

**RECEIVED**  
**Feb 16 2022**  
**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

---

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas  
The Honorable R. Lawton McIntosh

---

Circuit Court Case No. 2019-CP-07-01246  
Appellate Case No. 2021-000375

---

Greg Marcus Simmons and Jermaine Robinson, both individually and derivatively on behalf of Simmons Family Holdings, LLC, a South Carolina Limited Liability Company,  
Respondents,

v.

Palmer E. Simmons, individually and as Trustee of the Charles E. Simmons, Jr. and Rosa G. Simmons Revocable Trust dated May 5, 2016, and Charlesetta S. Aiken,  
Appellants,

And

Simmons Family Holdings, LLC,

as a nominal Defendant.

---

APPELLANTS' MOTION TO STRIKE MATERIALS FROM RESPONDENTS' BRIEF  
AND DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL  
AND TO STAY DEADLINES UNTIL THE COURT RULES ON THE MOTION

---

Appellants move this Court for an order striking Item No. 3 from Respondents' Designations of Matter to be included in the record on appeal and all references to and discussion of those materials from Respondents' brief. Appellants also respectfully request the Court stay the deadlines for filing Appellants' reply brief until it rules on this 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).

This is an appeal from certain summary judgment and related discovery orders<sup>1</sup> first rendered by Judge McIntosh on March 1, 2021. Respondents have improperly designated matter that was not presented to or before the lower court in its determination of the summary judgment and discovery motion at issue.

Specifically, Respondents have designated an interlocutory order that was issued *after* Judge McIntosh rendered his decisions on appeal and after Judge McIntosh denied Appellants’ Motion to Reconsider. Respondents’ Designation of Matter, Item No. 3, is an Order issued by Judge Dukes on March 12, 2021. The order by Judge Dukes post-dates Judge McIntosh’s decisions on appeal, including his denial of Appellants’ Motion to Reconsider.<sup>2</sup> In other words, Judge Dukes’ later-filed order could not have been

---

<sup>1</sup> The discovery orders improperly make rulings on the substantive merits of this case.

<sup>2</sup> The timing of the orders on appeal was somewhat wonky. Judge McIntosh first issued his rulings on appeal from the bench at the hearing on March 1, 2021. He then filed a Form 4 order on March 2, 2021, making multiple substantive rulings and stating:

MR. HAIGHT TO PREPARE A FORMAL ORDER. THE FORMAL ORDER SHALL SPECIFICALLY DISCUSS THE COURT'S AUTHORITY TO ISSUE THE ABOVE ORDER.

The Form 4 order and its substantive rulings triggered Appellants’ 10-day window to file a motion to reconsider, which they did on March 11, 2021. Judge McIntosh denied Appellants’ Rule 59 Motion on March 12, 2021. Oddly, Judge McIntosh later filed the written order on March 19, 2021, *after* denying the motion to reconsider.

“presented to” Judge McIntosh, and it was by no means a basis for the rulings by Judge McIntosh now on appeal. We know this because **Judge McIntosh himself identified the record presented to him:**

[1] The Verified Second Amended Complaint, [2] the Answer thereto, [3] the various affidavits and [4] memoranda filed with this Court, and [5] the deposition excerpts filed of record therewith, **constitute the factual record of this case** and that the Court may dispose of this case as a matter of law.

(p. 1, Order Denying Defendants’ Motion for Summary Judgment and Granting in Part Plaintiffs’ Motion for Summary Judgment, filed March 19, 2021) (emphasis added).

Prior to filing this motion, Appellants asked Respondents to confirm whether Judge Dukes’ order was presented to Judge McIntosh on summary judgment and, if not, to withdraw the designation and all references to and discussion of it from Respondents’ brief. Respondent would not consent and argued that any material “filed” with the lower court could be included in the record and brief. Appellants disagree and move the Court to strike the designation because it was not “presented to the lower court.” Rule 210(c), SCACR.

Appellants are not aware of any authority that permits the inclusion in the Record on Appeal of materials that post-date the decision on appeal. Moreover, Appellants are not aware of any authority that allows the inclusion of irrelevant materials that were not presented to and considered by the judge below to be included within the Record on Appeal and brief. In fact, the Appellate Court Rules specifically contemplate the opposite.

For these reasons, Appellants respectfully requests the Court grant the motion and strike Respondents’ Designation No. 3, the Order issued by Judge Dukes, March 12, 2021.

Respectfully submitted,

FORD WALLACE THOMSON LLC

s/Ainsley F. Tillman

Ainsley F. Tillman, S.C. Bar No. 70551

[Ainsley.Tillman@FordWallace.com](mailto:Ainsley.Tillman@FordWallace.com)

Ian S. Ford, S.C. Bar No. 12463

[Ian.Ford@FordWallace.com](mailto:Ian.Ford@FordWallace.com)

715 King Street

Charleston, SC 29403

(843) 277-2011

[www.FordWallace.com](http://www.FordWallace.com)

Mark S. Berglind, S.C. Bar No. 74839

Vaux Marscher Berglind P.A.

Post Office Box 769

Bluffton, SC 29910

*Attorneys for Appellants*

*Palmer E. Simmons, individually and as Trustee of  
the Charles E. Simmons, Jr. and Rosa G. Simmons  
Revocable Trust dated May 5, 2016,  
and Charlesetta S. Aiken*

February 16, 2022  
Charleston, South Carolina

**RECEIVED**

**Feb 16 2022**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

---

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas  
The Honorable R. Lawton McIntosh

---

Appellate Case No. 2021-000375

---

Greg Marcus Simmons and Jermaine Robinson, both individually and derivatively on behalf of Simmons Family Holdings, LLC, a South Carolina Limited Liability Company,  
Respondents,

v.

Palmer E. Simmons, individually and as Trustee of the Charles E. Simmons, Jr. and Rosa G. Simmons Revocable Trust dated May 5, 2016, and Charlesetta S. Aiken,  
Appellants,

and

Simmons Family Holdings, LLC,

as a nominal Defendant.

---

**PROOF OF SERVICE**

---

I certify that I served the Appellants' Motion to Strike and to Stay Deadlines on counsel for the Respondents on February 16, 2022, at their email addresses of record with the AIS:

[thomas@tktlawyers.com](mailto:thomas@tktlawyers.com)

[rick@mhalawfirm.com](mailto:rick@mhalawfirm.com)

[stacey@mhalawfirm.com](mailto:stacey@mhalawfirm.com)

s/ Ainsley F. Tillman

715 King Street

Charleston, SC 29401

(843) 266-1289

*Attorney for Appellants*