

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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JUN 14 2013

SC Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

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Case No. 2010-CP-10-9917

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Rolando Santiago, as the Personal Representative of the  
Estate of Jose Hernandez-Arizmendi a/k/a Eduardo Gomez-Ortiz, . . . . Appellant

vs.

Chloe Engel, U.S. Group, Inc., Southern Concrete and Construction,  
Inc., Sanders Brothers Construction Company, Inc., J. Moore Electrical  
Contractors, Inc., and Charleston County, . . . . . Defendants

of whom

Chloe Engel is . . . . . Respondent.

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**APPELLANT'S RETURN TO RESPONDENT'S  
MOTION TO STRIKE**

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Respondent Chloe Engel has filed a motion to strike items 6 and 7 from the Designation of Matter to be Included in the Record on Appeal filed by Appellant Rolando Santiago in this appeal. Respondent contends the items are improper under Rule 210(c), SCACR, because the items were "not part of the Circuit Court record." Respondent attached the indices to the exhibits that were marked and admitted at trial in support of the motion and contend these items should accordingly be struck from the Record. The Court should deny this motion.

Rule 210(c), SCACR, governs the content of the Record on Appeal and provides, in part: “The Record on Appeal shall include all matter designated to be included by any party under Rule 209 and shall comply with the requirements of Rule 267. The Record shall not, however, include matter *which was not presented to the lower court or tribunal...*” (Emphasis added). The Rule does not define what is meant by “presented to” the trial court, but it does not provide the evidence had to be marked or otherwise introduced into the record below.

The word “present,” however, is a transitive verb which means “to bring or introduce into the presence of someone especially of superior rank or status.” Merriam-Webster Dictionary, at <http://www.merriam-webster.com/dictionary/present>. *See also* The Random House Dictionary of the English Language 1529 (Second Ed. Unabr.1987) (defining “present” to mean “to show or exhibit”); Oxford Advanced Learner’s Dictionary, at [http://oald8.oxfordlearnersdictionaries.com/dictionary/present\\_3](http://oald8.oxfordlearnersdictionaries.com/dictionary/present_3) (to present means “to show or offer something for other people to look at or consider”). Thus, for an item of evidence to be included in the Record on Appeal, the item need only be “presented to” the trial court for its ruling over whether to permit its introduction into evidence. *Compare Argabright v. Argabright*, 398 S.C. 176, 179 n. 3, 727 S.E.2d 748, 750 n. 3 (2012) (citing to Rule 210(c), Supreme Court refused to consider fact because “the Record shall not ... include matter which was not presented to the lower court or tribunal.”); *State v. White*, 372 S.C. 364, 642 S.E.2d 607 (Ct. App. 2007) (holding a statement that was not presented to the trial court “cannot be properly included in the Record on Appeal.”).

There is no dispute that the documents to which Respondent Engel objects were “presented to” the trial court below. (Tr. p. 118, l. 6 - p. 122, l. 2; p. 124, l. 7 - p. 127, l. 9; p.331, ll. 2-11; p. 333, ll. 1-12; p. 334, l. 13-25). This is readily apparent from the Record:

Mr. Phillips: Let’s take a look at that document (**the autopsy report**). That’s the ... autopsy report.

Mr. Halio: Objection, Your Honor. Objection.

The Court: Basis of the objection?

Mr. Halio: It’s not in evidence.

The Court: It is not. You can allow him to use it to refresh his memory, if it formed the basis of his opinion, but you can’t publish it to the jury.

Mr. Phillips: Okay.

The Court: It’s not in evidence and it contains subjective opinions.

(Tr. p. 330, l. 25 - p. 331, l. 11)

The Court: Then let me see the document.

[Whereupon Mr. Phillips proffers the document (**the coroner’s report**) to the Court]

(Tr. p. 335, ll. 8-9). This was sufficient for purposes of including these documents for this Court’s review on appeal pursuant to Rule 210(c).

Appellant has the burden of providing this Court with a sufficient record for this Court to adequately review the issue Appellant has raised on appeal. *E.g., Jenkins v. Jenkins*, 401 S.C. 191, 736 S.E.2d 292 (Ct. App. 2012) (appellant has burden of providing record on appeal sufficient for intelligent review; under Rule 210(h), SCACR, “[e]xcept as provided by Rule 212 and Rule 208(b)(1)(C) and (2), the appellate court will

not consider any fact which does not appear in the Record on Appeal.”). Had Appellant not included the documents he risked an adverse decision on that basis alone. *See, e.g., State v. Howard*, 295 S.C. 462, 369 S.E.2d 132 (1988) (affirming issue where the record on appeal contained no proffer of excluded records appellant contended were admissible); *State v. King*, 367 S.C. 131, 623 S.E.2d 865 (Ct. App. 2005) (the reason for the rule requiring a proffer of excluded evidence is to enable the reviewing court to discern prejudice; the rule has been relaxed where the record demonstrates prejudice); *State v. Jenkins*, 322 S.C. 360, 474 S.E.2d 812 (Ct. App. 1996) (the reason for the rule requiring a proffer of excluded evidence is to enable the reviewing court to discern prejudice; that rule has been relaxed where the record clearly demonstrates prejudice); *Gold Kist, Inc. v. Citizens and Southern Nat. Bank of South Carolina*, 286 S.C. 272, 333 S.E.2d 67 (Ct. App. 1985) (noting the failure to proffer excluded evidence in the record on appeal prevented appellate court from determining the prejudicial nature of the error); *Benya v. Gamble*, 282 S.C. 624, 321 S.E.2d 57 (Ct. App. 1984) (failing to reach an issue over excluded evidence where appellant failed to set forth “in the transcript of record a sufficient proffer of the particular evidence she wished to introduce”). *See also Windsor Properties, Inc. v. Dolphin Head Const. Co., Inc.*, 331 S.C. 466, 498 S.E.2d 858 (1998) (applying the rule to a respondent, who had the burden on crucial issue, and reversing where respondent failed to include critical documents in the Record on Appeal); Toal, Jean H., *et al., Appellate Practice in South Carolina* (Second Edition) 130-132 (SC Bar 2002) (discussing designation and content of the Record on Appeal).

Respondent would have this Court require an appellant to engage in the futile act

of marking an excluded piece of evidence for inclusion in the transcript of the proceedings even though the evidence itself reveals its prejudicial nature. While it may be true that excluded testimony must be proffered at trial so that the appellate court may judge prejudice from its exclusion, documents such as the ones at issue in this case do not need to be restated into the record where the documents themselves allow the Court to judge the prejudicial effect of their exclusion. To require more than is required under Rule 210(c) would require a party to engage in a redundant, useless and futile act. *Compare State v. Pace*, 316 S.C. 71, 447 S.E.2d 186 (1994) (overlooking counsel's failure to raise an objection because "the tone and tenor of the trial judge's remarks concerning her gender and conduct were such that any objection would have been futile"). *See also Reed v. Becka*, 333 S.C. 676, 681, 511 S.E.2d 396, 399 (Ct. App. 1999) (Court declined motion to strike affidavit but stated in order that "the matter would not be given substantive consideration if it was not *presented to the trial court*"; Court concluded that "upon review of the record, we find the material was presented to the trial court.") (emphasis added).

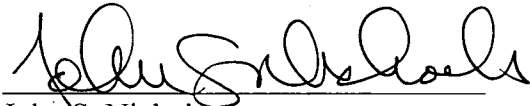
The documents were "presented to the lower court or tribunal," which is all Rule 210(c) requires. They are included in the Record on Appeal so that this Court can assess Appellant's claim of prejudice in the trial court's exclusion of the documents. The Court should deny Respondent's motion to strike these documents from Appellant's designation of matter to be included in the Record on Appeal.

**CONCLUSION**

The Court should deny Respondent's motion to strike these items from the Designation of Matter.

Respectfully submitted,

June 14, 2013



John S. Nichols  
SC Bar No. 004210  
Bluestein, Nichols, Thompson & Delgado, LLC  
P.O. Box 7965  
Columbia, SC 29202  
(803) 779-7599

Robert V. Phillips  
SC Bar No. 68458  
McGowan Hood & Felder, LLC  
1539 Health Care Drive  
Rock Hill, South Carolina 29732  
(803) 327-7800

Daniel W. Luginbill  
SC Bar No. 68525  
Wilson, Luginbill & Kirkland, LLC  
Post Office Box 1150  
Bamberg, South Carolina 29003  
(803) 245-7799

Attorneys for Appellant

THE STATE OF SOUTH CAROLINA  
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Construction Company, Inc., J. Moore Electrical  
Contractors, Inc., and Charleston County, ..... Defendants,

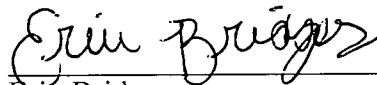
of whom  
Chloe Engel is ..... Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served  
counsel for the Respondent with a copy of the *Return to Respondent's Motion to Strike* by  
mailing copies of the same by United States Mail with first class postage prepaid to the  
following address:

Andrew S. Halio, Esquire  
Halio & Halio, PA  
P.O. Box 747  
Charleston, SC 29402-0747

June 14, 2013



Erin Bridges  
BLUESTEIN, NICHOLS, THOMPSON  
& DELGADO, LLC



BLUESTEIN · NICHOLS · THOMPSON · DELGADO LLC

ATTORNEYS AT LAW

Margaret Miles Bluestein  
John Shannon Nichols  
Stacy Elizabeth Thompson  
John Dennis Delgado  
Allison Paige Sullivan  
Ashley Trout Thompson  
Blake Alexander Hewitt  
Kenneth Henry Dojaquez  
John Clarke Newton

OF COUNSEL  
O. Eugene Powell, Jr.

June 14, 2013

**VIA HAND DELIVERY**

The Honorable Jenny Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

RE: Rolando Santiago, as the Personal Representative of the Estate of Jose Hernandez-Arizmendi a/k/a Esuardo Gomez-Ortiz v. Chloe Engel, et. al.  
Case Tracking No.: 2012-212708

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven (7) copies of Appellant's *Return to Respondent's Motion to Strike* in regards to this case. I have also enclosed a proof of service of this document on counsel for the Respondent. Please return the additional filed copy to me via our courier.

Thank you for your attention to this matter. If you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely,

Erin Bridges  
Paralegal to John S. Nichols  
BLUESTEIN, NICHOLS, THOMPSON &  
DELGADO, LLC

/emb

Enclosures

cc: Robert V. Phillips, Esquire  
Daniel W. Luginbill, Esquire  
Andrew S. Halio, Esquire

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