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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

APR 16 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.

**RESPONDENTS' AMENDED MOTION TO DISMISS APPEAL OR,
IN THE ALTERNATIVE, MOTION TO STRIKE
APPELLANTS' FINAL BRIEF**

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

Pursuant to Rule 240, SCACR, 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”) respectfully move this Court of an Order dismissing the above-captioned appeal. In the alternative, Respondents move pursuant to Rule 211(b), SCACR, for an order striking certain portions of Appellants Cassandra M. Myers and Bartholomew Myers in their capacity as Co-Personal Representatives of the Estate of Evan Morris Myers’ (“Appellants”) Final Brief.

Further, Respondents move for an Order imposing sanctions upon Appellants, including, but not limited to attorneys’ fees and costs, relating to Respondents’ motion practice based on Appellants’ continued failure to comply with the Appellate Court Rules.

FACTUAL/PROCEDURAL BACKGROUND

This action arises out of the accidental drowning of Evan Morris Myers on June 15, 2011. Appellants commenced suit against Respondents, asserting a cause of action for, inter alia, wrongful death sounding in negligence. Appellants have appealed from the Circuit Court’s entry of summary judgment in favor of Respondents.

Respondents first filed a motion to strike certain matters contained in Appellants’ Designation of Matter on February 21, 2017. The basis for

Respondents' motion was the inclusion of certain matters contained in Appellants' Designation of Matter that were not part of the Circuit Court record, including, inter alia, certain portions of Mandy Bellamy's ("Bellamy") deposition transcript and Answers to Interrogatories. (**Exhibit A**). Notably, certain pages of Bellamy's testimony and Answers to Interrogatories were not presented as exhibits to the Circuit Court for its review of Respondents' Motion for Summary Judgment. Respondents requested the Court order Appellants to strike certain matters in the Designation of Matter and be ordered "to revise their Initial Brief to omit all references to the same." (Id. p. 6).

By Order filed April 16, 2017, this Court granted Respondents' Motion to Strike and ordered that the following designations shall not be included in the amended designation of matter: "(1) answers to interrogatories ... and [(2)] portions of the deposition transcript of Mandy Bellamy that were not part of the circuit court's record." (**Exhibit B**).

Appellants submitted an Amended Designation of Matter and subsequently filed the Record on Appeal, containing matters pursuant to the Court's directive.¹

On or about March 26, 2018, Appellants served their Final Brief and Final Reply Brief. Appellants Final Brief contains citations to matters not contained in the Record on Appeal or that were part of the Circuit Court record.

LAW/ANALYSIS

The Appellate Court Rules provide that matters not presented to the trial court are not properly included in the Record on Appeal. Rule 210(c), SCACR; 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); Quattlebaum v. Black, 22 S.C. 587 (1884); State v. White, 372 S.C. 364, 642 S.E.2d 607 (Ct. App. 2007); Norris v. Ferre, 315 S.C. 179, 432 S.E.2d 491 (Ct. App. 1993) (record may not be supplemented with matters not presented to trial judge); S.C. Jur. Appeal and Error § 63. Furthermore, matters not presented to the

¹ Of note, Respondents do not take issue with the matters contained in the Record on Appeal. Indeed, the Record on Appeal comports with the South Carolina Appellate Court Rules and this Court's prior orders in this case.

Circuit Court will not be given substantive consideration on appeal. Reed v. Becka, 333 S.C. 676, 511 S.E.2d 396 (Ct. App. 1999).

Pursuant to Rule 211, SCACR, the parties shall serve final brief(s) within twenty (20) days after the service of the Record on Appeal. The final brief(s) must comply with Rule 211(b), SCACR, which states that the final brief(s) must be identical to the brief(s) previously served under Rule 208, SCACR, except the references in the initial brief “shall be revised to indicate **where the material appears in the Record on Appeal.**” Rule 211(b), SCACR.

Appellants cited to matters not contained in the Record on Appeal. Specifically, on page 7 of Appellants’ Final Brief, Appellants reference “Def. Ans. To Interrog. ¶¶ 1-3.” Initially, Respondents note that the inclusion of interrogatories was the basis of their motion to strike filed on February 21, 2017, which this Court granted. Accordingly, the inclusion of the same in Appellants’ final brief is improper.

Furthermore, on page 7 of Appellants’ Final Brief, Appellants’ again cite to “Defs. Ans. To Interrog. ¶ 3, Defs. Ans. To 2d Set of Interrog, ¶¶ 2, 27, 29.” Interrogatories and Answers thereto are not part of the Circuit Court record, are not contained in the Record on Appeal, and are improper for this Court’s consideration.

Additionally, on pages 8, 9, and 10 of Appellants' Final Brief, Appellants cited to several pages of Bellamy's transcript that are not part of the Record on Appeal, including pages 56, 57, 69, 71, 72, 81, 149, and 150. The portions of the transcript that are relevant to this Appeal and were part of the Circuit Court record and, therefore, properly contained in the Record on Appeal, are contained on pages 110 through 133 of the Record on Appeal.² The above-referenced citations in Appellants' Final Brief are, therefore, improper for this Court's consideration.

Respondents note that this is their fourth motion filed with this Court regarding the appeal. Two prior motions filed on February 21, 2017 and May 11, 2017, objected to certain matters contained in Appellants' Designation of Matter; Respondents' December 15, 2017, regarded Appellants' Record on Appeal and matters contained in the same. These motions were addressed by the Court in which the Court gave clear direction to Appellants regarding what matters shall be included in their Designation of Matter and subsequent Record on Appeal. Notably, the Court **granted** Respondents February 21, 2017, motion, which requested Appellants be ordered to revise their brief to omit all

² The specific designated pages of the transcript are: 1, 20, 21, 42, 55, 74, 75, 78, 79, 86, 87, 93, 96, 97, 99, 100, 101, 116, 117, 144, 145, 146, 147, and 148.

references to the improper matters contained in Appellants' Designation of Matter, including Answers to Interrogatories and certain pages of Bellamy's deposition transcript.

Appellants have seemingly defied this Court's April 16, 2017, Order. Because of this, Respondents respectfully request the Court dismiss Appellants' appeal. In the alternative, Respondents respectfully request the above-referenced citations to Answers to Interrogatories and Certain pages of the Bellamy deposition transcript not included in the Record on Appeal be stricken from Appellants' Final Brief.

Respondents respectfully request that all current deadlines, including the deadline for Respondents to file and serve their final brief, be held in abeyance during the pendency and disposition of the instant motion.

CONCLUSION

Based on Appellants' continued failure to comply with the Appellate Court Rules and this Court's Orders, Respondents respectfully request the Court dismiss Appellants' appeal. In the alternative, Respondents respectfully request the Court strike certain references to matters not included in the Record on Appeal within Appellants' Final Brief. 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.

Respectfully submitted,

COLLINS & LACY, P.C.



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ATTORNEYS FOR RESPONDENTS

**RESPONDENTS' AMENDED
MOTION TO DISMISS APPEAL
OR, IN THE ALTERNATIVE,
MOTION TO STRIKE
APPELLANTS' FINAL BRIEF**

Columbia, South Carolina
April 16, 2018

EXHIBIT A

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

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FEB 21 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' MOTION TO STRIKE

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

Pursuant to Rule 209(b) and Rule 210(c), 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”) respectfully move this Court for an order striking from Appellants’ Designation of Matter certain materials designated by Appellants and requiring Appellants to file an amended initial brief omitting all references to the disputed items. Respondents additionally request that all deadlines be held in abeyance until the Court issues its ruling on this motion to strike.

This action arises out of the accidental drowning of Evan Morris Myers on June 15, 2011, in the freshwaters of Lake Murray in Lexington County, South Carolina. Appellants commenced suit against Respondents asserting a cause of action for, inter alia, wrongful death sounding in negligence.¹ Appellants have appealed from the Circuit Court’s entry of summary judgment in favor of Respondents.

At this time, counsels for Appellants and Respondents are not in agreement concerning the Appellants’ Designation of Matter and the undersigned now moves to strike all non-relevant documents from the same.

¹ Appellants initially brought a wrongful death action sounding in negligence and intentional infliction of emotional distress claims against Respondents and other Defendants. Appellants subsequently dismissed the other defendants and amended their complaint eliminating their intentional infliction of emotional distress claims.

The Appellate Court Rules provide that matters not presented to the trial court are not properly included in the Record on Appeal. Rule 210(c), SCACR; 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); Quattlebaum v. Black, 22 S.C. 587 (1884); State v. White, 372 S.C. 364, 642 S.E.2d 607 (Ct. App. 2007); Norris v. Ferre, 315 S.C. 179, 432 S.E.2d 491 (Ct. App. 1993) (record may not be supplemented with matters not presented to trial judge); S.C. Jur. Appeal and Error § 63. Furthermore, matters not presented to the Circuit Court will not be given substantive consideration on appeal. Reed v. Becka, 333 S.C. 676, 511 S.E.2d 396 (Ct. App. 1999).

The Record on Appeal must generally contain everything necessary to the resolution of the issues presented to the appellate court, including evidence, statutes or ordinances on which the parties are relying, and written memorials of any judicial action which triggered the appeal or which is necessary for the resolution of the appeal. 5 Am. Jur. 2d Appellate Review § 441. The record is deemed to consist of all papers and exhibits filed with the trial court. Id. at § 442.

Respondents move to strike the following material and documents from Appellants' Designation of Matter that were not part of the Circuit Court record:

- a. Answers to all Interrogatories and Requests for Production;
- b. Deposition transcript and exhibits of Mandy Bellamy, to the extent Appellants' seek to include the entire deposition and excerpts;²
- c. All emails between counsel of record.

Respondents further request the Court strike from Appellants' Designation of Matter the inclusion of all pleadings, all motions and all orders.

This appeal stems from the Circuit Court's order granting Respondents' Summary Judgment. The only relevant pleadings, motions, and orders include: (1) Appellants' Complaint; (2) Appellants' Amended Complaint; (3) Respondents' Answer to Amended Complaint; (4) Respondents' Motion for Summary Judgment and supporting memorandum; (5) Appellants'

² See Rule 209, SCACR (“[T]he Designation may only propose to include portions of the transcript, pleadings, orders, exhibits which may not be properly included in the Record on Appeal [See Rule 210(c)]”) (emphasis added).

Memorandum of Law in response to Respondents' Motion for Summary Judgment; (6) Appellants' Motion to ~~Alter~~ Amend pursuant to Rule 59(e), SCRCF; (7) Respondents' Memorandum in Opposition to Appellants' Rule 59(e) motion; (8) Order granting Summary Judgment; (9) Order denying Rule 59(e) motion, SCRCF.

To the extent Appellants seek to include any pleadings, motions or orders not articulated above, such material and documents are irrelevant to the current appeal. See Rule 209(b) ("A party shall not include any matter on his Designation which is not relevant to the appeal."); 16 S.C. Jur Appeal and Error § 59 ("The Record on Appeal should contain only information needed to permit the Court to decide the issues on appeal; it should contain no irrelevant material."); 15. S.C. Jur. Appeal and Error § 63 ("Matters irrelevant to the question involved in the appeal are also disallowed.")

Respondents further move to strike from Appellants' Designation of Matter "Any other document cited in Appellants' Initial Briefs." The Appellate Court Rules clearly provide that documents listed in the Designation of Matter must be specifically named. See Rule 209(b), SCARC ("The Designation must clearly identify what the party desires to

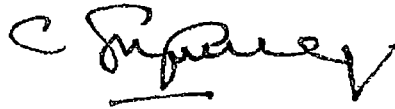
have included in the Record on Appeal[.]”). Appellants’ reference to “[a]ny other document cited,” does not comport with this rule.

In short, Appellants have included items in their Designation of Matter and Initial Brief that were not presented to the Circuit Court and do not form part of the record on Respondents’ summary judgment motion. Further, Appellants have purported to include items in the Designation of Matter that are irrelevant to the issues on Appeal. Accordingly, pursuant to Rules 209(b) and 210(c), SCACR, Respondents respectfully request the above-listed items be stricken from Appellants’ Designation of Matter and Appellants be ordered to revise their Initial Brief to omit all references to the same. Respondents additionally request 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 RESPONDENTS

**RESPONDENTS' MOTION TO
STRIKE**

Columbia, South Carolina
February 21, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

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FEB 21 2017

SC Court of Appeals

Appellate Case No. 2016-002487

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.

PROOF OF SERVICE

I hereby certify that I served Respondents' Motion to Strike upon all parties, by placing a copy in the United States mail, postage prepaid, to all counsel of record on February 21, 2017, addressed to the following:

COUNSEL SERVED:

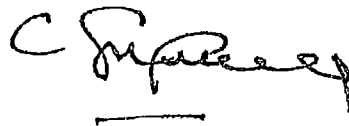
Pedro E. Krompecher, III, Esquire
Krompecher Law Firm, PLLC

Post Office Box 6639
Raleigh, NC 27628
Counsel for Appellants

Edward L. Graham, Esquire
J. Layton Ruffin, Esquire
Graham Law Firm, P.A.
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Counsel for Appellants

Respectfully submitted,

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ATTORNEYS FOR RESPONDENTS

EXHIBIT B

The South Carolina 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.

Appellate Case No. 2016-002487

ORDER

Respondents' motion to strike Appellants' designation of matter is granted. Within twenty days of this order, Appellants shall serve and file an amended designation of matter that includes only those documents that were presented to the circuit court. The following designations shall not be included in the amended designation of matter: (1) answers to interrogatories and requests for production; (2) emails between counsel that were not part of the circuit court's record; and (3) portions of the deposition transcript of Mandy Bellamy that were not part of the circuit court's record. Further, the amended designation of matter must specifically reference each document Appellant desires to be included in the record on appeal at this time. Nothing, however, prevents Appellants from moving to supplement their designation of matter after Respondents file their initial brief.

Respondents shall serve and file their initial brief and designation of matter within thirty days of service of Appellants' amended designation of matter.


FOR THE COURT

Columbia, South Carolina

cc:

Pedro Eduardo Krompecher, Esquire

Christian Stegmaier, Esquire

Meghan Hazelwood Hall, Esquire

John Layton Ruffin, Esquire

Edward L. Graham, Esquire

FILED

April 6, 2017

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

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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.

PROOF OF SERVICE

I hereby certify that I served Respondents' Amended Motion to Dismiss Appeal or, in the Alternative, Motion to Strike Appellants' Final Brief upon all parties, by placing a copy in the United States mail, postage prepaid, to all counsel of record on April 16, 2018, addressed to the following:

COUNSEL SERVED:

Pedro E. Krompecher, III, Esquire
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Counsel for Appellants

Edward L. Graham, Esquire
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Counsel for Appellants

Respectfully submitted,

COLLINS & LACY, P.C.



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ATTORNEYS FOR RESPONDENTS

Christian Stegmaier | D: 803.255.0454 | E: cstegmaier@collinsandlacy.com

April 16, 2018

VIA HAND DELIVERY

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

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APR 16 2018

SC Court of Appeals

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 Respondents' Amended Motion to Dismiss Appeal or, in the alternative, Motion to Strike Appellants' Final Brief 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 of same via our courier.

By copy of this letter and enclosure, we are serving 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: Edward L. Graham, Esquire
Pedro E. Krompecher, III, Esquire

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APR 16 2018

SC Court of Appeals



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

VIA HAND DELIVERY

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