

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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Nov 22 2022

SC Court of Appeals

APPEAL FROM THE COURT OF COMMON PLEAS  
Spartanburg County

Shannon M. Phillips, Master-in-Equity

Appellate Case No. 2022-001420

Civil Action No. 2021-CP-42-00086

Civil Action No. 2021-CP-42-00504

Gibbs International, Inc.....Respondent,

v.

Vidalia Industrial Facilities, LLC.....Appellant.

AND

Vidalia Industrial Facilities, LLC and Indigo Appellants,  
Industrial Investments, LLC.....

v.

Gibbs, International, Inc.; Gregory Boozer; and  
Jimmy Gibbs..... Respondents.

AND

GBPT, LLC .....Respondent,

v.

Rumsfeld Indigo, LLC.....Appellant.

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MOTION TO STRIKE IMPROPER DESIGNATIONS

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Pursuant to Rules 209, 210, and 240 of the South Carolina Appellate Court Rules ("SCACR"), Respondents Gibbs International, Inc. and GBPT, LLC ("Respondents") move this

Court for an order striking matter that Vidalia Industrial Facilities, LLC, Indigo Industrial Investments, LLC and Rumsfeld Indigo, LLC ("Appellants") improperly designated for inclusion in the record on appeal in this case.

This matter is an appeal from an Order filed September 9, 2022, denying Appellants' Motion to Strike a Confession of Judgment. Appellants filed their Motion to Strike a Confession of Judgment on June 29, 2022. (Mot. to Strike Confession of Judgment). On September 9, 2022, the Master-in-Equity, Hon. Shannon Phillips, issued her Order denying the Appellants' Motion to Strike. (Order Denying Mot. To Strike). Appellants filed a Motion for Reconsideration, with a brief, and additional documents eleven days later on September 20, 2022.<sup>1</sup>

Appellants' Motion for Reconsideration, Appellants' Brief in Support of Motion for Reconsideration, and the materials attached to that Brief in Support had not been presented to the lower court and were not considered by the Court of Common Pleas, either before or after Appellants appealed. (Brief of App. at 3.) However, in Appellants' Designation of Matter to Be Included in the Record on Appeal, appellants designated for inclusion these two improper items: (1) the Motion for Reconsideration, filed September 20, 2022, (item No. 5 of Appellants' Designation of Matter to Be Included in the Record on Appeal) and (2) a Brief in Support of Motion for Reconsideration and Exhibits thereto, filed September 20, 2022, (item No. 9 of Appellants' Designation of Matter to Be Included in the Record on Appeal).

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<sup>1</sup> Appellants attempted to file their Motion for Reconsideration on September 19, 2022; however, the attempted filing failed for reasons unknown to Respondents. Regardless of the reason for the delay, it is undisputed that the Motion for Reconsideration and Brief in Support were not formally filed until September 20, 2022, more than 10 days after the parties received written notice of the entry of the Order on appeal. Apparently concerned that the time to file their Notice of Appeal was not stayed by that September 20, 2022 filing, Appellants filed their notice of appeal without waiting for the lower court to consider, respond to, or take any action on their Motion for Reconsideration. The filing of the notice of appeal deprived the trial court of jurisdiction and prevented any consideration or ruling on the two items subject to this motion to strike.

The determination of what may be designated for inclusion in the Record on Appeal is governed by Rules 209(b) and 210(c), SCACR. These rules set forth two primary requirements for what may be designated and included in the Record: (1) it must be relevant to the appeal, and (2) it must have been presented to the lower court. *See* Rule 209(b), SCACR ("A party shall not include any matter in his Designation which is not relevant to the appeal."); Rule 210(c), SCACR ("The Record shall not, however, include matter which was not presented to the lower court or tribunal."). The South Carolina Supreme Court has stressed the important principle that the parties must raise issues and arguments to the lower court and attempt to obtain a ruling if they wish to raise or rely on those issues on appeal. *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 24, 602 S.E. 2d 772, 779 (2004) (citing Rule 210(c), SCACR, for the proposition that an issue must be raised to and ruled upon by the lower court before it can be considered on appeal).

The two items sought to be stricken are not relevant to whether the lower court erred in issuing the September 9, 2022 Order, which is the relevant inquiry in the appeal. The two items were not considered by the trial court in issuing the Order subject to the appeal. The motion, memorandum, and exhibits were filed after the Order which is subject to the appeal. The Appellants did not obtain a ruling on the motion for reconsideration. Under SCACR 209(b), the two items are not relevant to the Order on appeal because they post-date the Order at issue. No matter how interesting Appellants think those materials are, those materials *cannot demonstrate* that the lower court erred in its analysis and ruling because those materials were not presented to the lower court as part of its analysis and ruling.

The items were also not "presented to the lower court" as is required by SCACR 210(c). If what was done in this case satisfies the rule, then a party could file any documents after the court has ruled to pad the record on appeal. Merely filing of a document is not sufficient to satisfy SCACR 210(c). The Rule's term "presented to" necessarily indicates materials timely

presented to the court for consideration as part of the ruling on appeal, i.e., materials that the lower court had the opportunity to consider and rule upon. That did not occur in this case.

Striking the improper items in this matter is consistent with established authority. Where a party has failed to submit evidence for the lower court's consideration, such matter is not preserved for the appellate court's review. *See Fountain v. Fred's, Inc.*, 429 S.C. 533, 554, 839 S.E.2d 475, 486 n.18 (Ct. App. 2020), *rev'd on other grounds*, 436 S.C. 40, 871 S.E.2d 166 (2022) (striking a settlement agreement from the record on appeal based on Rule 210(c), SCACR, because the settlement agreement was never presented to the circuit court).<sup>2</sup>

In violation of Rules 209(b) and 210(c), SCACR, Appellants have attempted to designate their Motion for Reconsideration, filed September 20, 2022, and their Brief in Support of Motion for Reconsideration and Exhibits thereto, neither of which were presented to, considered, or ruled on by the lower court as part of the Order on appeal. (Brief of App. at 2, 3).

#### CONCLUSION

Because Appellants may not properly rely upon these documents on appeal, Respondents respectfully request the Court strike from Appellants' Designation of Matter to be Included in the Record on Appeal: (1) the Motion for Reconsideration, filed September 20, 2022, (item No. 5 of Appellants' Designation of Matter to Be Included in the Record on Appeal) and (2) the Brief in Support of Motion for Reconsideration and Exhibits thereto, filed September 20, 2022, (item No. 9 of Appellants' Designation of Matter to Be Included in the Record on Appeal), as well as striking any reference of these documents from the Brief of Appellant.

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<sup>2</sup> Similarly, in a 2006 Order, in a domestic relations dispute, this Court struck an affidavit that the appellant had improperly attempted to designate for inclusion in the Record. Because the Court's ruling was unpublished, Respondents mention it here without citation pursuant to Rule 268(d)(2), SCACR.

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Greenville, South Carolina  
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THE STATE OF SOUTH CAROLINA  
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Rumsfeld Indigo, LLC. ....Appellant.

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PROOF OF SERVICE

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Pursuant to Section g(3) of Chief Justice Beatty's Amended Order dated May 29, 2020,  
undersigned counsel hereby certifies I have served a copy of Respondent's Motion to Strike

Improper Designations on counsel of record by electronic mail:

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**Via electronic filing and US Mail**

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

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**SC Court of Appeals**

RE: Motion to Strike Improper Designations  
*Gibbs International, Inc. / Vidalia Industrial Facilities, LLC / GBPT, LLC*  
Appellate Case No. 2022-001420  
Civil Action No. 2021-CP-42-00086 / 00504  
Our File No. 014125.01504

Dear Ms. Kitchings:

Please find enclosed for filing in the above-referenced matter Respondents' Gibbs International, Inc and GBPT, LLC's Motion to Strike Improper Designations. Also enclosed is a Proof of Service of the same. We ask that you file the Motion and, if possible, return an electronic version to us bearing the Court's file stamp.

In addition to the documents filed electronically, the US Mail letter will enclose the filing fee check of \$50. Please do not hesitate to contact us with any questions.

Very truly yours,



William S. Brown  
*Counsel for Respondents*

CC: (by electronic mail)  
L. Walter Tollison, II, Esq.  
Daniel R. Kelley, Esq.  
Tyler J. Mitchell, Esq.