

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Deadra L. Jefferson, Circuit Court Judge

Case No. 2010-CP-10-9917

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.

REPLY

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SC Court of Appeals

The issue presented by this Motion to Strike is whether documents that are not part of the circuit court record can be included in the Record on Appeal. Appellant argues that the "autopsy report" and the "coroner's report," documents that were not marked as exhibits at trial and are not otherwise included in the circuit court record in this case, qualify for inclusion under Rule 210 (c), SCACR, as "matter" that was "presented to" the lower court during the trial. Appellant is arguing that during a trial documents need not be marked as exhibits in order to be included in the Record on Appeal and that marking the documents as exhibits in this

case would have been a “redundant, useless and futile task.” (Return, p. 5) This argument is clearly without merit.

“Exhibits” are “matter” that can be included in the Record on Appeal under Rule 210 (c). Rule 209 (b) also identifies “exhibits” as “materials which may be properly included in the Record on Appeal.” It is undisputed that the two documents at issue in this motion are not “exhibits.” They do not appear on the Exhibit List, and the Return acknowledges that were not marked as exhibits. Neither Rule 209 nor Rule 210 identifies unmarked exhibits that are not part of the lower court record as materials that are properly included in the Record on Appeal. Therefore, Appellant suggests a broad interpretation of the term “presented to” in Rule 210 (c) as the basis for inclusion of these documents. Rule 210 (c) states in part that: “The Record shall not, however, include matter which was not presented to the lower court or tribunal.” Appellant’s broad interpretation of “presented to,” if adopted by this Court, could potentially cause serious problems.

The excerpts of the trial court transcript cited by the Appellant at page 3 of the Return illustrate of how confusing an appeal can become when documents are not marked during trial. The Return quotes a sentence from page 335 of the transcript that purportedly states: [“Whereupon Mr. Phillips proffers the document (**the coroner’s report**) to the Court.”] However, the words “coroner’s report” are not anywhere to be found on page 335. The transcript actually states: [“Whereupon Mr. Phillips proffers **documents** to the Court.”] (Tr. p. 335, ll. 8-9). (Emphasis added). The discussion on page 335 relates to an objection to a witness’ notes of a telephone conversation and not to the coroner’s report: “MR. HALIO: The basis of

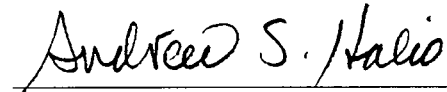
the objection is that this is Mr. Lamont's notes of a telephone conversation." (Tr. p. 335, ll. 24-25; Tr. p. 336, l. 1). The coroner's report is not mentioned until later on page 336. The coroner's report may or may not have been one of the "documents" proffered to the court. This confusion could have been avoided if the document had been marked as an exhibit, which is why marking evidence is not, as Appellant claims, a "futile act."

Another reason why marking exhibits is not a "redundant, useless and futile act" relates to the custody of documents and other materials that are not part of the trial record. By not marking the documents, they did not become part of the official record. If this Court allows the reports to become part of the Record on Appeal, the trial court is no longer the custodian of the evidence presented at trial, and the ramifications of such a ruling would be enormous.

Another problem created by Appellant's position involves determining what "presented to" means. Is it enough that the document be mentioned during a question to a witness? Does the trial judge need to look at it? Does the judge's need to comment about it? Should the trial judge be required to hold it? This Court should not be put in the position of having to determine when an unmarked document is sufficiently presented to a trial court to be included in the Record on Appeal. In regard to documentary evidence, documents qualify for inclusion in the Record on Appeal when they are also part of the lower court's record. In the context of a trial, this means that they must be marked as exhibits. Nothing less assures an accurate and intelligible Record on Appeal.

CONCLUSION

For the reasons set forth herein and in the Motion to Strike, the coroner's report and the autopsy report should be stricken from the Appellant's Designation of Matter to be Included in the Record on Appeal.



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June 19, 2013

1 THE COURT: Any objection?

2 Please show it to Mr. Halio --

3 MR. HALIO: Objection.

4 THE COURT: -- what you're relying on.

5 MR. HALIO: Objection.

6 THE COURT: Look at the documents first, please.

7 MR. HALIO: I know what the document is.

8 THE COURT: Then let me see the document.

9 [Whereupon, Mr. Phillips proffers documents to
10 the Court]

11 [Whereupon, the Court reviews documents]

12 THE COURT: Under what rule of evidence, would
13 this be admissible?

14 Ladies and gentlemen, I have a matter of law I
15 need to take up outside of your presence.

16 During the break, please do not discuss the
17 case. And please leave your notepads in your seats.
18 We appreciate your patience.

19 [Whereupon, the jury exits the courtroom at
20 2:42 p.m.]

21 THE COURT: Okay. There is an objection
22 pending. What is the basis of the objection, Mr.
23 Halio?

24 MR. HALIO: The basis of the objection is that
25 this is Mr. Lamont's notes of a telephone

1 conversation. The witness is on the witness stand.
2 The notes have been shown to him. He's asked him
3 to -- he's asked to explain it. He's explained it.
4 And I don't believe his notes property into -- would
5 properly be admissible into evidence.

6 THE COURT: Under what theory are you seeking
7 the admission of the document?

8 MR. PHILLIPS: The coroner's report, Your Honor.

9 THE COURT: The coroner's report is not going to
10 be admissible. It wouldn't be admissible even if he
11 relied on it as the foundation of his opinion. It's
12 hearsay.

13 Experts can rely on hearsay in forming the basis
14 of their opinion. They can -- they can refer to it,
15 they can rely on it, but it doesn't make it an
16 admissible document. The rules provide that they can
17 rely on hearsay in formulating the basis of an
18 opinion.

19 If you want to ask him questions along those
20 lines as to how he formulated his opinion based on the
21 coroner's report, you can. But it doesn't make the
22 document admissible. It's still hearsay. It's the
23 subjective opinions of someone else made outside of
24 court, that cannot be cross-examined, that are offered
25 for the truth.

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PROOF OF SERVICE


The undersigned hereby certifies that on the date indicated below, he served
counsel for the Appellant with a copy of the *Reply* by mailing copies of the same by
United States Mail with first class postage prepaid to the following addresses:

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June 19, 2013

The Honorable Jenny Kitchings
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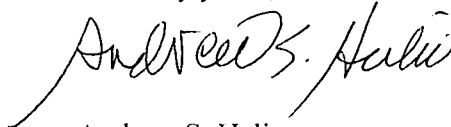
Re: *Rolando Santiago, as P.R. of the Estate of
Jose Hernandez-Arizendi a/k/a Eduardo Gomez-
Ortiz v. Chloe Engel, et al.*
Case Tracking No.: 2012-212708

Dear Ms. Kitchings:

Please find enclosed an original and seven (7) copies of a Reply and an original and one copy of Proof of Service. Please return clocked copies of the Reply and the Proof of Service in the enclosed envelope.

Thank you for your attention to this matter.

Sincerely yours,



Andrew S. Halio

Enclosures

cc: John S. Nichols, Esq.
Robert V. Phillips, Esq.
Daniel W. Luginbill, Esq.
Dale E. Van Slambrook, Esq.

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