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**Jun 06 2022**  
**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Appellate Case No.: 2022-000031

Royal Garden Resort Regime Homeowners Association, Inc. ....Respondent

v.

Sea Breeze Property Management & Contract Services, Inc.; Calvin Donaldson;  
and Phoenix of the Strand, Inc. .... Appellants,

**APPELLANTS' MOTION TO STRIKE**

Appellants, Sea Breeze Property Management & Contract Services, Inc., Calvin Donaldson, and Phoenix of the Strand, Inc. (“Appellants”), move pursuant to Rule 240, SCACR, for an order striking Respondent Royal Garden Resort Regime Homeowners Association, Inc.’s Statement of Facts and all other factual assertions<sup>1</sup> set forth in Respondent’s Initial Brief because they are either not supported by the matters designated by the parties to be included in the Record on Appeal, contain no citation to the matters so designated, or are not appropriate to be considered as part of the Record on Appeal because they were never presented to the lower court.

<sup>1</sup> Additional unsupported statements of fact appear on pages 6 – 15 within the ARGUMENT section of Appellants’ Initial Brief.

## **LEGAL STANDARD AND STANDARD OF REVIEW**

“[T]he appellate court will not consider any fact which does not appear in the Record on Appeal.” Rule 210(h), SCACR. An appellate court “does not sit as a trial court to receive evidence on disputed issues of fact; our function is to review the judgment of the circuit court for reversible error based on the issues and evidence presented to that court.” Sanders v. Salley, 283 S.C. 458, 460, 322 S.E.2d 829, 830 (Ct. App. 1984). While “[a] party may ... include a ... statement of facts relevant to the issues presented for review...” within the argument section of its brief, those facts must be supported by a “reference to the record on appeal.” Rule 208(b)(E), SCACR. Thus, a party to an appeal may not proffer statements of unsupported and/or contested facts in a brief; rather, the facts presented by a party to an appeal must be supported by the record before the trial court whose decision is subject to review.

## **ARGUMENT**

Not one statement of fact contained in the Respondent’s Initial Brief contains a proper citation to the matters designated by Respondent or Appellants to be included in the Record on Appeal. Sporadically throughout Respondent’s Initial Brief, Respondent will include “(R. \_\_\_\_)[,]” after one of its factual assertions. However, none of Respondent’s “(R. \_\_\_\_)” notations contain any reference to the specific document upon which Respondent relies, nor the page number therein, as required by Rule 208(b)(4), SCACR. Moreover, some of the factual statements set forth in the “Statement of Facts” and “Argument” sections of Respondent’s Initial Brief were not presented to the trial court and are, therefore, outside of the Record on Appeal. This Court should, therefore, strike Respondent’s Statement of Facts and each statement of fact

contained in Respondent's "Argument" section of its brief which likewise contain no citation to the underlying record.

Appellants should not bear the burden of identifying each and every statement of fact proffered by Respondent in its Initial Brief as supported or unsupported by the record, true or untrue, or contested or uncontested, and thereby subject to being stricken. It is Respondent who has filed its Initial Brief without properly supporting its factual statements. However, by way of example, in a list of items Respondent alleges it "offered" to the lower court, on page seven (7) of Respondent's Initial Brief, Respondent refers to a "Prior Cable Communications Easement." (Respondent's Initial Brief, pp. 6, 7). The "Prior Cable Communications Easement" to which Respondent refers was not a part of the record in this case before the lower court, was never presented to the lower court, and was not considered by the lower court in rendering the decision that is at issue on appeal.

The South Carolina Appellate Court Rules require that all facts presented by Respondent be supported by the Record on Appeal, and that the Record on Appeal contain only that evidence actually presented to the trial court prior to rendering its decision. See Rules 210(h) and 208(b)(E), SCACR. Therefore, not only is it improper for Respondent to attempt to include such alleged easement in the Record on Appeal, but it highlights the necessity of requiring Respondent to comply with Rule 208(b)(E), SCACR, by providing proper citations to the facts Respondent includes in its Initial Brief. It is thus imperative Respondent be required to properly cite the documents upon which it relies so it may be determined whether such documents, and the information contained therein, were before the trial court at the time the trial court rendered the decisions at issue in this appeal. It is also important for Respondent to be required to properly cite

to the documents upon which it refers so that Appellants may structure their own arguments in Reply to Respondent's Initial Brief.

### CONCLUSION

In sum, this Court should order that all statements of fact contained in Respondent's Initial Brief be stricken since none contain citations to the documents designated by the parties to become a part of the Record on Appeal, and then provide Respondent with a period of time to file an amended Initial Brief supported by the record, as evidenced by proper citations thereto. Once an amended brief is filed, Appellants will then be able to file an appropriate Reply brief in response, addressing only those facts and issues addressed by the trial court prior to making its ruling. In furtherance of the foregoing, in the event the Court of Appeals grants this Motion to Strike, and requires Respondent to file an amended Initial Brief, Appellants respectfully request they be allowed to file an amended Reply thereto accordingly.

Respectfully submitted,

s/Douglas M. Zayicek

Douglas M. Zayicek, Esq. SC Bar No. 11304

Holly M. Lusk, Esq., SC Bar No. 102307

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Royal Garden Resort Regime Homeowners Association, Inc.....Respondent

vs.

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and Phoenix of the Strand, Inc.....Appellants

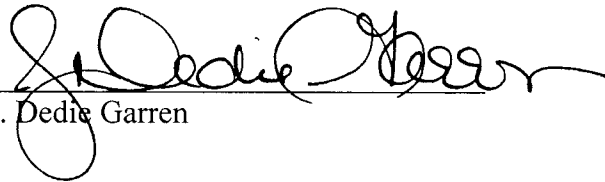
PROOF OF SERVICE

The undersigned certifies that she is employed by the law firm of Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, P.A., attorneys for the Appellants, Sea Breeze Property Management & Contract Services, Inc.; Calvin Donaldson; and Phoenix of the Strand, Inc., that she has mailed and emailed a copy of the Appellants' Reply to Respondent's Initial Brief, Appellants' Amended Designation of Matter, Appellants' Motion to Strike, and Proof of Service to counsel listed below this 6th day of June, 2022, with proper postage attached thereto.

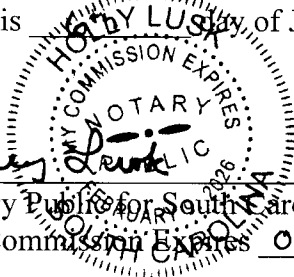
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\_\_\_\_\_  
J. Dedie Garren

SWORN TO AND SUBSCRIBED before  
me this Holly Lusk of June 2022.

  
Holly Lusk  
\_\_\_\_\_  
Notary Public for South Carolina  
My Commission Expires 02/09/2026

HOWELL V. BELLAMY, JR.  
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<sup>+</sup> CERTIFIED MEDIATOR  
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June 6, 2022

**VIA ELECTRONIC MAIL (AND U.S. MAIL, AS NOTED)**

Jenny Abbott Kitchings  
The South Carolina Court of Appeals  
Post Office Box 11629  
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[ctappfilings@sccourts.org](mailto:ctappfilings@sccourts.org)

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**SC Court of Appeals**

**Re: Royal Garden Resort Regime Homeowners Association, Inc. v. Sea Breeze Property Management & Contract Services, Inc.; Calvin Donaldson; and Phoenix of the Strand, Inc.**  
**Case No. 2018-CP-26-06033**  
**Appellate Case No. 2022-000031**

Dear Ms. Kitchings:

Enclosed for filing are the following:

1. Appellants' Reply to Respondent's Initial Brief (via email only);
2. Appellants' Amended Designation of Matter (via email only);
3. Appellants' Motion to Strike (via email only);
4. A check in the amount of \$50.00 for the Court of Appeals' Motion filing fee (via email and U.S. Mail); and
5. Proof of Service of items 1-4 identified above (via email only).

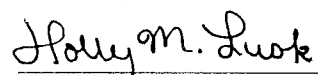
By copy of this letter, and pursuant to the enclosed Proof of Service, I hereby serve the Respondent, through its attorneys of record, with the foregoing documents. At your convenience, please return clocked copies to us of the foregoing documents, via electronic mail.

June 6, 2022

Page 2

If the Court needs anything additional, please do not hesitate to let us know.

Sincerely,



---

Douglas M. Zayicek

Holly M. Lusk

Enclosures

cc: Gene M. Connell, Esq.  
Kirby Shealy, III, Esq.  
Luke M. Allen, Esq.

BELLAMY, RUTENBERG, COPELAND, EPPS, GRAVELY & BOWERS, P.A., Attorneys at Law  
P.O. BOX 357, MYRTLE BEACH, SOUTH CAROLINA 29578

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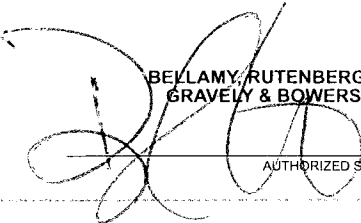
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TO THE ORDER OF: SOUTH CAROLINA COURT OF APPEALS

  
BELLAMY, RUTENBERG, COPELAND, EPPS,  
GRAVELY & BOWERS - General Account  
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MEMO: ROYAL GARDEN V. SEA BREEZE ET AL AP

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