

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

APPEAL FROM CHARLESTON COUNTY *qd720*
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2019-000866
Circuit Court Case No. 2016-CP-10-04062

RECEIVED

AUG 30 2019

SC Court of Appeals

Donald Stanley and Sean Reiter,
Individually and as Class Representatives,

Respondents,

v.

Southern States Police Benevolent Association,
Inc.

Appellant.

**RESPONDENTS' PETITION TO STRIKE APPELLANT'S
INITIAL BRIEF AND DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL**

PLEASE TAKE NOTICE THAT Respondents Donald Stanley and Sean Reiter hereby petition the Court of Appeals to strike all matter included in the Initial Brief and Designation of Matter to be Included in the Record on Appeal filed by Appellant Southern States Police Benevolent Association, Inc. ("Defendant" or "PBA") that was not presented to the trial court, namely the depositions of Respondents Stanley and Reiter.

Although very limited portions of Stanley's and Reiter's depositions were attached to the parties' briefs, they were not filed in whole with the trial court and not included in any record before the trial court. Nevertheless, Defendant has included those entire depositions in the Record

on Appeal and relied on them extensively throughout Appellant's Initial Brief to make arguments never presented to the lower court.

Because the depositions were not filed with the trial court, they cannot be part of the Record on Appeal and cannot form the basis for any arguments made by Defendant. Rule 210(c), SCACR ("The Record [on Appeal] shall not, however, include matter which was not presented to the lower court or tribunal."); Ravan v. Greenville Cty., 315 S.C. 447, 460, 434 S.E.2d 296, 304 (Ct. App. 1993) ("Secondly, the matters raised by the landowners are completely outside the record and may not form the basis for a reversal.").

In its Initial Brief, Defendant relies extensively on the testimony of Stanley and Reiter, primarily to support its arguments on substantive issues rather than class certification issues. None of these arguments are appropriate on appeal for at least two reasons. First, the material relied on was not presented to or filed with the trial court. Second, it is well-settled that "[a] court may not look to the merits when determining whether to certify a class." Tilley v. Pacesetter Corp., 333 S.C. 33, 508 S.E.2d 16, 21 (1998); King v. Am. Gen. Fin., Inc., 386 S.C. 82, 687 S.E.2d 321, 324 (2009).

Defendant's inclusion of matter that was not presented to the trial court is further exacerbated by the fact that none of Defendant's arguments directly addressing class certification issues, namely commonality, typicality, and adequacy, were made before the trial court. Rather, Defendant's opposition to class certification at the trial court level focused exclusively on substantive issues, namely an alleged lack of standing and lack of damages.¹ Defendant has not

¹ These substantive issues were raised and denied by the trial court twice, on a motion to dismiss and a motion for summary judgment, prior to class certification.


pointed to any portion of its briefs or argument wherein it raised before the trial court the issues of commonality, typicality, or adequacy that are argued in its appellate brief.

Defendant's failure to address class certification issues explains why the trial court did not specifically address the arguments that Defendant now makes for the first time on appeal. Defendant attempts to exploit its own failure to raise relevant arguments before the trial court by repeatedly arguing that the trial court failed to engage in the "requisite rigorous analysis" of the issues raised for the first time on appeal. Defendant's improper maneuvering is a prime example of why the losing party on appeal must present its issues and arguments to the lower court before an appellate court will review those issues and arguments. On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000), and cases cited therein.

The appropriate relief for citing material on appeal that was not presented to the lower court is to order the appellant to file a new initial brief and designation of matter to be included in the record on appeal that does not include matter or arguments not presented to the trial court. Henning v. Kaye, 307 S.C. 436, 438, 415 S.E.2d 794, 794 (1992). Accordingly, Plaintiffs would ask that the Court strike Defendant's Initial Brief and Designation of Matter to be Included in the Record on Appeal and re-file its Initial Brief and Designation in compliance with Rule 210(c), SCACR.

Respectfully submitted,

PIERCE, SLOAN, WILSON, KENNEDY &
EARLY, LLC

By: 
Joseph C. Wilson, IV (SC Bar No. 63002)
Carl E. Pierce, II (SC Bar No. 7946)
Daniel F. Lynch, IV (Sc Bar No. 102767)
P.O. Box 22437
Charleston, South Carolina 29413
843-722-7733

Ronald L. Richter, Jr.
Scott M. Mongillo
BLAND RICHTER, LLP
Peoples Building, Messanine Level
18 Broad Street
Charleston, South Carolina 29401
(843) 573-9900

Eric S. Bland
BLAND RICHTER, LLP
P.O. Box 72
Columbia, South Carolina 29202
(803) 256-9664

Andrew J. Savage, III
SAVAGE LAW FIRM
15 Prioleau Street
Charleston, South Carolina 29401
(843) 720-7470

*Attorneys for Respondents Donald Stanley and Sean
Reiter, Individually and as Class Representatives*

Charleston, South Carolina
August 26, 2019

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County

Court of Common Pleas

Edward W. Miller, Circuit Court Judge

RECEIVED

AUG 30 2019

SC Court of Appeals

Appellate Case No. 2019-000866
Circuit Court Case No. 2016-CP-10-04062

Donald Stanley and Sean Reiter,
Individually and as Class Representatives,

Respondents,

v.

Southern States Police Benevolent Association, Inc.

Appellant.

PROOF OF SERVICE

I, Carl E. Pierce, II, of Pierce, Sloan, Wilson, Kennedy & Early, LLC, counsel for Respondents Donald Stanley and Sean Reiter, Individually and as Class Representatives, hereby certify that the foregoing **RESPONDENTS' PETITION TO STRIKE APPELLANT'S INITIAL BRIEF AND DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL** was served on all other parties to this matter by depositing a copy of same in the U.S. Mail on August 28, 2019, properly posted for delivery to the following addressees:

James Edward Bradley, Esq.
Moore Taylor Law Firm, P.A.
PO Box 5709
West Columbia, SC 29171

and

Kent T. Stair, Esq.
J. Patrick Norris, Esq.
J. Andrew Yoho, Esq.

Carlock, Copeland and Stair, LLP
40 Calhoun St., Ste. 400
Charleston, SC 29401
Attorneys for Appellant
South States Police Benevolent Association, Inc.

Respectfully submitted,

PIERCE, SLOAN, WILSON, KENNEDY
& EARLY, LLC

By:



Carl E. Pierce, II (SC BAR NO. 7946)
Attorney for Respondents Donald Stanley
and Sean Reiter, Individually and as Class
Representatives

Charleston, South Carolina

Dated: 8/28/19

PIERCE | SLOAN

WILSON KENNEDY & EARLY LLC

ATTORNEYS AND COUNSELORS AT LAW

THE BLAKE-GRIMKÉ HOUSE | 321 EAST BAY STREET
CHARLESTON, SOUTH CAROLINA 29401

POST OFFICE BOX 22437
CHARLESTON, SOUTH CAROLINA 29413

(843) 722-7733
(843) 722-7732 FAX
www.piercesloan.com

August 28, 2019

CARL E. PIERCE, II
ALLAN P. SLOAN, III *◆
JOSEPH C. WILSON, IV †❖
JAMES G. KENNEDY
WILLIAM P. EARLY ●
SONALY K. HENDRICKS

* MEMBER SC & FL BAR
◆ CERTIFIED SC CIRCUIT
COURT MEDIATOR
† MEMBER SC, FL & GA BAR
❖ OF COUNSEL
● MEMBER SC & TN BAR

BENJAMIN C. SMOOT, II ■
J. MORGAN FORRESTER
M. TODD RAINSFORD
CARSON R. PARKER
KATIE L. MILLER
DANIEL F. LYNCH, IV

■ MEMBER SC & VA BAR

Direct Dial: (843) 725-7726
Email: kellyforrester@piercesloan.com

90720
RECEIVED

AUG 30 2019
SC Court of Appeals

VIA U.S. MAIL

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

Re: *Donald Stanley, Individually and as Class Representative v. Southern States
Police Benevolent Association, Inc.*
Circuit Court C/A No. 2016-CP-10-4062
PSWKE File No.: P2765.00

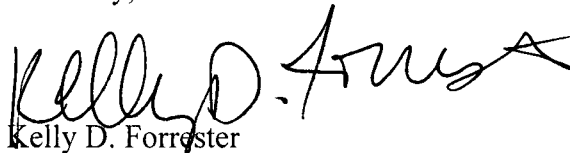
Dear Ms. Kitchings:

Enclosed for filing, please find the original and seven (7) copies of the Respondents' Petition to Strike Appellant's Initial Brief and Designation of Matter to be Included in the Record on Appeal in the above referenced matter. Please file the original with the Court and return a clocked-in copy to our office via the enclosed envelope. Should you have any questions or concerns, please do not hesitate to contact our office.

Please feel free to contact me with any questions or concerns you may have.

With kind regards,

Sincerely,



Kelly D. Forrester
Paralegal to Joseph C. Wilson, IV

Enclosures

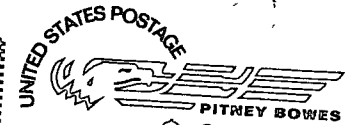
cc: Kent T. Stair, Esquire (Via Email and U.S. Mail)
James E. Bradley, Esquire (Via Email and U.S. Mail)
Ronald L. Richter, Jr., Esquire (Via Email)

RECEIVED
SEP 03 2019
S.C. SUPREME COURT

Eric S. Bland, Esquire (Via Email)
Andrew J. Savage, Esquire (Via Email)

PIERCE SLOAN WILSON KENNEDY & EARLY LLC
POST OFFICE BOX 22437
CHARLESTON, SOUTH CAROLINA 29413

The Honorable Jenny Kitchings
Clerk, S.C. Court of Appeals
1220 Senate St.
Columbia, SC 29201



02 1P \$002.350
0000869317 AUG 28 2019
MAILED FROM ZIP CODE 29401