

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2018-002270
Case No. 2014-CP-26-07790

RECEIVED

JUL 31 2019

SC Court of Appeals

Richard Ciampanella,Respondent,

v.

City of Myrtle Beach,Appellant.

**REPLY TO RETURN TO MOTION TO STRIKE AND HOLD DEADLINES IN
ABEYANCE**

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

Pursuant to Rule 240(f), SCACR, Appellant City of Myrtle Beach (“City”), submits the following Reply to Respondent’s Return to Appellant’s Motion to Strike and Hold Deadlines in Abeyance.

I. Alan Campbell’s Affidavit is Not Properly Included in the Record on Appeal

Respondent does not dispute that Alan Campbell’s affidavit was not made a separate trial exhibit and that the trial court did not consider this affidavit in ruling on the motion for directed verdict or motion for a new trial. To justify including the affidavit in the Record on Appeal, Respondent relies on the affidavit’s mere coincidental attachment to Mr. Campbell’s deposition

transcript, which was made a Court's Exhibit at the conclusion of trial, after the trial judge had ruled on the directed verdict motion.

As an initial matter, the City takes issue with Respondent's contention that the City did not object to Mr. Campbell's deposition being made a Court's Exhibit. There is no indication the City (or Respondent for that matter) even knew the transcript was being marked as a Court's Exhibit or was given the opportunity to object. The transcript reflects no direction from the trial judge to mark any Court's Exhibits. The trial judge had ruled on the directed verdict motion, called the jury back into the courtroom to thank them for their service, excused the jury, and then the transcript, without any explanation or discussion, states "WHEREUPON Court's Exhibit Nos. 1 and 3 were marked for identification only." (Ex. A, Trial Tr. p. 384). Contrary to Respondent's contention in his Return, the trial court did not "f[ind] it necessary to attach Campbell's affidavit to Court's Exhibit 1." (Return, p. 4). The trial transcript certainly does not reflect that Mr. Campbell's deposition was made a Court's exhibit for any reason related to the affidavit, which was only coincidentally attached to the deposition transcript, nor does Respondent cite to such a reason in his Return.

Likewise, filing Mr. Campbell's affidavit months before trial in opposition to the City's summary judgment motion and defense counsel examining Mr. Campbell regarding the contents of his affidavit during his subsequent deposition do not make the affidavit part of the Record on Appeal. If this was the case, the contents of the Record on Appeal would be virtually limitless and there would be no need for preservation rules.

Respondent also contends Mr. Campbell's affidavit is properly included in the Record on Appeal pursuant to the additional sustaining ground doctrine. However, while some of the issues discussed in the affidavit may supply the basis for Respondent to assert an additional sustaining

ground, that does not render the affidavit itself proper for inclusion in the Record on Appeal when it was not otherwise presented to the trial court. Under the appellate court rules, the respondent “may raise on appeal any additional reasons the appellate court should affirm the lower court’s ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.” I’On, LLC v. Town of Mt. Pleasant, 388 S.C. 406, 418 (2000) (emphasis added). I’On speaks in terms of “issues,” “reasons,” and “arguments,” not in terms of documentary evidence. Here, Respondent, by his own admission, is not using Mr. Campbell’s affidavit to present an additional reason for affirmance. Instead, Respondent claims he is attempting to buttress the same reasons for the denial of the directed verdict motion and partial grant of a new trial that he presented at trial, only using a different piece of evidence. The additional sustaining ground concept does not give Respondent carte-blanche to include any documents in the Record on Appeal that he sees fit if those documents are not otherwise properly part of the Record on Appeal.¹

Accordingly, because Mr. Campbell’s affidavit is not properly included in the Record on Appeal, it should be stricken from Respondent’s Designation of Matter and Initial Brief.

II. The “Myrtle Beach Walkover Inspection Report” Should be Stricken

Respondent’s Initial Brief contains a discussion of documents entitled “Myrtle Beach Walkover Inspection Report” and “Culture and Leisure Work Orders,” which Respondent cites to as “Exhibit 1” and “Exhibit 4.” (Resp. Initial Br. p. 20). Respondent’s Return clarifies that the “Culture and Leisure Work Orders” were misidentified in Respondent’s Initial Brief and is actually Plaintiff’s Exhibit 19. Given this clarification, the City consents to the inclusion of Exhibit 19 in

¹ As explained in the City’s motion to strike, the City contends Respondent is attempting to use the affidavit to alleviate the impact of Mr. Campbell’s trial testimony, in which he acknowledged that the walkover was designed and constructed using appropriate screws and withstood the 200-pound concentrated force requirement when constructed. Respondent is attempting to use the affidavit to walk-back this testimony.

the Record on Appeal. However, the “Myrtle Beach Walkover Inspection Report” should be stricken from Respondent’s Designation of Matter and his Initial Brief amended to omit all references to this document. Respondent’s sole argument for inclusion of the “Myrtle Beach Walkover Inspection Report” is that it was an exhibit to City employee Richard Kirby’s deposition and Respondent’s expert reviewed this deposition transcript. (Return, p. 6). Stated otherwise, Respondent is attempting to bootstrap the “Myrtle Beach Walkover Inspection Report” into the Record on Appeal on the basis that it was an exhibit to a deposition that his expert reviewed. It is undisputed that Respondent did not use or refer to the “Myrtle Beach Walkover Inspection Report” in questioning this expert, did not offer or move the document into evidence, or even request that the deposition transcript to which it is attached be included as an exhibit at trial, Court’s exhibit or otherwise. In short, the “Myrtle Beach Walkover Inspection Report” was in no way presented to the trial court and, as such, is not properly included in the Record on Appeal pursuant to Rule 210(c), SCACR.

III. The Remaining Disputed Items Should be Stricken Because Respondent does not Cite to or Rely on Them

Respondent’s Designation of Matter designates the trial transcript and “all exhibits listed in the transcript” for inclusion in the Record on Appeal. In addition to the items specifically discussed above, the City moved that several additional trial exhibits be stricken from the Record on Appeal because they were not referenced or cited to in Respondent’s Initial Brief.

Respondent contends Plaintiff’s Exhibits 15, 25, 27, 33 and Court’s Exhibits 1, 2, and 3 are relevant to the appeal because they were relied on by Mr. Campbell in reaching his opinion. It appears that Respondent believes anything Mr. Campbell reviewed, regardless of whether it forms a basis for Respondent’s appellate arguments, should be included in the Record on Appeal. However, Rule 210(c), SCACR, permits inclusion only of items that are relevant to the appeal.

Respondent does not cite to or refer to Exhibits 15, 25, 27, 33 or Court's Exhibits 1, 2, or 3 in his Initial Brief, leaving little question that these exhibits are not relevant to the appeal.

Finally, the City also seeks to strike Plaintiff's Exhibits 1 (Loss Report) and 31 (deposition transcript of Respondent's treating physician). Respondent does not address these exhibits in his Return. However, because these matters are not cited to or referenced in Respondent's brief, they are not relevant to the appeal and also must be stricken from the Record on Appeal pursuant to Rule 209(b), SCACR.

CONCLUSION

The City respectfully requests that the matters be stricken from Respondent's Initial Brief and Designation of Matter as outlined above.

Respectfully submitted,

COLLINS & LACY, P.C.

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Murrells Inlet, South Carolina
July 29, 2019

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1 duty once every three calendar years. So you've earned
2 that exemption.

3 So if you get another summons for jury service
4 here in circuit court for the balance of this year, all
5 of 2018 and all of 2019, and you wish to be excused
6 from that service, you can claim that exemption. Now,
7 it is just an exemption. It doesn't mean you're not
8 qualified to serve. So if you do get another jury
9 summons in that timeframe and you would like to serve,
10 I would encourage you to do so; okay?

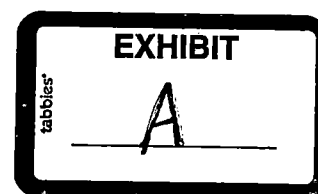
11 So, everyone else please remain seated. Folks,
12 you're excused for the balance of the week. Thank you.

13 (WHEREUPON, the jury exited the courtroom at
14 11:24 a.m.)

15 (WHEREUPON, Court's Exhibit Nos. 1 to 3 were
16 marked for identification only.)

17 (WHEREUPON, the hearing concluded at approximately
18 11:24 a.m.)

19 (End of Transcript of Record.)
20
21
22
23
24
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PROOF OF SERVICE

I certify that I have served Appellant's Reply to Return to Motion to Strike and Hold Deadlines in Abeyance by mailing a copy of same to Respondent's attorneys of record in the United States mail, with sufficient postage affixed thereto on the date indicated below.

COUNSEL SERVED:

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[SIGNATURE PAGE TO FOLLOW]

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July 29, 2019



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July 29, 2019

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

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Re: Richard Ciampanella v. City of Myrtle Beach
Appellate Case No. 2018-002270
C&L File No. 000456-01017

Dear Ms. Kitchings:

Enclosed for filing is the original and six (6) copies of Appellant's Reply to Return to Motion to Strike and Hold Deadlines in Abeyance together with Proof of Service. Please return a filed copy to me in the self-addressed stamped envelope provided.

With kind regards,

Sincerely,

A handwritten signature in black ink, appearing to read "Fred H. Oliver".

Fred H. Oliver

/acg
Enclosures

pc: Gene M. Connell, Jr., Esquire
Julian Z. Hanna, Esquire



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