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SC Court of Appeals  
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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Circuit Court Judge William P. Keesley

CASE No. 2016- CP-10-4122

MICHELE BLANK .....Appellant

Vs.

PATRICIA TIMMONS, TRUSTEE  
OF THE GORDON H. TIMMONS  
EXEMPT FAMILY TRUST.....Respondent

**APPELLANT’S MOTION TO STRIKE  
PART OF RESPONDENT’S DESIGNATION  
OF MATTER AND TO STAY THE FILING  
OF APPELLANT’S REPLY BRIEF AND  
FURTHER DESIGNATION OF MATTER**

Appellant files this Motion to strike certain items included in Respondent’s Designation of Matter to be included in the Record on Appeal and to Stay the filing of Appellant’s Reply Brief and any further Designation of Matter to be included in the Record on Appeal based upon the following circumstances and issues of law.

**FACTS RELATING TO THIS MOTION**

This Appeal arises from the Circuit Court Decision of the Hon. William P. Keesley entered June 14, 2019 after a bench trial. The issues before the Circuit Court were: (1) whether the common property boundary line between Appellant’s Lot 11 and Respondent’s Lot 12 was established as a matter of law as res judicata based upon Respondent’s dismissal with prejudice of an earlier trespass case, Timmons v Blank,

2015-CP10-3013, in which the boundary line was in issue (First Count ); (2) whether Respondent's subsequent construction of a driveway encroaching on the established boundary line was a trespass ( Second Count); (3) whether Respondent was in contempt of Court ( Third Count ) or slandered the Appellant's title ( Fourth Count ) by recording a Plat claiming title to a portion of Appellant's property as established in the prior case; or (4) whether Respondent's driveway created a nuisance causing Appellant's property to flood during heavy rainstorms ( Fifth Count).

Judge Keesley granted judgment on the First Count holding that Appellant's property boundary line was res judicata in the earlier case; but dismissed the remaining Counts of the Complaint as well as all of Respondent's Counterclaims. Appellant timely appealed the dismissal of the Fourth ( Slander of Title) and Fifth ( Nuisance) Counts. Respondent did not cross appeal the Judgment entered against her on the First Count or dismissal of her Counterclaims including a claim that the boundary line was unresolved (Fourth Counterclaim) .

Appellant filed an Initial Brief and Designation of Matter and later moved to file an Amended Designation of Matter because of clerical errors. By Order filed March 12, 2020, this Court accepted the Amended Designation for filing. Respondent failed to file any Initial Brief or Designation of Matter within the time prescribed by R. 208(a)(2), S.C.A.C.R. By letter dated January 6, 2020, the Clerk advised Respondent's Counsel that he had until January 16, 2020 to file an Initial Brief and Designation of Matter or it would not be considered. By letter dated January 14, 2020, Respondent's Counsel's firm requested a 30-day extension due to a personal emergency. On February 4, 2020 Respondent filed an Initial Brief and Designation of Matter. By Order filed March 6,

2020, this Court accepted Respondent's Initial Brief and Designation of Matter for filing and directed Appellant to file her Reply Brief within 30 days.

Respondent's Designation of Matter which was just accepted for filing contains thirty- one separate items, among which are the following: No. 1- entire trial testimony of Gordon H. Timmons; No. 2- entire testimony of Michele Blank; No. 5- Reply in 2015-CP10-3013; No. 10- Arrington Affidavit in 2016-CP10-4122; No. 11- Judge Toal's Order denying summary judgment in 2016-CP10-4122; No. 20- entire trial testimony of Cleve Gillette; No. 21- entire trial testimony of Rob Arrington. In addition, Item Nos. 3 & 31 are the identical Trial Exhibit; Nos. 5 & 12 are the identical Trial Exhibit; Nos. 7 & 24 are the identical Trial Exhibit and Nos. 16 & 19 are the identical Trial Exhibit.

Appellant requests for the reasons set forth below that the Court strike Items No. 1, 2, 5, 10, 11, 12, 19, 20, 21, 24 and 31 from Respondent's Designation of Matter.

## **LEGAL ARGUMENT**

### **I. CERTAIN DESIGNATED ITEMS VIOLATE THIS COURT'S RULES**

Appellant contends that following designated Items should be stricken because they either violate this Court's rules or are duplicative of other designated Items, as more fully discussed below.

#### **A. Respondent failed to provide the required specificity as to Items 1, 2, 20 and 21.**

R. 209(a), S.C.A.C.R. states that the Designation of Matter "shall set forth with specificity those parts of the transcript. . . which he proposes to include in the record on appeal." R. 209(b), S.C.A.C.R. states that the "Designation may only propose to include portions of the transcript. . . which may be properly included in the Record on appeal."

Based upon the plain language of these Rules and the lack of specificity in Respondent's Initial Brief, Appellant contends that Items No. 1, 2, 20 and 21 must be excluded.

Item No. 1 designates the entire Trial Transcript of Gordon Timmons totaling 54 pages. Respondent's Initial Brief refers to Mr. Timmons' testimony, see pages 6,8, but doesn't contain any specific page and line citation to the facts being asserted, in violation of R. 208(b)(4), S.C.A.C.R. ( the brief "shall contain references to the transcript . . . to support the facts alleged."). Appellant's Initial Brief refers to 21 specific pages of the Trial Transcript of Gordon Timmons out of the total of 54 pages of his Trial Testimony. See Appellant's Initial Brief at pages 19-21; Appellant's Amended Designation of Matter, Item No. 22. Therefore, only the 21 pages of the Trial Testimony of Gordon Timmons designated by Appellant are permitted in the Record on Appeal because they satisfy the specificity requirement. Respondent has not cited any relevant facts in any of the other 33 pages of Gordon Timmons Trial testimony. Therefore, Item No. 1 cannot be included in Respondent's Designation of Matter because it would violate R. 208(b)(4) and 209(a) & (b), S.C.A.C.R.

Item No. 2 designates the entire Trial transcript of the Testimony of Appellant Michele Blank totaling 95 pages. Respondent's Initial Brief refers to Ms. Blank's testimony, see pages 4 & 10, but doesn't contain any specific page and line citation to the facts being asserted, in violation of R. 208(b)(4), S.C.A.C.R. Appellant's Initial Brief contains 55 specific pages of the Trial Transcript of Michele Blank, see pages 10-14; Appellant's Amended Designation of Matter, Item No. 18. Therefore, only the 55 pages of the Trial Testimony of Michele Blank designated by Appellant are permitted in the Record on Appeal because they satisfy the specificity requirement.

Respondent has not cited any relevant facts in any of the other 40 pages of Michele Blank's Trial testimony. Therefore, Item No. 2 cannot be included in Respondent's Designation of Matter because it would violate R. 209(a) & (b), S.C.A.C.R.

Item No. 20 refers to the entire Trial transcript of the Testimony of Cleve Gillete, consisting of 47 pages and Item No. 21 to the entire Trial transcript of the Testimony of Robert Arrington consisting of 54 pages. Respondent's Initial Brief mentions two independent surveyors who were hired to determine the boundaries of Respondent's lot, see page 6, 17. These references are presumably to Messers Gillete and Arrington who did testify at the trial in support of Respondent's Fourth Counterclaim to determine the property boundary line, which Count has been dismissed. Respondent did not cite any specific page and line reference in the trial testimony of either witness to support the facts being asserted, in violation of R. 208(b)(4), S.C.A.C.R. Appellant's Initial Brief and Designation of Matter does not contain any reference to either of these witnesses. Therefore, there is no basis to allow Respondent's Designation of Items No. 20 and 21, totaling 101 pages, because none of those pages have been specifically cited as containing relevant facts by Appellant or Respondent.

Furthermore, the testimony of these two surveyors who Respondent hired to determine her boundary line is irrelevant to this Appeal which only involves the Fourth and Fifth Counts of the Complaint. Respondent never cross appealed Judge Keesley's Decision that the common boundary line was a matter of res judicata after Respondent dismissed her earlier trespass case and dismissed Respondent's Fourth Counterclaim to determine the common boundary. The common boundary line as established in the earlier case is now the law of the case, see First Union Nat'l Bank of S.C. v. Soden, 333 S.C.

554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (an "unchallenged ruling, right or wrong, is the law of the case and requires affirmance"). Respondent has not established any relevancy by citing their specific testimony on either of the issues on appeal, slander of title or nuisance pursuant to R. 209(b), S.C.A.C.R. , accordingly, the surveyors' testimony is not relevant. Therefore, for this further reason, Appellant contends that Items No. 20 & 21 should be stricken from the Respondent 's Designation of Matter.

In summary, Respondent's Initial Brief does not contain any specific transcript citations to the testimony of any witness who is identified in Items No. 1, 2, 20 & 21 to support the allegations contained therein, in violation of R. 208(b)(4), S.C.A.C.R. Therefore, Items 1,2,20 and 21 must be excluded since they violate R.208(b)(4) and R. 209(a)&(b), S.C.A.C.R.

**B. Items No. 5 & 10 are not in the Record.**

Item No. 5 designates the "Reply in 2015-CP10-3013" to be included in the Record on Appeal. But no document with this name was never introduced into evidence at the Trial. Item No. 10 designates " the Arrington Affidavit in 2016-CP10-4122 but there is no filing designated as " Arrington Affidavit" in this case and there was no Exhibit designated as such introduced in the Trial Transcript . R 210( c), S.C.A.C.R. states that the "the record shall not . . . include matter which was not presented to the lower court." Since neither Item No. 5 or 10 was presented to the Trial Court, these Items must be stricken from Respondent's Designation of Matter.

**C. Item No. 11 is not relevant to the issues on Appeal.**

Item No. 11 designates "Justice Toal's Order denying summary judgment. In 2016-CP10-4122. This Item refers to an interlocutory order entered in response to

Appellant's Motion for Summary Judgment as to the First Count seeking a declaratory judgment of res judicata as to her boundary line. Respondent's Initial Brief does not specifically refer to the denial of summary judgment in the Statement of Facts or Argument and Respondent did not cross appeal the entry of judgment on the First Count and so there is no relevancy to the issues on appeal, which involve Slander of Title and Nuisance. This Item violates of R. 209(b), S.C.A.C.R. and therefore it must be stricken from the Designation of Matter.

**D. Item Nos. 12, 19, 24 and 31 are duplicative of other Items.**

Respondent has inadvertently duplicated several Items in the Designation of matter: Item No. 12 is a duplicate of Item No. 6; Item No. 19 is a duplicate of Item No. 16; Item No. 24 is a duplicate of Item No. 7; and Item No. 31 is a duplicate of Item No. 3. Accordingly, Item Nos. 12, 19, 24 and 31 should be stricken as duplications. .

In summary, for the reasons above, this Court should strike Item Nos. 1,2, 5, 10, 11, 12, 19, 20, 21, 24 and 31 of Respondent's Designation of Matter.

**II. RESPONDENT'S DESIGNATION OF IRRELEVANT MATTER CREATES UNNECESSARY EXPENSE**

Appellant contends that there is a further reason to strike the Items enumerated above. If these Items are not stricken, the Record on Appeal will be expanded by almost 175 pages that do not specifically relate to the issues addressed in Appellant's Initial Brief or Respondent's Initial Brief. Appellant will have to incur the expense of an additional 3,000 pages (for sixteen copies) in the Record on Appeal. As demonstrated above, Respondent has utterly failed to demonstrate the relevancy of these extra pages and Appellant should not be required to bear the cost of this deficiency.

## CONCLUSION

Appellant urges the Court to grant the relief requested due the Respondent's failure to adhere to R. 208(b)(4) and 209(a) & (b), S.C.A.C.R. and to prevent unnecessary expense.

Respectfully submitted,



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Attorney for Appellant

Dated: March 18, 2020

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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Circuit Court Judge William P. Keesley

CASE No. 2016- CP-10-4122

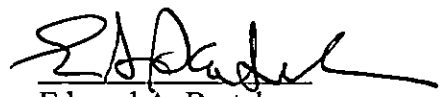
MICHELE BLANK .....Appellant

Vs.

PATRICIA TIMMONS, TRUSTEE  
OF THE GORDON H. TIMMONS  
EXEMPT FAMILY TRUST.....Respondent

CERTIFICATION OF SERVICE

I hereby certify that a true copy of Appellant's Motion to Strike Part of Respondent's Designation of Matter to be included in the Record on Appeal and to Stay Filing of Appellant's Reply Brief was served upon Respondent's Attorney, Mark Mason, Esq. by regular mail to his last known mailing address shown below.

  
Edward A. Bertele

March 19, 2020

Mark Mason, Esq.  
THE MASON LAW FIRM, P.A.  
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March 19, 2020

Ms. Jenny Abbott Kitchings, Clerk  
South Carolina Court of Appeals  
1220 Senate St.  
PO Box 11629  
Columbia, SC 29211

**Re: Blank v. Timmons**  
**Appellate Case No. 2019-001555**

Dear Ms. Kitchings:

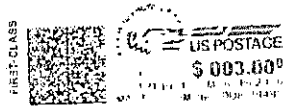
Enclosed please find original and six (6) copies of Appellant's Motion to Strike Part of Respondent's Designation of Matter to be included in the Record of Appeal and Stay filing of Appellant's Reply Brief and a Certification of Service. Also enclosed is my check for the filing fee of Fifty Dollars (\$50.00). Thank you for your kind assistance in this matter.

Very truly yours,

  
Edward A. Bertele

CC: Mark Mason, Esq.

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SC Court of Appeals

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