

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Honorable Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2012-CP-26-05610

**Appellate Case No.: 2019-001814**

Shaul Levy and Meir Levy ..... Appellants,

v.

Carolinian, LLC ..... Respondent.

**RESPONDENT CAROLINIAN, LLC's  
MOTION TO STRIKE AND MOTION TO STAY  
DEADLINE FOR RESPONDENT TO FILE INITIAL BRIEF AND DESIGNATION OF  
MATTER TO BE INCLUDED IN THE RECORD ON APPEAL**

Respondent, Carolinian, LLC, moves pursuant to Rule 240, SCACR for an order striking Appellants' Statement of Facts and all other factual assertions<sup>1</sup> set forth in their Initial Brief because they are either not supported by the matters designated by the Appellants to be included in the Record on Appeal or contain no citation to the matters so designated. Respondent also requests the Court stay the time deadline by which Respondent must file its Initial Brief and

<sup>1</sup> Several additional unsupported statements of fact appear on pages 11 – 16 within the ARGUMENT section of Appellants' Initial Brief.

Designation of Matter to be Included in the Record on Appeal until a time after the disposition of the present motion.

### **LEGAL STANDARD AND STANDARD OF REVIEW**

“[T]he appellate court will not consider any fact which does not appear in the Record on Appeal.” Rule 210(h), SCACR. An appellate court “does not sit as a trial court to receive evidence on disputed issues of fact; our function is to review the judgment of the circuit court for reversible error based on the issues and evidence presented to that court.” Sanders v. Salley, 283 S.C. 458, 460, 322 S.E.2d 829, 830 (Ct. App. 1984). While “[a] party may ... include a ... statement of facts relevant to the issues presented for review...” within the argument section of its brief, those facts must be supported by a “reference to the record on appeal.” Rule 208(b)(E), SCACR. Thus, a party to an appeal may not proffer statements of unsupported and/or contested facts in a brief; rather, the facts presented by a party to an appeal must be supported by the record before the trial court whose decision is subject to review.

This Court may order a stay of the time limits imposed by the Appellate Court Rules while a motion or petition is pending. Rule 240(b), SCACR

### **ARGUMENT**

Not one statement of fact contained in the Appellants’ Initial Brief contains a citation to the matters designated by Appellants to be included in the Record on Appeal. Many of the statements of fact set forth in the “Statement of Facts” section of the Appellants’ Initial Brief were not presented to the trial court and are, therefore, outside of the Record on Appeal. Appellants acknowledge as much in their brief, stating, “[w]hile specific references to the record may not be available to support all these facts that are outlined, these facts are undisputed between the parties.”

(Initial Brief of Appellant, p. 5, FN 3). This statement is false. In fact, some of the statements of fact contained in the Appellants' Initial Brief- aside from not being in the Record on Appeal- are not only contested, but simply false. This Court should, therefore, strike the Appellants' Statement of Facts and each statement of fact contained in the Appellants' "Argument" section of their brief which likewise contain no citation to the underlying record.

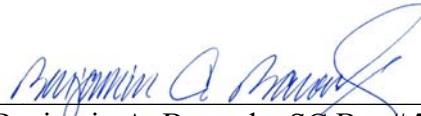
Respondent should not bear the burden of identifying each and every statement of fact proffered by the Appellants in their brief as supported or unsupported by the record, true or untrue, or contested or uncontested, and thereby subject to being stricken. It is the Appellants who have filed this appeal charging the trial court with error and availed themselves of the Appellate Court Rules. Those Rules require that all facts presented by Appellants be supported by a Record on Appeal, and that the Record on Appeal contain only that evidence actually presented to the trial court prior to rendering its decision. See Rules 210(h) and 208(b)(E), SCACR.

### **CONCLUSION**

In sum, this Court should order that all statements of fact contained in the Appellants' Initial Brief be stricken since none contain citations to the matters designated by the Appellants to become a part of the Record on Appeal, and then provide the Appellants with a period of time to file an amended Initial Brief supported by the record, as evidenced by proper citations thereto. Once an amended brief is filed, the Respondent will then be able to file an appropriate brief in response, addressing only those facts and issues addressed by the trial court prior to making its ruling.

Respondents further request that the Court stay the time period within which Respondent must file its Initial Brief and Designation of Matter to be Included in the Record on Appeal until

such time that this Court rules upon the present motion. For, the Court's disposition of this motion will materially affect the arguments Respondent chooses to present this Court.



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