appellants

vs.

Geoffrey Duerk, Kristen Duerk and James M. Stewart,.....Respondents

**RESPONDENT STEWART'S MOTION TO STRIKE AND
HOLD DEADLINES IN ABEYANCE**

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

Pursuant to Rules 208(b)(4), 209(b), Rule 210(c), SCACR, Respondent James M. Stewart ("Respondent") respectfully moves this Court for an Order striking Appellants' Initial Brief and certain matters from the record on appeal designated by Appellants. Respondent additionally requests that all deadlines be held in abeyance until the Court rules on this Motion to Strike.

FACTS/PROCEDURAL HISTORY

This action arises out of a dispute between siblings over assets from the estate of their cousin, Eileen Ryan, and the alleged conversion of funds from Ryan's Estate by the residuary beneficiaries Geoffrey Duerk and Kristen Duerk. Respondent, a Florida attorney, was hired by the Personal Representative of Ryan's Estate to probate Ryan's Estate in Florida. Appellants filed the original Summons and Complaint against Geoffrey Duerk on October 31, 2014. On March 28,

2016, Appellants filed an Amended Complaint naming Respondent as a defendant.¹ The Amended Complaint asserted a single cause of action labeled “Conflict of Interest/Misrepresentation/Breach of Fiduciary Duty” against Respondent.

Respondent filed a Motion to Dismiss and supporting memorandum pursuant to Rules 12(b)(2) and 12(b)(6) of the South Carolina Rules of Civil Procedure on June 15, 2016. Respondent’s Motion to Dismiss was heard on November 8, 2016. The circuit court took the Motion under advisement and later granted the Motion by way of a Form 4 Order on November 10, 2016. Appellants then filed a Rule 59(e) Motion to Reconsider, which was denied. This Appeal followed.

ARGUMENT

Appellants filed their Initial Brief and Designation of Matter to be Included in the Record on Appeal on June 28, 2017. However, both Appellants’ Initial Brief and Designation of Matter to be Included in the Record on Appeal fail to comply with Appellate Court Rules and should be stricken and/or limited.

A. Argument to Strike Appellants’ Brief

Appellants’ Initial Brief fails to comply with Appellate Court Rule 208(b) inasmuch as the Brief contains no citations to the record and includes contested assertions within the Statement of the Case.² Appellants’ failure to include citations to the record is contrary to Rule 208(b)(4), SCACR, which provides that “[t]he brief shall contain references to the transcript, pleadings, orders, exhibits or other material which may be properly included in the Record on Appeal to support the salient facts alleged.” Appellants’ Brief also runs afoul of the Appellate Court Rule

¹ The Amended Complaint also added Geoffrey Duerk’s daughter, Kristen Duerk, as a defendant.

² In the Statement of Case, Appellants make various assertions regarding the frequency of contact between Respondent and Appellants, which are clearly contested matters in violation of Rule 208(b)(1)(C), SCACR.

208(b)(1)(C) by including several contested assertions within the Statement of the Case. Respondent therefore requests that Appellants' Initial Brief be stricken for failure to comply with Appellate Court Rules 208(b)(1)(C) and 208(b)(4).

In Henning v. Kaye, 307 S.C. 436, 415 S.E.2d 794 (1982), the Supreme Court of South Carolina held that "the South Carolina Appellate Court Rules are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals in this State." In Henning, the respondent moved to dismiss the appeal because of appellant's failure to comply with the Appellate Court Rules. Specifically, the appellant's brief was not organized correctly, the components were not correctly labeled, the issues were not distinctively labeled, the table of authorities was not alphabetized, the arguments contained no citations to the record or to the cases listed in the table of authorities, and the statement of the case included contested matter. Id. at 437, 415 S.E.2d at 794.

The Court noted that appellant's violations of the Rules justified granting dismissal. However, the Court, instead, granted appellant 15 days to file an initial brief that fully complied with the rules with the stipulation that no changes to the argument section were permitted other than adding citations and references to the record. Id. at 438, 415 S.E.2d at 794.

Here, Appellants' Initial Brief, which contains no citations to the record and presents several contested matters in the Statement of the Case, is similarly deficient. Respondent therefore requests Appellants' Initial Brief be dismissed or, alternatively, that Appellants be required to file a new brief that conforms with the Appellate Court Rules without changing the argument section except for citations to material properly in the Record on Appeal.

B. Argument to Strike or Limit Designation of Matter for Inclusion in the Record on Appeal

Appellants' Designation of Matter to be Included in the Record on Appeal similarly fails to comply with the Appellate Court Rules because Appellants have included material that is not relevant to the appeal and was not presented to the lower court. Rule 209(b), SCACR, prohibits a party from including any matter in his or her Designation of Matter that is irrelevant to the appeal. See also 15 S.C. Jur. Appeal and Error §63 ("Matters irrelevant to the question involved in the appeal are also disallowed."). Additionally, Rule 210(c), SCACR, provides that matters not presented to the trial court are not properly included in the Record on Appeal. See also Associates Discount Corp. v. Hiers, 248 S.C. 430, 150 S.E.2d 611 (1966); Sanders v. Allis Chalmers Mfg. Co., 235 S.C. 259, 111 S.E.2d 201 (1959); State v. Johnson, 147 S.C. 325, 145 S.E. 194 (1928); Norris v. Ferre, 315 S.C. 179, 432 S.E.2d 491 (Ct. App. 1993). Most of the material in Appellants' Designation of Matter violates Rules 209 and 210, SCACR.

The only items from Appellants' Designation of Matter that were before the lower court are the following:

- Amended Complaint;
- Respondent's Motion to Dismiss;
- Affidavit of Respondent (Exhibit A to Defendant's Motion);
- Appellants' Memorandum in Opposition;
- Affidavit of Clifford H. Tall (Exhibit A to Plaintiff's Memorandum); and
- November 8, 2016 transcript from hearing on Motion to Dismiss.

The remaining material listed in Appellants' Designation of Matter was not presented to the lower court for use in ruling on Respondent's Motion to Dismiss. Therefore, Respondent moves to strike the following irrelevant documents from Appellants' Designation of Matter:

- Appellants' Motion to Enjoin Transfer of Assets dated October 31, 2014;
- Summons and Complaint dated October 31, 2014;
- Form 4 Order showing Motion to Enjoin resolved dated May 5, 2015;
- Email from office of Appellants' counsel to court dated May 5, 2015;
- Correspondence from counsel for Appellant to counsel for Respondent Geoffrey Duerk dated May 15, 2015;
- Email from office of Appellants' counsel to office of respondent Geoffrey Duerk's counsel with proposed consent order dated June 16, 2015;
- Email from office of Respondent Geoffrey Duerk's counsel to office of Appellants' counsel dated June 18, 2015;
- Email from office of Appellants' counsel to office of Respondent Geoffrey Duerk's counsel dated August 6, 2015;
- Appellants' Motion to Join Additional Parties dated September 9, 2015;
- Bench Order Denying without prejudice Appellants' Motion to Join Additional Party dated October 26, 2015;
- Appellants' Motion to Enforce Agreement (Sanctions) dated November 2, 2015;
- Deposition Transcript of James Stewart dated December 1, 2015;
- Appellants' Motion to Join Additional Parties dated January 19, 2016;
- Appellants' Memorandum in Support of Motion to Join Additional Parties dated January 19, 2016;
- Form 4 Order continuing Motion to Enforce Settlement dated January 25, 2016;
- Form 4 Granting Appellants' Motion to Join Additional Parties dated February 22, 2016;
- Transcript of Record, Common Pleas Court, dated June 7, 2016.

None of the above-listed items were presented to the circuit court for consideration during the pendency of Respondent's Motion to Dismiss. In particular, the deposition transcript of

Respondent, emails and correspondence identified in Appellants' Designation of Matter were never made a part of the Clerk of Court's file. Accordingly, the items identified above must be excluded from the Record on Appeal and all reference to them removed from Appellants' Initial Brief.

CONCLUSION

Appellants' Initial Brief fails to comply with Appellate Court Rules. The Brief contains no references or citations to the record and presents contested matters within the Statement of the Case in violation of Rules 208(b)(4) and 208(b)(C). Respondent therefore respectfully requests Appellants' Initial Brief be dismissed or, in the alternative, that Appellants be ordered to re-file a Brief that complies with the Appellate Court Rules.

Appellants have also included items in their Designation of Matter that were not presented to the Circuit Court and are irrelevant to this appeal. Pursuant to Rules 209(b) and 210(c), SCACR, Respondent further requests Appellants' Designation of Matter be limited to only those matters that were before the Circuit Court in connection with Respondent's Motion to Dismiss. Because the granting of this motion in whole or in part will require substantial revision to Appellants' Initial Brief, Respondent additionally requests the Court hold the briefing deadlines in abeyance during the pendency of this Motion.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

COLLINS & LACY, P.C.

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ATTORNEYS FOR RESPONDENT

JAMES M. STEWART

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July 28, 2017

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In the Court of Appeals

APPEAL FROM HORRY COUNTY
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PROOF OF SERVICE

I hereby certify that I served Respondent Stewart's Motion to Strike and Hold Deadlines in Abeyance upon all parties, by placing a copy in the United States mail, postage prepaid, to all counsel of record on July 28, 2017, addressed to the following:

COUNSEL SERVED:

Thomas C. Brittain, Esquire
THE BRITTAIN LAW FIRM, P.A.
4614 Oleander Drive
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Attorney for Appellants

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Attorney for Co-Respondents Geoffrey Duerk and Kristen Duerk

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July 28, 2017

The Honorable Jenny A. Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Gregory Duerk, Donald L. Duerk, Jr. and Deborah Duerk Tiller v. Geoffrey Duerk, Kristen Duerk and James M. Stewart
Appellate Case No. 2017-000471
C&L File No. 001326-00127

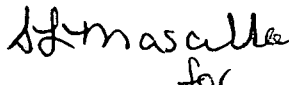
Dear Ms. Kitchings:

Please find enclosed for filing the unbound original and seven (7) copies of Respondent Stewart's Motion to Strike and Hold Deadline in Abeyance in the above-referenced matter. Also enclosed is our firm's check in the amount of \$25.00, representing the filing fee of same. Please file the original and return a clocked copy in the enclosed stamped, self-addressed envelope.

By copy of this letter and enclosure, I am serving same on counsel of record.

With kind regards,

Sincerely,


for
William A. Bryan, Jr.

WABJR:ljc
Enclosures
cc: Thomas C. Brittain, Esquire
Jay M. Bultz, Esquire

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