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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The 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, LLCAppellant.

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, LLCAppellant.

REPLY IN SUPPORT OF MOTION TO STRIKE
IMPROPER DESIGNATIONS

Pursuant to Rule 240(f) of the South Carolina Appellate Court Rules ("SCACR"), Respondents Gibbs International, Inc. and GBPT, LLC ("Respondents") hereby reply to the Return to Motion to Strike Improper Designations ("Return") filed by Vidalia Industrial Facilities, LLC, Indigo Industrial Investments, LLC, and Rumsfeld Indigo, LLC ("Appellants"). The grounds for this reply are as follows:

ARGUMENT

I. Appellants do not (and cannot) explain how their designations meet the standards provided by Rules 209 and 210, SCACR.

It is undisputed that Rules 209(b) and 210(c), SCACR, govern a party's designation of matter for inclusion in the Record of Appeal. 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; Rule 210(c), SCACR. Inherent in these requirements is an implied, but inescapable, requirement that the material must have been presented or proffered to the lower court *at or before the time the lower court made the ruling* that is being challenged on appeal. Otherwise, the material would not (and could not) be relevant to the review of the Order on appeal. *See* Resp't Mot. to Strike Improper Designations at 3-4.

Respondents moved for this Court to strike two items from Appellants' Designation of Matter: (1) the Motion for Reconsideration, filed September 20, 2022 (item No. 5 of Appellants' Designation of Matter), 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) because neither item meets the requirements under Rules 209(b) and 210(c), SCACR. *See* Resp't Mot. to Strike Improper Designations.

In their Return, Appellants fail to address how the designations at issue are relevant and make no argument that the two items at issue were presented to and ruled on by the lower court. Instead, Appellants just make the conclusory statement that Appellants' Motion for Reconsideration and Brief in Support of Motion for Reconsideration are relevant, with no demonstration of *how* they are relevant. *See* Return at 1–2. Appellants make no mention of whether their Motion for Reconsideration and Brief in Support of Motion for Reconsideration were presented to the lower court at the time of the ruling that's now on appeal (they weren't) and whether the Motion and Brief were ever ruled on by the lower court (they weren't). *See id.* Because Appellants submit no argument for how their designations meet the requirements under Rules 209(b) and 210(c), SCACR, they provide no grounds for denying Respondents' Motion to Strike Improper Designations, and the Motion should be granted.

II. The Settlement Agreement attached to Appellants' Brief in Support of Motion for Reconsideration is not properly designated for inclusion in the Record on Appeal.

Appellants' Return almost entirely concerns a settlement agreement between the parties. The settlement agreement was the single attachment to Appellants' Brief in Support of Motion for Reconsideration, and, therefore, may not properly be designated under Rules 209(b) and Rules 210(c), SCACR. Moreover, Appellants incorrectly assert that *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998) supports the inclusion of the settlement agreement in the Record on Appeal. Both arguments are discussed more fully below.

A. The same reasoning that requires the exclusion of the Motion and Brief that were not raised to and ruled on by the lower court also require the exclusion of the attachment to that Brief.

As mentioned above, Rules 209(b) and 210(c) dictate that items designated for inclusion in the Record of Appeal must be relevant to the appeal and must have been timely presented to the lower court. *See* Rule 209(b), SCACR; Rule 210(c), SCACR. That requirement applies not

only to the belated Motion and Brief themselves, but also to their exhibits or attachments that had not previously and properly been raised to and ruled upon to the lower court as part of the ruling challenged on appeal.

The settlement agreement was not presented to or considered by the lower court in the course of the ruling that is now challenged on appeal. Indeed, the trial court made the express finding that the "complete settlement agreement. . . **was *not* presented to the Court** for consideration." (Ord. Den. Mots. to Strike at 3) (emphasis added). Accordingly, the settlement agreement must be excluded from the Record on Appeal because it was not "presented to the lower court" as required by SCACR Rule 210(c). The Rule's term "presented to" necessarily means materials the lower court had the opportunity to consider as part of its ruling. That did not occur in this case. The lower court made the express finding that the settlement agreement had not been presented for consideration. Merely mentioning the existence of a settlement agreement at a hearing (which is all that occurred here) is not the same as presenting the settlement agreement to the lower courts as required by SCACR Rule 210(c). If what Appellants attempt to do here were enough to satisfy Rule 210(c), SCACR, then any party could "sandbag" and then pad the Record by including in the Record on Appeal any document merely mentioned during oral arguments despite the court having had no opportunity to review the document.

Furthermore, the settlement agreement "is not relevant to" the question of whether the lower court erred in issuing the September 9, 2022, Order, which is the proper inquiry in this appeal. *See* Rule 209(b), SCACR. Appellants chose not to present that document to the lower court until *after* the court had ruled, and they cannot now argue that the document was relevant to the ruling nor can they complain that the trial court ruled without it. Regardless of whether Appellants think the settlement agreement adds context and color to Respondents' actions, the

settlement agreement was not considered by the lower court in issuing its ruling and cannot demonstrate that the lower court erred in its analysis. Accordingly, the settlement agreement is not relevant under Rule 209(b), SCACR, and cannot be included in the Record on Appeal.

B. The *Wilder Corp.* case does not support including the settlement agreement in the Record on Appeal.

Appellants improperly assert that *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998) supports the settlement agreement being included in the Record on Appeal. But *Wilder Corp.* analyzed a different procedural question and arose from different procedural facts than the case at hand. Specifically, *Wilder Corp.* dealt with whether an issue was preserved for appeal when the lower court did not expressly rule on an objection. It did not discuss (and is not relevant to the question of) whether material has been improperly designated for inclusion in the Record on Appeal because it was not timely presented to the lower court.

Moreover, in *Wilder Corp.*, the South Carolina Supreme Court found that although the trial judge did not make an express, contemporaneous ruling on an objection, the objection was ultimately ruled on and preserved for appeal because it was integral to the trial court's final decision. *Wilder Corp.*, 330 S.C. at 76–77, 497 S.E.2d at 733–34 (1998). Here, in contrast, the lower court specifically noted the complete settlement agreement had not been presented to the court for consideration and, therefore, could not have been considered by (much less integral to) the lower court's Order.

Appellants improperly cite *Wilder Corp.* in an attempt to get around the lower court's finding that the complete settlement agreement had not been presented for consideration. But *Wilder Corp.* does not stand for that proposition or support that result. Appellants are essentially asking the Court to pretend that Appellants presented the settlement agreement to the trial court, even though they did not and the trial court expressly found that they did not.

III. Appellants admit the Designations are not necessary and, therefore, are improper under Rule 209, SCACR.

As noted above, Rule 209(b) provides that "[a] party shall not include any matter in his Designation which is not relevant to the appeal." Rule 209(b), SCACR. In Section II of their Return, Appellants argue that even if the designations at issue (Appellants' Motion for Reconsideration and Appellants' Brief in Support of Motion for Reconsideration) are stricken, there remains ample basis in Record on Appeal on which to find for the Appellants. (Return at 3).¹ Appellants also concede that the absence of the settlement agreement should have no bearing on the Court's determination, and they clarify that it is not Appellants' contention that language omitted from the settlement agreement should warrant a finding in Appellants' favor on appeal. (Return at 1, 4). Appellants' admission that the Motion for Reconsideration, Brief in Support of the Motion for Reconsideration and the settlement agreement attached are not necessary to the Court's ruling on Appellants' appeal means that they are not necessary or relevant under SCACR 209(b) and the Court should strike these designations.

CONCLUSION

In violation of Rules 209(b) and 210(c), SCACR, Appellants have attempted to designate their Motion for Reconsideration and Brief in Support of Motion for Reconsideration and Exhibits thereto, including a settlement agreement executed between the parties. None of these documents were presented to, considered by, or ruled on by the lower court as part of the Order, which is the subject of the appeal. Because Appellants may not properly rely upon these documents on appeal, Respondents respectfully request the Court strike from Appellants' Designation of Matter to be

¹ Appellants' contentions regarding the sufficiency of the Record of Appeal goes to the merits of Appellants' appeal and not a matter addressed in Respondents' Motion to Strike Improper Designations. Accordingly, the Court should disregard any arguments on the merits of the appeal when considering Appellants' Return to Motion to Strike.

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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PROOF OF SERVICE

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 Reply in Support of the Motion to Strike Improper Designations on counsel of record by electronic mail:

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December 7, 2022

Via electronic filing

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RE: Reply In Support of 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 Reply in Support of the 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.

Very truly yours,



William S. Brown
Counsel for Respondents

CC: (by electronic mail)
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