

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
Sep 24 2021
SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
The Honorable R. Ferrell Cothran, Jr.

Appellate Case No. 2021-000301

Charles Waymon Murphy,.....Appellant,

v.

Lori Ann Niverson; Starr Distributing, LLC.....Defendants,

Of which Starr Distributing, LLC, is the.....Respondent,

AND

Starr Distributing, LLC.....Third-Party Plaintiff,

v.

Arthur C. Niverson.....Respondent.

APPELLANT’S MOTION TO STRIKE TWO OF RESPONDENT ARTHUR C. NIVERSON’S
DESIGNATIONS OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL AND
TO STAY DEADLINES UNTIL THE COURT RULES ON THE MOTION

Appellant Charles Waymon Murphy moves this Court for an order striking two of Respondent Arthur C. Niverson’s designations of matter to be included in the record on appeal and all references to and discussion of those documents from his brief. Appellant also requests the Court stay the deadlines for filing Appellant’s reply briefs until it rules on the motion to strike. Rule 240, SCACR.

Under Rule 210(c), SCACR, “[t]he Record shall not, however, include matter which was not presented to the lower court or tribunal.” The designation of matter to be included in the record on appeal “may only propose to include portions of the transcript, pleadings, orders, exhibits or other materials which may be properly included in the Record on Appeal [See Rule 210(c)].” Rule 209(b), SCACR (alteration in original).

Respondent Arthur C. Niverson designated the following two documents that he knows were not presented to the lower court:

1. Transcript of Charles A. Starr deposition;
2. Invoices #1196, #1762, and #1790

(Resp’t Niverson’s Designation of Matter p. 2, numbers 12 & 14). Prior to filing this motion, Appellant asked Respondent to confirm whether these documents were presented to the lower court and, if not, to withdraw the designations and all references to and discussion of them from Respondent Niverson’s brief. (Exh. 1, email). Respondent replied that the documents were not presented to the lower court but were proper designations given the standard of review and clarification of additional sustaining grounds. (Exh. 1, email). Appellant disagrees and moves the Court to strike the designations because they were not “presented to the lower court.” Rule 210(c), SCACR.

Appellant is not aware of any authority that allows a document to be presented to the court for the first time on appeal simply because of a given standard of review or the existence of additional sustaining grounds. Regardless, Respondent Niverson’s brief does not raise any additional sustaining ground. Respondent Niverson chose not to file the documents in the lower court and cannot do so now under the Appellate Court rules. Appellant respectfully requests the Court grant the motion.

Respectfully submitted,

September 24, 2021

s/Kathleen C. Barnes
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Attorneys for Appellant

EXHIBIT 1

From: [Kelly Dean](#)
To: [Kathleen Barnes](#); [Mitch Griffith](#)
Cc: [Ashley Twombly](#); [Ainsley Tillman](#); [Ian S. Ford](#)
Subject: RE: Murphy v. Starr - Mr. Niverson's Record on Appeal designations
Date: Wednesday, September 15, 2021 9:29:50 AM
Attachments: [image001.png](#)
[image002.png](#)

Kathleen – We think they are properly included for the reasons mentioned. Please proceed how you see fit.
Thanks - Kelly

Kelly Dennis Dean

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From: Kathleen Barnes <kbarnes@barneslawfirm.com>
Sent: Tuesday, September 14, 2021 11:21 AM
To: Kelly Dean <Kdean@griffithfreeman.com>; Mitch Griffith <Mgriffith@griffithfreeman.com>
Cc: Ashley Twombly <twombly@twlawfirm.com>; Ainsley Tillman <Ainsley.Tillman@fordwallace.com>; Ian S. Ford <ian.ford@fordwallace.com>
Subject: RE: Murphy v. Starr - Mr. Niverson's Record on Appeal designations

Kelly,

I did not see any additional sustaining grounds raised in Mr. Niverson's brief and am not aware of an exception to Rule 210(c), SCACR, for additional sustaining grounds. Under Rule 210(c), SCACR, "[t]he Record shall not, however, include matter which was not presented to the lower court or tribunal." We do not think those documents are properly included in the record or discussed in Mr. Niverson's brief. Please let me know if you agree to remove them and refile the brief, or if we will need to file a motion to strike the designation and brief references.

Thank you,

Kathleen

From: Kelly Dean <Kdean@griffithfreeman.com>

Sent: Tuesday, September 14, 2021 11:13 AM

To: Kathleen Barnes <kbarnes@barneslawfirm.com>; Mitch Griffith <Mgriffith@griffithfreeman.com>

Cc: Ashley Twombly <twombly@twlawfirm.com>; Ainsley Tillman <Ainsley.Tillman@fordwallace.com>; Ian S. Ford <ian.ford@fordwallace.com>

Subject: RE: Murphy v. Starr - Mr. Niverson's Record on Appeal designations

Kathleen – Starr’s deposition was not filed with the Court. Arthur Niverson’s deposition was filed in its entirety, but the Invoices referenced and marked as Exhibits to the deposition were not. We chose to include them to rebut the characterizations of the facts contained in Appellant’s brief and believe that their inclusion is proper given the appropriate Standard of Review and clarification of “additional sustaining grounds” in *l’On, LLC v. Town of Mt. Pleasant*, 338 SC 406 (2000).

Thanks - Kelly

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From: Kathleen Barnes <kbarnes@barneslawfirm.com>

Sent: Tuesday, September 14, 2021 10:06 AM

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Subject: Murphy v. Starr - Mr. Niverson's Record on Appeal designations

Kelly,

I hope you are doing well. In reading Mr. Niverson’s brief and looking over the record on appeal designations, I see that you reference and designate the deposition of Mr. Starr and invoices used during Mr. Niverson’s deposition. I do not see any of those documents in the online filings with the lower court. Were those documents presented to the lower court? If not, we will ask that they be removed from the designations and

that all references to and discussion of them be removed from Mr. Niverson's brief. I may have missed them, so please let me know.

Thank you,

Kathleen



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