STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Jean H. Toal
Acting Circuit Court Judge

C.A. No: 2019-CP-40-06243
Appellate Case No. 2021-000648

Peter D. Protopapas, as Receiver for Starr Davis Company, Inc. and Starr Davis Company of S.C., Inc..... Respondents,

v.

Travelers Casualty and Surety Company f/k/a The Aetna Casualty and Surety Company; The Standard Fire Insurance Company; St. Paul Fire and Marine Insurance Company; The Employers' Fire Insurance Company; Southeastern Agency Group and M.I.A. Company, Inc. individually and as successors to or f/k/a Merrimon Insurance Agency, Inc.; Robert E. Aspray; Nell Ashworth, individually and as personal representative of the Estate of Robert J. Ashworth; Betty C. D'Amico, individually and as Executor of the Estate of Julian D'Amico, Jr.; Kayla Keith, individually and as the personal representative of the Estate of Jerry W. Archer, Sr.; Richard L. Knight II, as personal representative of the Estate of Teddy L. Knight, Sr., and Linda Knight, individually; David D. Rollins; James W. Smith and Frances R. Smith; and Linda J. White, individually and as personal representative of the Estate of Lubert R. White, Jr.,..... Defendants,

of which

Travelers Casualty and Surety Company f/k/a The Aetna Casualty and Surety Company and The Standard Fire Insurance Company are the..... Appellants.

MOTION TO STRIKE PORTION OF RESPONDENTS' BRIEF AND ENTRY ON RESPONDENTS' DESIGNATION OF MATTER AND TO HOLD REMAINING DEADLINES IN ABEYANCE DURING PENDENCY OF MOTION

INTRODUCTION

The order on appeal is a summary judgment decision that holds, as a factual matter, that Travelers issued insurance policies to Starr Davis for forty consecutive years; the order also purports to construe the terms of all policies issued over those forty years. (*See* App. 79 (ruling that "[t]he undisputed evidence presented by Starr Davis in connection with the Motion [for Partial Summary Judgment] shows a 40-year uninterrupted relationship between the parties from January 1, 1946 to April 30, 1986, during which Travelers issued liability insurance coverage" to Starr Davis); App. 85 (stating that "it is not premature for the Court to rule on the missing Travelers policies issues framed by the Motion," and acknowledging that the court relied on Starr Davis's counsel's "compilation of policy dates, insurance policy numbers, and occurrence and aggregate limits" in finding that the policies allegedly spanned form 1946 to 1986).)

A key error with this part of the circuit court's ruling is that it was issued without the court ever actually reviewing the policies themselves. As Travelers explained in its opening appellate brief, with the exception of a few incomplete policies, insurance contracts showing "a 40-year uninterrupted relationship" were never presented to the circuit court, and there is no way that the circuit court could construe insurance policies that it had never seen—especially at the summary judgment stage. (*See generally* Appellants' Br. at 11–26.) This is because like any contract, interpreting an insurance policy must begin "with the language of the policies themselves." *Crossmann Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 52–53, 717 S.E.2d 589, 595 (2011).

Importantly, Starr Davis could have, but did not, submit copies of all of the policies it possessed—complete or incomplete—as evidence in support of its motion for partial summary judgment. In other words, despite the fact that Starr Davis possessed additional policy documents,

it made the conscious decision to provide the circuit court with copies of only two incomplete policies. This gaping hole in the record is an obvious error that requires reversal.

Yet, when Starr Davis filed its return brief, it argued that documents showing a forty-year history of Travelers' insurance actually had been filed with the circuit court. (*E.g.*, Respondents' Br. at 8–9, 12, 14–22.) Indeed, it mocked Travelers for ignoring those documents, arguing that it would "waste judicial resources" to reverse summary judgment and allow the parties to litigate to verdict the question of what policies Travelers may have issued to Starr Davis because documents demonstrating this decades-long insurance program were already on file below. (*Id.* at 16 n.2.)

To be sure, the parties' respective briefs to this Court read as if they are discussing cases with two different procedural histories. That's because the materials on which Starr Davis has based Section I of its appellate argument were never filed below. They were never served on Travelers or any other litigant. Instead, they were apparently sent to the trial judge at her home on an *ex parte* basis. And they were apparently delivered to the trial judge a full day after she signed the summary judgment order. Travelers did not learn about the *ex parte* communication or its content until after Starr Davis filed an appellate brief with this Court that so heavily relies on those documents.

These deceptive litigation tactics fly in the face of the South Carolina Rules of Appellate Procedure, Rules of Civil Procedure, and Rules of Professional Conduct. The appellate record and briefing cannot be polluted with documents and arguments that were never filed or served below but, instead, were improperly given to the trial judge at her home on an *ex parte* basis after entering the order on appeal. Accordingly, the Court should strike the final entry on Starr Davis's designation of matter (Designation 3), and it should strike all arguments in Starr Davis's appellate brief that rely on those materials (arguments on Pages 8–9, 12, and 14–22 of Starr Davis's brief).

PROCEDURAL BACKGROUND

I. Starr Davis moved for summary judgment almost immediately after filing suit, with an incomplete record and without submitting evidence to support its position.

Starr Davis filed this case on November 6, 2019. (App. 18.) It filed its first motion for summary judgment on February 28, 2020, and it filed a "supplemental" motion for summary on June 23, 2020. (App. 11–12.) After amending the complaint, Starr Davis filed a third motion for summary judgment on August 21, 2020, which is the operative motion the circuit court granted and that is the subject of this appeal. (App. 10.)

Travelers opposed summary judgment on several grounds. In part, Travelers argued that summary judgment would be premature because Starr Davis was asking for judicial declarations that Travelers had issued Starr Davis forty consecutive years of insurance policies, from 1946 to 1986, and for judicial declarations as to the precise terms of those policies, despite the fact that (1) the record did not contain documentation relating to the vast majority of the policies needed to support such declarations; and (2) a 1985 agreement with Starr Davis contractually specified that Travelers provided coverage back to 1959, ***not*** to 1946. (App. 20–22, 33–44.) Because (among other reasons) discovery remained ongoing and the disputed issues as to the issuance and content of the alleged policies should be resolved at trial, summary judgment was improper.

II. Despite the absence of proof from Starr Davis on disputed factual issues, the circuit court granted Starr Davis's motion for summary judgment.

Despite these and other defects in Starr Davis's motion, the circuit court orally granted summary judgment during a January 25, 2021 hearing. Starr Davis transmitted a proposed order to the court on February 2, 2021, to which Travelers filed objections. (App. 4.) In its objections, Travelers once again argued that summary judgment was improper for several reasons, including because Starr Davis was asking the circuit court to issue declaratory rulings and construe insurance

policies that were never introduced into the record. (App. 65–68.) Starr Davis transmitted a revised proposed order to the circuit court on February 19, 2021. (App. 3.) In both proposed orders, Starr Davis asked the circuit court to rely on inadmissible summary charts or "policy schedules," devoid of any policy language, that Starr Davis's counsel prepared, rather than copies of the policies themselves.

On March 3, 2021, the trial judge electronically signed a summary judgment order, which adopted substantially the language of Starr Davis's amended proposed order and granted Starr Davis's motion for partial summary judgment. (App. 105.) The Clerk of Court uploaded it to the Public Index at 7:40 am on March 4, 2021. (App. 3.)

III. After the circuit court granted summary judgment, Starr Davis filed two documents that cryptically suggested it would submit unidentified materials under seal, but no such materials were ever filed or served—as far as Travelers knew.

At the close of business on March 4, 2021—a full calendar day ***after*** the circuit court signed the summary judgment order, and a full business day ***after*** the order was posted on the Public Index—Starr Davis filed two documents with the circuit court. One was entitled "Notice of Filing," which said that Starr Davis was filing "the documents attached hereto as Exhibit A." (App. 107.) But "Exhibit A" was only a slip sheet indicating that some materials would be filed under seal, and no actual documents were attached. (App. 108.)

The other filing was entitled "Motion to Seal," which requested that "Exhibit A" from the "Notice of Filing" be filed under seal. (App. 110.) It also had no documents attached. (App. 109–11.)

Neither filing included an index or a list indicating what was supposedly being filed, as required by Rule 41.1(b), SCRCP. Neither filing said anything about Starr Davis submitting insurance policies or pieces of policies to the circuit court. Neither filing contained a Rule 11

certification. Instead, the filings generically indicated that the documents would "address the arguments" raised in Travelers' various submissions in opposition to summary judgment (App. 107), which was peculiar given that these filings came ***after*** Starr Davis filed its summary judgment motion, ***after*** the motion was heard and orally granted, ***after*** Starr Davis submitted its two proposed orders, and ***after*** the circuit court signed and docketed the summary judgment order.

Without any specific identification as to what these documents were, Travelers awaited some indication as to what Starr Davis would ultimately file and serve in support of its "Notice of Filing" and "Motion to Seal" in order to assess whether any additional arguments or objections needed to be made. And as far as Travelers was aware, anything Starr Davis purported to file at that point relating to its motion for partial summary judgment—that is, after the court had already granted the motion—appeared to be irrelevant and mooted by the circuit court's order.

Nothing was ever filed or served. Travelers received no emails with documents attached, no letters with flash drives containing documents, and no binders containing hard copies of exhibits. Nothing. The absence of anything following the cryptic "notice of filing" reinforced Travelers's understanding that there was no substance to that untimely filing.[1]

IV. Travelers timely filed a Rule 59 motion, and neither Starr Davis nor the circuit court ever indicated that Starr Davis had attempted to add materials to the record after the summary judgment order had been entered.

With nothing else in the record, Travelers timely filed a Rule 59 motion, and again argued that summary judgment was improper because Starr Davis had failed to introduce actual policies or even parts of policies other than the two incomplete policies it attached to its motion. (App. 113–14.) Starr Davis filed an opposition memorandum that failed to mention any supposed post-

[1] As discussed further below, it was not until on October 21, 2021, that Starr Davis's counsel sent a link to Travelers' counsel that supposedly contains "copies of everything that was [allegedly] filed with the Court for the March 4, 2021 Notice of Filing." (App. 127.)

judgment filings or the introduction of additional policy materials in the record. (App. 117–22.) On May 19, 2021, the circuit court denied the Rule 59 motion without mentioning any post-judgment filings or Starr Davis's motion to seal. (App. 123–25.)

V. On appeal, Starr Davis disclosed for the first time that it had sent materials to the trial judge on an *ex parte* basis, and did so after summary judgment had been entered.

On June 18, 2021, Travelers timely noticed its appeal of the circuit court's summary judgment ruling and its denial of Travelers' motion to reconsider. In its opening brief, Travelers argued that the summary judgment ruling was improper and premature because there was woefully insufficient admissible evidence in the record to support the circuit court's sweeping, 40-year declarations concerning the existence, terms, and conditions of alleged coverage. (Appellants' Br. at 11–26.) In response, Starr Davis argued that Travelers was simply incorrect, that plenty of evidence was in the record below, and that it would be a "waste" to allow litigation to continue below. (Respondents' Br. at 8–9, 12, 14–22.) Starr Davis also included its March 4th "Notice of Filing with Exhibits" in its designation of matter. (Respondents' Designation at Entry 3.)

Starr Davis's arguments and designation of matter were puzzling, as the "Notice of Filing" had attached only a slip sheet containing nothing of substance and, as noted above, was filed after the circuit court had already granted summary judgment. In addition, Travelers believed the filing must have been in error or was mooted by the summary judgment order, particularly since no documents were ever filed or served on Travelers and the motion to seal was never acted upon. After reviewing Starr Davis's arguments in its appellate brief, however, which rely heavily on never-before-seen documents supposedly attached to Starr Davis's belated "Notice of Filing," Travelers reached out to Starr Davis to investigate the situation. (App. 127.)

During that investigation, Starr Davis disclosed for the first time that it had sent materials on an *ex parte* basis to the circuit court judge's house on March 4th, after the summary judgment

order had been entered. (App. 129.) When Travelers directly inquired as to whether that set of materials had also been served on the parties, Starr Davis eventually acknowledged that it was "not able to find evidence" that any of the documents apparently provided to the circuit judge at her residence had ever been served on Travelers. (App. 126–27.)

Of course, Starr Davis's "protests too much" response overlooks the obvious: Travelers had no reason or basis to object to materials it did not know were sent to the trial judge, at her personal residence, after summary judgment has been entered, that were never filed with the circuit court, and that were never served on Travelers. Moreover, setting aside whether Travelers could have objected to documents it did not even know about, the trial judge indisputably did not consider them in her summary judgment ruling because the court issued its the order a full day before Starr Davis supposedly provided the documents to the trial judge, making them ineligible for inclusion in the record on appeal.

ARGUMENT

It is hornbook law that this Court cannot consider arguments and evidence that were not properly presented below. *See, e.g.*, Rule 210(c), SCACR ("The Record shall not, however, include matter which was not presented to the lower court or tribunal."); *id.* Rule 210(h) (stating that with few irrelevant exceptions, "the appellate court will not consider any fact which does not appear in the Record on Appeal"); *id.* Rule 208(b)(1)(E) (requiring parties to an appeal to include "reference to the record on appeal" when providing factual arguments); *cf. Dempsey v. Huskey*, 224 S.C. 536, 545, 80 S.E.2d 119, 123 (1954) (affirming the trial court's refusal to consider evidence submitted after a hearing on the matter because it would have been improper to consider additional evidence without an opportunity for cross-examination); *Norris v. Ferre*, 315 S.C. 179, 183, 432 S.E.2d 491, 493 (Ct. App. 1993) ("Finally, Norris moved to supplement the record on appeal with

deposition testimony from an unrelated action. We deny the motion since the matters were not presented to the trial judge."); *Gilmore v. Ivey*, 290 S.C. 53, 58, 348 S.E.2d 180, 184 (Ct. App. 1986) (affirming the trial court's decision to disregard certain depositions when ruling on a summary judgment motion because they "had not been filed as the rule required or had not been published and therefore were not in the record").

When a party attempts to rehabilitate a lacking record with materials that were never presented below, this Court should strike those entries from the record and not consider them in arguments. *See generally* Jean Hoefer Toal, *Appellate Practice in South Carolina* 369 (3d ed. 2016) ("[I]f the opposing party includes matter not presented below, parties often make motions to strike that matter."); *id.* at 405 ("[I]f a party includes material in the Designation that was not presented below, another party may ask the appellate court to strike the improper material.").

The Court should strike Entry 3 on Starr Davis's Designation of Matter and all arguments in its appellate brief that rely on that entry—that is, arguments on Pages 8–9, 12, and 14–22 of Starr Davis's brief. It would be fundamentally improper and unfair for this Court to consider those materials and arguments on appeal when they were never filed or served below but instead delivered to the trial judge's house on an *ex parte* basis and presented after summary judgment had already been entered. (App. 129.) Travelers had no way of addressing them with the trial court at any step in the process, and their inclusion in the record and consideration on appeal would plainly be prejudicial.

South Carolina law is replete with rules designed to avoid just such a situation:

- Rule 5(a), SCRCP, directs that all "written notices" and "other similar papers shall be served upon each of the parties of record."
- Rule 5(b)(3), SCRCP, directs that "[a]ny party providing . . . other paper to the court for its consideration in any pending matter shall serve the same on all counsel of record at the same time and by the same means."

- The 2005 comment describes Rule 5, SCRCP, as "mak[ing] explicit that all major documents and papers, including, but not limited to, pleadings and amended pleadings, discovery requests and responses, motions and similar papers are to be served on every party of record."

- Rule 11, SCRCP, requires counsel to consult with adverse parties prior to filing a motion, which would have brought this whole situation to light had Starr Davis done so with respect to its "motion to seal."

- Rule 3.5(b) of the South Carolina Rules of Professional Conduct prohibit a lawyer from "communicat[ing] *ex parte* with [a judge, juror, member of the jury venire, or other official] during the proceeding unless authorized to do so by law or court order."

- Canon 3(B)(7) of the Code of Judicial Conduct prohibits a judge from "consider[ing] *ex parte* communications, or consider[ing] other communications made to the judge outside the presence of the parties concerning a pending or impending proceedings" with limited exceptions that are irrelevant here.[2]

The South Carolina Supreme Court has rigorously enforced these rules, which go to the very credibility of the litigation process and adversarial system. *See, e.g.*, *In re Duffy*, 418 S.C. 370, 370–71, 793 S.E.2d 299, 299–300 (2016) (publicly reprimanding counsel for sending correspondence to a judge without a copy to opposing counsel); *In re Valenta*, 400 S.C. 466, 468, 734 S.E.2d 653, 654 (2012) (publicly reprimanding an agency attorney who was sending letters to

[2] Only after Travelers received Starr Davis's appellate brief and followed up with Starr Davis's counsel regarding the references to an alleged supplement to the record did Starr Davis provide Travelers with a March 4, 2021 letter addressed to the trial judge that was not copied to any other litigant. (App. 129.) Starr Davis apparently sent this letter to the trial judge, and only the trial judge, the day after she signed the summary judgment order, and after the ruling had been docketed in the Public Index. However, Travelers does not know if the trial judge ever actually received or reviewed these materials. Nothing in the record below indicates that the trial judge was aware of these documents, as the order denying Travelers' Rule 59 motion makes no mention of them, nor has there ever been a ruling on the Starr Davis "motion to seal" that references these materials. Likewise, Rule 5(e), SCRCP, explains that filing with the trial court takes place under two circumstances: when documents are submitted to the clerk of court, which never happened here; or when documents are submitted to the trial judge, who is then required to "note thereon the filing date and forthwith transmit them to the office of the clerk," which also never happened here. Presumably, if the trial judge ever received and reviewed the documents on which Starr Davis is basing its lead appellate argument, there would be some indication of that in the record. But there is none, which reinforces the need to grant this motion and strike the portions of Starr Davis's brief and designation of matter that rely on information not timely or properly presented below.

magistrate judges regarding cases pending before them without including other parties to those cases on that correspondence); *In re Cheatham*, 390 S.C. 439, 442, 702 S.E.2d 559, 560 (2010) (publicly reprimanding counsel for submitting a proposed order to the family court without also serving it on opposing counsel).

At bottom, litigants are prohibited from submitting materials to a court on an *ex parte* basis, and appellate courts are prohibited from considering documents that were not properly filed or served below. This is particularly true under the circumstances of this case, where the *ex parte* communication apparently included documents intended to supplement a deficient summary judgment record after the motion for summary judgment had already been decided. Starr Davis's conduct, misleading arguments, and improper designation of matter on appeal violate both of these longstanding principles.

CONCLUSION

For the reasons discussed above, the Court should strike Designation 3 on Starr Davis's designation of matter and all arguments in Starr Davis's appellate brief that rely on those materials, including Pages 8–9, 12, and 14–22.

Additionally, because the outcome of this motion impacts issues that Travelers needs to address in its reply appellate brief as well as the contents of the appellate record, Travelers respectfully requests that the Court hold in abeyance the deadlines for filing its reply brief and preparing the record on appeal until after this motion has been resolved. *See* Rule 240(b), SCACR (authorizing the Court to stay briefing deadlines when needed).

Pursuant to Rule 11, SCRCP, Travelers certifies that it conferred with Starr Davis regarding this issue but, as the attached correspondence demonstrates (App. 126), Starr Davis believes its *ex parte* communications below were proper.

Respectfully submitted,

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November 9, 2021

PROOF OF SERVICE

I, the undersigned of the law offices of Womble Bond Dickinson (US) LLP, attorneys for Appellants, do hereby certify that I have served all parties to this appeal with a copy of the pleading(s) specified below by emailing them as the addresses below:

Pleading(s): Motion to Strike Portion of Respondents' Brief and Entry on Respondents' Designation of Matter and to Hold Remaining Deadlines in Abeyance During Pendency of Motion

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By: /s/ M. Todd Carroll

November 9, 2021

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Nov 09 2021
SC Court of Appeals

November 9, 2021

Via Electronic Filing
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
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Re: Protopapas, as Receiver for Starr Davis Company v. Travelers Casualty and Surety Company
Appellate Case No. 2021-000648
Motion to Strike and to Hold Remaining Deadlines in Abeyance

Dear Ms. Kitchings:

Please find attached for filing with the Court a Motion to Strike Portions of Starr Davis's Appellate Filings and to Hold the Remaining Deadlines in Abeyance while this motion is pending, along with an Appendix of materials supporting the motion. We are e-filing this motion pursuant to Section (b)(1) of Supreme Court Order 2021-08-25-02, and we are also serving this motion via email on counsel for the Respondents, as permitted by Section (d)(1) of that Order.

Pursuant to Section (c) of that Order, we shall mail the filing fee that accompanies this request within five days of this filing.

The next deadline in the appellate process is November 17, 2021, which is the due date for Travelers to file its initial reply brief. This motion impacts what arguments Travelers may need to address in reply, and what documents may be included in the appellate record. Accordingly, as indicated in the motion itself, we would appreciate it if the Court would stay all remaining deadlines until this motion is resolved.

We appreciate the Court's consideration of this motion. If we can provide any additional materials or information, please do not hesitate to call on us.

Best regards,

/s/ M. Todd Carroll

cc: Counsel for Respondents