

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
JAN 10 2018
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.

**RETURN TO THE MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE,
MOTION TO STRIKE AND AMEND THE RECORD ON APPEAL**

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

Appellants hereby respond to the Respondents' Motion to Dismiss the Appeal or to Strike and Amend the Record on Appeal. Appellants acknowledge that there were some inadvertent mistakes in the Record on Appeal previously filed. Appellants also acknowledge that certain materials included in the Record on Appeal were in fact included in the Record but included in a different location than was recognized by Respondents. To the extent that Appellants inadvertently did not include material that should not have been included or omitted material that should have been included, Appellant agrees to correct the Record voluntarily. Appellants propose to do so pursuant to direction from the Clerk of the Court of Appeals.

As an explanation, but not as an excuse, Appellant would show the Court that a number of these mistakes relate to the recent resignation of the attorney who had primary responsibility for this Appeal. Appellants' counsel had difficulty discerning exactly what was to be included and excluded without input from the attorney who had recently resigned.

Appellants respond to the eight issues raised by the Respondents as follows:

1. The original Summons and Complaint, which was not listed in either parties' Designation of Matter, was included in the Record. Appellants agree to voluntarily correct the issue, according to the direction of the Clerk of Court.
2. Respondents noted that the Appellants misidentified Respondents' Motion for Summary Judgment as Motion for Partial Summary Judgment in the Record on Appeal's Index. Appellants acknowledge the inadvertent error and agree to voluntarily correct the issue, according to the direction of the Clerk of Court.
3. The Respondents' Answers to Interrogatories and Second Answers to Interrogatories were included in the Record. Appellants erroneously included them in the Record because they were referenced in the Briefs. Appellants agree to voluntarily correct the inadvertent error, according to the direction of the Clerk of Court.
4. Exhibits and/or slipcovers:
 - a. Appellants explain Respondents' assertion that Exhibit A is missing and that two slipcovers are missing as follows: Exhibit A represents portions of the Bellamy Transcript. Those portions of the Bellamy transcript were incorporated in the Transcripts Section of the Record. Appellants acknowledge that the contents of Exhibit A should have been repeated in the Exhibits section. Inadvertently, they were not. Appellants will correct this oversight as directed by the Clerk of the Court of

Appeals.

Respondents complain about the omission of the coverslip for Exhibit B. Exhibit B represents the Affidavit of Andrea L. Lange and its attachments, all of which were included in the Record on Appeal. It was not clear to Appellants that Respondents wanted the Exhibit B slipcover to be included as part of Exhibit B. However, Appellant will agree to include the slipcover in the fashion directed by the Clerk of the Court of Appeals.

- b. Appellants explain the alleged omissions of Exhibits A-R. These Exhibits are the Exhibits to the Respondents' Memorandum in Opposition to Plaintiffs' Motion to Alter or Amend Pursuant to Rule 59(e). The Exhibits were, in fact, included in the Record on Appeal. However, they were included in a different section, which Respondents did not recognize. Exhibit A is p. 39, line 7 - p. 41, line 9 of the Summary Judgement Hearing Transcript, which is located in the Transcripts section on pp 385-387. Exhibits B-K are the e-mail correspondence between the Honorable William P. Keesley and counsel for both the Plaintiff and Defendant on June 15 – 17, 2016, which are located in the Exhibits section on pp. 400 - 410. Exhibit L is the Order Granting Defendants Motion for Summary Judgment, which is in the Orders section on pp. 5 - 20. Exhibit M is the Plaintiffs' Notice of Motion and Motion to Alter or Amend Pursuant to Rule 59(e), SCRCF, which is in the Motions section on pp. 238 - 283. Exhibit N is the Affidavit of Francesco Pia, Ph.D., which is in the Motions section on pp. 136 - 159. Exhibit O is the Affidavit of Ralph Johnson, Ph.D., which is in the Motions section on pp. 160 - 185. Exhibit P is the Supplemental Affidavit of Francesco Pia, Ph.D., which is in the Motions section on pp. 270 - 275. Exhibit Q is

the Supplemental Affidavit of Ralph Johnson, Ph.D., which is in the Motions section on pp. 276 - 283. Appellants are agreeable to including the Exhibits as requested by Respondents, as directed by the Clerk.

5. Respondents complain that pages 299 and 312 were included in the Record on Appeal. Appellants included those pages because each is the final page of a Memorandum and a Reply, respectively. Appellants are agreeable to removing those pages from the Record if so directed by the Court.
6. Respondents complain that numerous page numbers in the Record on Appeal are illegible. The page numbers referenced by Respondents were copied in such a way that they were not as clear as Appellants intended. Appellants will correct the imperfect pagination in accordance with direction from the Clerk of Court.
7. Respondents complain that Appellants omitted specific emails to the court from the Record on Appeal. Appellants included the designated e-mails of which Appellants were aware. The emails referenced by Respondents are not in the current possession of Appellant. If the Respondents would kindly provide those e-mails, Appellants will arrange for their inclusion in the Record on Appeal as directed by the Clerk of Court.
8. Appellant explains the inclusion of certain pages which were not designated as follows: The only copy of transcript available to Appellants was in a condensed format, with four pages from the original included on a single page of the condensed transcript. If the Respondents would kindly provide a single page of the designated pages, Appellants will arrange for those pages to be substituted for the condensed pages previously included in the Record, in accordance with directions from the Clerk.

Respondents assert, incorrectly, that they were prejudiced by the inclusion/exclusion of certain documents in the Record on Appeal. Time spent in motions practice does not represent prejudice. Prejudice is when a party is denied a fair opportunity to submit testimony and other evidence to the Court. Respondents have made no assertion of genuine prejudice, and there is none.

Respondents requested that the Court impose sanctions. Appellants believe sanctions are inappropriate. The mistakes, while unfortunate, were inadvertent and were related to the change of personnel responsible for preparation of the Record on Appeal.

For the foregoing reasons, Respondents motion to strike should be denied.

Respectfully submitted,

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Attorney for Appellants

January 8, 2018

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Company, Inc.; SCANA, Respondents.

PROOF OF SERVICE

I hereby certify that one copy of the Appellants' **Return to the Motion to Dismiss Appeal or, in the Alternative, Motion to Strike and Amend the Record on Appeal** in the above-referenced matter was served by electronic mail and by U.S. Mail, postage prepaid, on January 8, 2018 addressed to the following counsel of record:

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GRAHAM LAW

Shining a Light on Safety, Guiding the Way to Justice.

Edward L. Graham
Diane M. Rodriguez

January 8, 2018

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

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Re: 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.
Appellate Case No. 2016-002487

Dear Ms. Kitchings:

Enclosed for filing is one original and six (6) copies of the Appellants' *Return To Respondents' Motion to Dismiss Appeal or, in the Alternative, Motion to Strike and Amend the Record on Appeal*. Proof of Service and a firm check in the amount of \$25 is also included.

Thank you for your attention to this matter.

Very truly yours,

Edward L. Graham
Pedro Krompecher
ELG/bh
Enclosures

cc: Christian Stegmaier
Megan H. Hall
Kelsey Jan Brudvig

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