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Dec 21 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

The Honorable Kristi F. Curtis
Circuit Court Judge

Case No.: 2014-CP-45-00132
(Court of Appeals Case No.: 2021-000494)

South Carolina Farm Bureau Ins. Co. Appellant,

v.

Marion L. Driggers, Shiralee Driggers, Tammy D. Floyd, Arthur McKenzie, a/k/a Arther McKenzie, The Travelers Home and Marine Insurance Company, The United States of America acting by and through Its agency, The Internal Revenue Services and The South Carolina Tax Commission, Defendants,

Of whom The Travelers Home and Marine Insurance Company is the Respondent.

**RESPONDENT THE TRAVELERS HOME AND MARINE INSURANCE
COMPANY’S MOTION TO STRIKE MATTERS DESIGNATED BY
APPELLANT IN AMENDED DESIGNATION OF MATTER TO BE INCLUDED
IN THE RECORD ON APPEAL**

Respondent moves before this Court for an Order striking irrelevant matter from the record on appeal as presented in an amended designation by the Appellant, because the amended designation of the Appellant continues to include matters which were not presented to and ruled on by the lower court.

Rule 210(c), SCRAP, provides that the record shall not include matter which was not presented to the lower court or tribunal, and this Court’s Order on November 17, 2021

ordered the amended designation and initial brief of Appellant to include “only the portions of the transcripts that were actually presented to the circuit court.”

The Amended Designation with Amended Initial Brief ignores the Court’s limitation and appears to follow the proposal made in Appellant’s Return to Respondent’s Motion to Strike, filed September 29, 2021 with this Court. Specifically, Appellant has designated portions of the Deposition of Marion L. Driggers taken on April 12, 2021 and portions of the Depositions of Shiralee Driggers taken on January 14, 2016 and April 15, 2021, as matters to be included in the record on appeal. Per Appellant’s Return to Respondent’s Motion to Strike filed September 29, 2021 and now its Amended Designation and Initial Brief filed December 16, 2021, these portions of the transcripts were “made a part of the record” with the circuit court per exhibit filings made April 21, 2021 (Motion of Defendants, Shiralee Driggers and Tammy D. Floyd, to Separate (Bifurcate) the Trial) and April 29, 2021 (Plaintiff Farm Bureau’s Rely/Response/Objection to Motion to Bifurcate & For Partial Summary Judgment Re Marion Driggers).

According to Appellant’s Amended Designation, these filings in late April 2021 were made in connection with a motion for summary judgment and motion to reconsider filed by Appellant in the lower court action. Respondent believes the motion for summary judgment to which Appellant refers is Plaintiff’s Reply/Response/Objection to Motion to Bifurcate & For Partial Summary Judgment Re Marion Driggers filed April 29, 2021. Respondent believes that the motion to reconsider referenced by Farm Bureau in its Amended Designation was filed April 8, 2021, which is prior to at least two of the depositions at issue and did not include any portion of deposition transcripts as exhibits to the motion before the lower court.

The portions of the depositions now noted in Appellant's Amended Designation and Initial Brief were not considered by the trial court and should not be considered by the appellate court. The timelines for the matters allegedly at issue on appeal before this Court are as follows:

- Respondent's Motion for Summary Judgment as to the Third Cause of Action for Equitable Indemnity of Plaintiff – **filed April 11, 2019**;
- Order Granting Respondent's Motion for Summary Judgment as to the Cause of Action for Equitable Indemnity of Plaintiff– **filed March 30, 2021**;
- Appellant's Motion to Alter, Amend, Reconsider – **filed April 8, 2021**;
- The Honorable Kristi F. Curtis's Form 4 Order Denying Appellant's Motion to Amend the Court's Order of March 30, 2021 – signed April 9, 2021 and **filed April 12, 2021**.
- Order of Dismissal with Prejudice of Respondent – **filed April 19, 2021**.

Although not properly listed on/attached to the Notice of Appeal and therefore not properly on appeal:

- Respondent's Motion for an Order Allowing Funds to be Deposited with the Court pursuant to Rule 22(b) of the SCRCF – **filed February 12, 2015**;
- Order Allowing Funds to be Deposited with the Court pursuant to Rule 22(b), SCRCF – **filed January 5, 2021**;
- Appellant's Notice of Motion & Motion to Alter/Amend/Reconsider and/or to Clarify – **filed January 14, 2021**;
- The Honorable Kristi F. Curtis's Form 4 Order Denying Appellant's Motion to Alter or Amend the Court's Order of January 5, 2021 – signed April 9, 2021 and

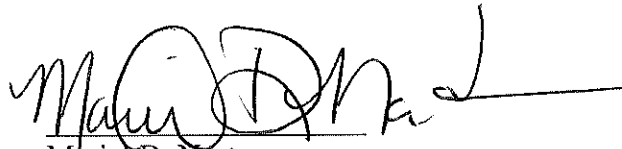
filed April 12, 2021.

- Order of Dismissal with Prejudice of Respondent – **filed April 19, 2021.**

Appellant, by designating these portions of depositions, is again attempting to introduce new evidence before the Court which was never introduced to the lower court prior to its decisions on the motions allegedly before this Court for consideration on appeal. While the portions allegedly were “made a part of the record” with the lower court through filings on April 29, 2021 and April 21, 2021, such filings were not “presented to the lower court” for consideration prior to the resulting Orders appealed before this Court. Stated another way, the Honorable Kristi F. Curtis did not consider the deposition portions added by Appellant prior to her final Orders on April 12, 2021, because such portions were not filed and made a part of the lower court record until filings made on April 21, 2021 and April 29, 2021. *See Williamsburg Rural Water & Sewer Co. v. Williamsburg Cty. Water & Sewer Auth.*, 367 S.C. 566, 571, 627 S.E.2d 690, 693 (2006) (stating that “[n]othing in the appellate court rules permits a party to unilaterally add after-created evidence to the record” and holding that only the evidence presented to the lower court for determination is proper for considering when reviewing a lower court’s order); *see also Norris v. Ferre*, 315 S.C. 179, 183, 432 S.E.2d 491, 493 (Ct. App. 1993) (applying Rule 209(c) to deny a motion to supplement record on appeal where the matters sought to be included “were not presented to the trial judge”). In fact, Respondent was no longer a party at the time that these portions of the depositions became a “part of the record” through filings on April 21, 2021 and April 29, 2021, having been dismissed with prejudice on April 19, 2021.

Therefore, Respondent again moves to strike the designations by the Appellant of the new portions of the Deposition of Marion L. Driggers and the Depositions of Shiralee

Driggers from the Amended Initial Designation of Matter and any references to those documents within the Appellant's Amended Initial Brief on the grounds that they violate this Court's Order on November 17, 2021, instructing that the amended designation and initial brief of Appellant include "only the portions of the transcripts that were actually presented to the circuit court."



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APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

The Honorable Kristi F. Curtis
Circuit Court Judge

Case No.: 2014-CP-45-00132
(Court of Appeals Case No.: 2021-000835)

South Carolina Farm Bureau Ins. Co. Plaintiff,

v.

Marion L. Driggers, Shiralee Driggers, Tammy D. Floyd, Arthur McKenzie, a/k/a Arther McKenzie, The Travelers Home and Marine Insurance Company, The United States of America acting by and through Its agency, The Internal Revenue Services and The South Carolina Tax Commission, Defendants,

Of whom Marion L. Driggers is Appellant and The Travelers Home and Marine Insurance Company is the Respondent.

PROOF OF SERVICE

I, Mariel D. Norton, of Baker, Ravenel & Bender, LLC, Attorney for Respondent, hereby certify that, on this 21st day of December 2021, I have served the following with the foregoing Respondent The Travelers Home and Marine Insurance Company's Motion to Strike Matters Designated by Appellant in Amended Designation of Matter to be Included in the Record on Appeal via electronic mail and U.S. Mail of same to counsel of record at the addresses shown below:

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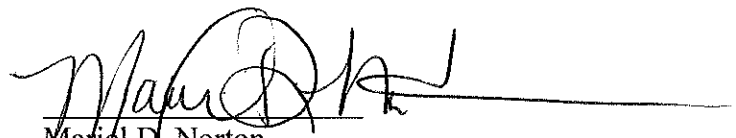
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December 21, 2021

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The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

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RE: South Carolina Farm Bureau Mutual Ins. Co., Appellant v. Marion L. Driggers, et al.
Of Which The Travelers Home and Marine Insurance Company is the Respondent
Appellate Case No.: 2021-000835
Our File No.: 7746.1749

Dear Ms. Kitchings:

Attached for filing in the above-referenced matter please find Respondent The Travelers Home and Marine Insurance Company's Motion to Strike Matters Designated by Appellant in Amended Designation of Matter to be Included in the Record on Appeal and Proof of Service thereof via electronic mail and U.S. Mail. Also enclosed is our firm check in the amount of \$50.00 to cover the filing fee.

By copy of this letter, the same is being served upon all counsel of record via U.S. Mail and electronic mail.

If you have any questions concerning this letter, please do not hesitate to contact me.

Sincerely yours,

Mariel D. Norton
MDN:sr; Enclosures

cc w/encl. via Email and U.S. Mail:

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