

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Dec 17 2020

SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2019-001488

MB Hutson/MB Hudson,Appellant,

v.

Penn America Insurance Company,
Global Indemnity Group, Inc.,
Timothy J. Newton, Esq., J.R. Murphy, Esq.,
John Doe #1, John Doe #2,Respondents.

**RESPONDENTS' SECOND JOINT MOTION TO DIRECT APPELLANT
TO CORRECT THE INDEX AND RECORD ON APPEAL**

Respondents Penn America Insurance Company and Global Indemnity Group, Inc. (“Respondents PAIC”), Timothy J. Newton (“Newton”) and J.R. Murphy (“Murphy”) (collectively “Respondents”), jointly move this Court for an Order directing Appellant to correct the Index and Record on Appeal that he electronically submitted on December 16, 2020. The Respondents object to the Index and Record submitted on the basis that they contain improper argument, fail to include material that was properly designated by Respondents, include material not properly designated by any party, and are not properly paginated.

BACKGROUND

Appellant filed his original Designation of Matter on or about November 12, 2019. It listed a single item: “RICHLAND COUNTY COMMON PLEAS Case History for Case 2018CP4006344” and had a two-page document attached. Appellant subsequently filed his Initial Brief of Appellant on or about March 2, 2020.

Respondents filed their respective Initial Briefs and Designations of Matter. Respondents’ Designations included all court filings from the trial court proceedings and the hearing transcript.

Appellant filed what he titled “Responses” to the Initial Briefs of Respondents, which appear to be his attempt at Reply Briefs, on April 27 and May 7, 2020. The Court ordered Appellant to comply with the applicable page limitations for Reply Briefs, which he did with the filing of an Amended Reply Brief to PAIC on August 6, 2020. Appellant did not file any additional Designation of Matter with his Reply Briefs or Amended Reply Brief.

The Record on Appeal was due to be served upon Respondents on September 8, 2020. On September 8, 2020, Appellant delivered a large stack of documents to Respondents. However, the content and format of the Record prepared by Appellant were deficient in numerous respects.

On September 11, 2020, Respondents sent correspondence to Appellant identifying all of the deficiencies in the Record on Appeal in detail and requested Appellant seek additional time from this Court to correct them.

On or about September 15, 2020, Appellant served a Request for Extension to file the Record on Appeal, asking the Court to identify any deficiencies in the Record.

Accordingly, on September 25, 2020, Respondents filed a Motion to Direct Appellant to Correct Record on Appeal and Hold Final Briefing in Abeyance. Respondents provided the Court

with the list of deficiencies that had already been identified to Appellant in the September 11, 2020 letter. Appellant filed no return to the Motion.

On November 30, 2020, this Court granted the Motion to Correct Record on Appeal “in its entirety.” The Order provided Appellant thirty days from the date of the Order to serve and file a Record on Appeal that complies with the South Carolina Appellate Court Rules. The Order further instructed: “The record must contain consecutively numbered pages, an index, and every page of all matters designated by the parties. The record may not include any matters not designated by the parties or first presented to the lower court.” The Order also denied Appellant’s motion requesting to include evidence to prove extrinsic fraud.

On December 3, 2020, Appellant requested Respondent’s counsel provide him with another copy of the September 11 deficiency letter, which they did.

On December 7, 2020, Appellant asked if there was any objection to service of the corrected Record on Appeal by e-mail. Respondents’ counsel confirmed there was none.

On December 10, 2020, Appellant inexplicably filed a Return to Respondents’ Motion to Correct the Record on Appeal, despite the fact that this Court already granted Respondents’ Motion.

On December 11, 2020, Appellant filed an Amended Designation of Matter to be Included in the Record on Appeal. The proposed Amended Designation was not accompanied by any motion.

Thereafter, on December 16, 2020, Appellant filed a Record on Appeal Index, which he indicated would be followed by the submission of the Record on Appeal in four parts. The afternoon, the Court of Appeals sent correspondence to Appellant explaining:

We are in receipt of your response to the respondents' joint motion to direct appellant to correct the record on appeal. Please be advised that this motion was decided by this Court's order dated November 30, 2020. Therefore, no further action will be taken on your response.

Furthermore, we are in receipt of an amended designation of matter. Please be advised that if you wish to amend your designation of matter, you must serve and file a motion pursuant to Rule 240 of the South Carolina Appellate Court Rules. Therefore, no further action will be taken on your amended designation of matter unless a motion is filed and the record on appeal must be served by December 30, 2020.

Ltr. from COA Clerk, Dec. 16, 2020. Later that evening, at approximately 8:00 p.m., Appellant attempted to file the four volume Record on Appeal via Adobe Acrobat.¹

For the reasons that follow, Respondents object to Index and the Record on Appeal and ask this Court to Order it be corrected, again.

APPLICABLE LAW

“[T]he South Carolina Appellate Court Rules are not mere technicalities but provide the parties and [the] Court with an orderly mechanism through which to guide appeals in this State. It is incumbent upon counsel to provide material that complies with the Rules and facilitates appellate review.” Henning v. Kaye, 307 S.C. 436, 437, 415 S.E.2d 794, 794 (1992).

Rule 209(a) of the South Carolina Appellate Court Rules provides the time to serve and file the Designation of Matter to be Included in the Record on Appeal:

Time to Serve and File. At the same time a party serves his initial brief(s) under Rule 208, to include a reply brief, he shall also serve on all parties to the appeal a Designation of Matter to be Included in the Record on Appeal which shall set forth with specificity those parts of the transcript, pleadings, orders, exhibits, or other materials which he proposes to include in the record on appeal. . . .

The timing, content, format, and certification of the Record on Appeal are governed by Rule 210. Specifically, Rule 210(c) provides:

¹ It is unclear whether counsel for all parties and the Court received all four volumes of the Record. While attorney Newton received transmittals with all four volumes, attorney Baer only received an e-mail transmission related only to Volume 2 of 4. The remaining volumes were forwarded to her by Newton.

The Record on Appeal shall include all matter designated to be included by any party under Rule 209 and shall comply with the requirements of Rule 267. The Record shall not, however, include matter which was not presented to the lower court or tribunal. . . .

Rule 210(c), SCACR. Regarding the Index, Rule 210(e) provides:

Every Record on Appeal shall contain an index to the principal matters therein to include orders, judgments, decisions, pleadings, pretrial matters, opening statements, testimony, motions, closing arguments, jury charges, post-trial motions and exhibits. For witness testimony, the index shall show the pages on which direct, cross, redirect and recross examination begins.

Rule 210(e), SCACR.

DISCUSSION

As the Court of Appeals noted in its December 16, 2020 correspondence to Appellant, Appellant's Amended Designation of Matter was procedurally improper because it was not accompanied by any motion seeking leave from the Court for the amendment. Nonetheless, Appellant used the Amended Designation as the outline for the Index and Record on Appeal he submitted to the Court. These filings are substantively deficient and improper.

A. The references in the Index to the lower court's treatment of Appellant's proposed order and Appellant's extraneous commentary are improper.

On page "i" of the Index, under item 2, Appellant wrote: "*Nettles also asked Pro Se Hutson to submit an order, which he did. (However, Judge Nettles never denied, nor acknowledged Hutson's submission. Therefore, Hutson moved to the Appellate Court rather than seeking reconsideration.)*" The Index is not an opportunity for Appellant to present arguments to the Court, particularly argument that has never been made in Appellant's brief. Thus, this language should not be permitted in the Index.

Additionally, on page ii of the Index, under item 9, Appellant unnecessarily writes “itemized list not provided” next to the exhibits to Respondent Newton’s Memorandum. The nature of each Exhibit is provided in the Memorandum itself. This commentary is improper.

B. The reference in the Index to “Unreported Extrinsic Fraud” is improper argument and an untimely attempt to supplement Appellant’s briefing.

On page iv of the Index, under item 18, Appellant wrote: “*NOTE: The un-reported Extrinsic Fraud is addressed by Appellant: p. 29, lines 24-25; p. 36, lines 3-6; p. 37, lines 6-14; p. 38, lines 6-13; p. 40, lines 9-19; p. 44, lines 5-11.*” It is evident that Appellant is attempting to use the Index as an opportunity to expand and buttress the arguments in his briefing, instead of providing the neutral filing intended by the Rules. Notably, this Court’s November 30, 2020 Order specifically provided: “First, Appellant’s motion requesting this court to allow Appellant to include evidence of extrinsic fraud is denied.” Appellant cannot circumvent that ruling now through an untimely Amended Designation and argumentative Index. Thus, this language should not be permitted in the Index.

C. The reference in the Index and inclusion in the Record of Hutson’s “Read Sheet” is improper because it was not properly designated for inclusion in the Record, it was not made an exhibit before the lower court and is not relevant or necessary to the appeal.

In Appellant’s improperly filed Amended Designation, he listed under the heading “EXHIBITS”:

19. Hutson’s “**Read Sheet**”: Prior to Plaintiff presenting his case to Judge Nettles, (Transcript, page 22, lines 14-19), Hutson personally distributed a twenty-four (24) page Exhibit Package to all parties (Hon. Judge Nettles, Tim Newton, Esq., JR Murphy, Esq., and Christian Stegmaier, Esq). Plaintiff refers to the Exhibit as his “Read Sheet” to the Honorable Judge Nettles (Transcript p. 22, line 19), which consisted of excerpts from Plaintiff’s earlier filings. The copy provided herein includes Plaintiff’s hand-notes and talking points that were planned, although cut short by the Judge (Transcript p. 46, ll. 9 – p. 47, ll.25).

This is also listed on page iv of the Index, as item 19, and included in the Record on pages 1061 through 1084.

Appellant's Amended Designation was not filed with the requisite motion. Thus, at this time, the inclusion of the "Read Sheet" in the Record, which was not designated by any other party, is not proper under Rule 210(c), SCACR. Further, Appellant again injects argument into the Index instead of simply listing the material contained in the Record.

Even if Appellant had filed the appropriate motion, inclusion of the "Read Sheet" in the Record would be improper. As an initial matter, it is unclear, since Appellant did not mark the document as an Exhibit at the hearing, whether the "hand-notes" and "talking points" he references were also included in the document that Appellant handed up to Judge Nettles during the hearing.

Appellant further acknowledges that the document was merely his "planned" argument, only some portions of which were made at the hearing. To the extent this document contains arguments that were never raised to the trial court and ruled upon, such arguments cannot now be asserted on appeal. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("[T]he losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments."). The arguments that were articulated to the lower court are contained in the hearing transcript itself.

Moreover, the transcript of the June 26, 2019 proceedings reveals that no documents were marked or admitted as exhibits at the hearing. (**Exhibit A**, June 26, 2019 Hr'g Tr. pp. 1-3). Appellant never moved to include his handout in evidence at the hearing before Judge Nettles. If Appellant had made such an effort to offer the "Read Sheet" into evidence, it would have been met with a timely objection from Respondents. "To hold evidence to which reference is made, but which is not offered into evidence, is admissible would severely prejudice the party opposing its

introduction by virtually precluding the party from placing the grounds for his objection on the record.” Roberts v. Roberts, 299 S.C. 315, 319, 384 S.E.2d 719, 721 (1989). Where, as here, Respondents were never given the opportunity to timely object to its inclusion., Appellant’s attempt to designate the material after the initial briefing should be rejected.

Furthermore, Appellant does not specify why this document is necessary. Appellant does not appear to contend that his initial brief relied upon it. Nor has Appellant supported his request with a demonstration that this document is relevant to this appeal. See Rule 209(b), SCACR. Accordingly, the “Read Sheet” should not be listed in the Index or included in the Record.





D. The Index and Record fail to include all properly designated material.

On page iii, under item 14, Appellant’s filed Index lists only a portion of the exhibits to Respondent Newton’s Affidavit, which were filed with the Court. There were three exhibits to Newton’s Affidavit: Exhibit 1 is materials copied by Newton from court file for C/A No. 2011-CP-14-00602 (Bates labeled EJECT_001 to EJECT_356); Exhibit 2 is a copy of the Public Index for C/A No. 2011-CP-14-00602; and Exhibit 3 is a bates-labeled copy of Exhibit V to Newton’s Memorandum in Support of Dismissal or Summary Judgment (Bates labeled EXH_V_001 to EXH_V_032). Exhibit 1 was filed in three parts, EJECT_001 to EJECT_155 and EJECT_156 to EJECT_315 were filed on June 25, 2019 on 10:47 a.m. Upon discovery that additional pages belonged in Exhibit 1, another filing of EJECT_316 to EJECT_356 was filed at 15:36 p.m. The Exhibits listed on the Index and included in the Record are missing the pages labeled EJECT_001 to EJECT_315 and Exhibit 2. While these materials are all available on the Public Index, Respondent Newton would have provided a complete copy to Appellant had it been requested.

Respondent PAIC’s designation of matter included: “PAIC’s Memorandum in Support of Summary Judgment with Exhibits A and B, filed June 25, 2019 (134 pages total).” Exhibit A is a

redacted copy of the commercial general liability policy issued to BWR Inc. d/b/a Big Water Resort. It is 94 pages including the cover sheet. Exhibit B is the Affidavit of Thomas L. Harper, Jr. with attachments. It is 16 pages including the cover sheet.

On page iv, under item 17, Appellant’s filed Index states that these exhibits were not filed with the Court. However, both exhibits are accessible on the Richland County Publix Index, as reflected in the screen snip below that shows three PDFs associated with the Memorandum filing:

Penn America Insurance Company	NEF(06-25-2019 02:23:54 PM) Memo/Memo in Support	Filing		06/25/2019-15:01		
Penn America Insurance Company	Memo/Memo in Support	Filing		06/25/2019-14:23		  

These exhibits are separate and distinct from the Exhibits A and B attached to Respondent’s Memorandum, which consist of the Report and Recommendation and the final Order entered in the federal class action lawsuit, Reed v. Big Water Resort, LLC.

Appellant could have requested that Respondent PAIC provide him with copies of the filed exhibits. Instead, he unilaterally and falsely stated in the Index that the Exhibits A and B to PAIC’s Memorandum were never filed. Further, it appears that PAIC’s Memorandum was omitted from the Record altogether. Instead, Appellant included a second copy of PAIC’s Motion for Summary Judgment on page 1165 of the Record.² Respondents are entitled to have the matter they designate properly listed in the Index and included in the Record on Appeal.

E. The pagination listed on the Index does not match the Record.

Appellant’s citations in the Index to pages 85, 992, 994, 997, 1061, and 1085 all appear incorrect. The Record provided is a total of 1256 pages, not 1085 pages as indicated on the Index. The page numbering in the Index is not useful where it does not coincide with the Record.

² On page iii of the Index, item 12, Appellant first list Respondent’s PAIC’s Motion for Summary Judgment and states that Exhibits A and B did not with this filing. That is correct, the Exhibits were not filed with the Motion; they were filed with the subsequent Memorandum.

CONCLUSION

In sum, the Index and Record contain improper argument, fail to include material that was properly designated by Respondents, include material not properly designated by any party, and the page references are inconsistent. Respondents request that the Court once again direct Appellant to file an Index and Record that complies with the Appellate Court Rules.

Based upon the foregoing, Respondents respectfully request that this Honorable Court:

- (a) direct Appellant to remove argumentative and unnecessary statements from the Index;
- (b) direct Appellant to remove material from the Index and Record that was not properly designated;
- (c) direct Appellant to include all material that was properly designated by Respondents in the Index and Record;
- (d) direct Appellant to confer with Respondents to correct the Index and Record he filed; and
- (e) direct Appellant that failure to comply with the Order of this Court may result in dismissal of his appeal.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

s/Christian Stegmaier _____

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PRO SE RESPONDENT

**RESPONDENTS' SECOND JOINT MOTION TO
DIRECT APPELLANT TO CORRECT THE
INDEX AND RECORD ON APPEAL**

Columbia, South Carolina
Dated: December 17, 2020

EXHIBIT A

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF RICHLAND) C.A. NO. 2018-CP-40-06344

MB HUTSON,)
)
) PLAINTIFF,)
)
)
VERSUS)
)
)
PENN AMERICA INSURANCE COMPANY, ET AL,)
)
)

DEFENDANTS.)

MOTION HEARING TRANSCRIPT

A MOTION HEARING IN THE ABOVE ENTITLED CASE WAS HELD ON THE 26TH DAY OF JUNE, 2019, COMMENCING AT THE HOUR OF 9:51 A.M., BEFORE THE HONORABLE JUDGE MICHAEL G. NETTLES AT THE RICHLAND COUNTY COURTHOUSE IN COLUMBIA, SOUTH CAROLINA.

REPORTED BY: KAREN E. HOLLEY, CVR-M
OFFICIAL STATE COURT REPORTER

APPEARANCES :

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EXHIBITS:

(NONE MARKED)

(THIS TRANSCRIPT MAY CONTAIN QUOTED MATERIAL. SUCH
MATERIAL IS REPRODUCED AS READ OR QUOTED BY THE SPEAKER.)

CERTIFICATE OF SERVICE

I, the undersigned, attorney for Respondents Penn America Insurance Company and Global Indemnity Group, Inc., do hereby certify that I have this date served the foregoing RESPONDENTS' SECOND JOINT MOTION TO DIRECT APPELLANT TO CORRECT THE INDEX AND RECORD ON APPEAL by causing the same to be deposited in a United States Postal Service mailbox, postage prepaid, and via electronic mail, addressed to the following:

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Pro Se Appellant

RECEIVED
Dec 17 2020
SC Court of Appeals

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GLOBAL INDEMNITY GROUP, INC.

Dated: December 17, 2020