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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of
Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
J. Derham Cole, Circuit Court Judge

Case No. 2022-CP-42-03123

Appellate Case No. 2023-001752

MECO, Inc. of Augusta. ....Appellant,

v.

Alex Sayed a/k/a Arshad M. Sayed a/k/a Arshed Sayed; NEPA Ventures LLC; NEPA Trading & Investments, LLC.. Respondents.

RESPONSE TO MOTION TO STRIKE

Appellant responds to Respondents' Motion to Strike, showing that its Designation of Matter does not violate appellate rules and Respondents' motion should be denied.

Respondents' motion is a naked attempt to limit the evidence on which this Court will render its decision, even though that evidence was available to all parties below and would be admissible at trial for jury consideration. In South Carolina, summary judgment is "a drastic remedy which should be cautiously invoked so that a litigant is not improperly deprived of a trial on disputed factual issues." Madison ex rel. Bryant v. Babcock Ctr., Inc., 371 S.C. 123, 134, 638 S.E.2d 650, 655 (2006). Consequently, "the court *must* view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving

party." Id. (emphasis supplied). Respondents' attempt to deprive Appellant of a trial based on limited evidence violates these cornerstone principles.

Appellant's Designation of Matter was appropriate, as "[t]he burden is on the appellant to furnish a sufficient record on appeal from which this court can make an intelligent review." Windham v. Honeycutt, 290 S.C. 60, 63, 348 S.E.2d 185, 187 (Ct. App. 1986). That is precisely what Appellant has done here.

But Respondents seek to exclude portions of the parties' testimony. In an apparent tacit admission that this testimony creates genuine disputes of fact, Respondents seek to keep it out of the record entirely. In essence, Respondents want this Court to determine whether the evidence generates factual disputes requiring jury resolution without all the evidence the jury would consider at trial. For the reasons explained below, Respondents' motion should be denied.

To begin, Appellant's Designation of Matter does not violate SCACR 209(b)'s prohibition against designation of matter "not relevant to the appeal." Respondents do not contend otherwise, and their motion to strike was filed precisely because the matter is relevant, would be admissible at trial, and proves that factual issues surrounding when MECO completed its work require reversal so that a jury may determine whether Appellant's claims are time-barred.

It is true that Rule 210(c), SCACR, prohibits "inclusion in the record on appeal of 'matter which was not presented to the lower court or tribunal.'" (See Resps.' Mot., ¶ 2 (quoting Rule 210(c), SCACR.) But as Respondents' motion shows, testimony from both Respondent Sayed and Appellant's 30(b)(6) representative was presented to the lower court. (See id. ¶¶ 4-5; see also Transcript, pp. 19-22 attached as Exhibit 1.) Thus, Appellant's designation of the parties' testimony does not violate Rule 210(c).

Attempting to artificially limit this Court's review of the evidence, Respondents contend that only those portions of witness testimony specifically cited to the trial court may be designated for the record on appeal. In other words, Respondents contend that "matter" is not the testimony of a witness, but each individual passage (or page—Respondents' position is not quite clear) of a witness's testimony. Respondents' argument misses the mark. In South Carolina, an appellate court "reviews a grant of summary judgment by applying the same standard as the circuit court under Rule 56(c), SCRCP." Easterling v. Burger King Corp., 416 S.C. 437, 445, 786 S.E.2d 443, 447 (Ct. App. 2016). Thus, Respondents' effort to prevent the Court from even viewing certain designated portions of the parties' testimony undermines the principle that "appellant [must] furnish a sufficient record on appeal from which this court can make an intelligent review." Windham, 290 S.C. at 63.

Moreover, none of the case law cited by Respondents prohibits designation of the testimony at issue. And Appellant is unaware of any case that holds that only portions of testimony specifically cited to the trial court may appear in the Record on Appeal, as Respondent argues here. The better interpretation is that because the trial court considered the testimony of Appellant's corporate representative and Respondent Sayed, this Court may also consider any of those witness's testimony.

Respondents' first case, State v. White, 372 S.C. 364, 387, 642 S.E.2d 607, 618 (Ct. App. 2007), aff'd but criticized, 382 S.C. 265, 676 S.E.2d 684 (2009), overruled by State v. Wallace, 440 S.C. 537, 892 S.E.2d 310 (2023), is a criminal case that has had part of its central holding reversed. In any event, White involves "a written statement retracting [a witness's] trial testimony" *after* the appellant served his notice of appeal. Id. So White addresses completely new evidence that was

unavailable to the parties or the court while the case was pending below and was not even created until after trial. These distinctions render White inapplicable here.

Respondents' reliance on Sanders v. Salley, 283 S.C. 458, 460, 322 S.E.2d 829, 830 (Ct. App. 1984), fares no better. In Sanders, the appellant argued "[f]or the first time on appeal," that a mortgage that was not in the record before the master in equity or the circuit court should be considered on appeal. Id. Here the parties urged the trial court to consider testimony from both MECO's corporate representative and Respondent Sayed below, unlike the completely new evidence in Sanders. And unlike the argument in Sanders made for the first time on appeal, Appellant's argument that factual disputes require a jury to determine when MECO's work was complete was squarely before the trial court here. Neither White nor Sanders supports the exclusion of the parties' testimony from the record here.

Finally, Respondents' citation to Noorai v. Sch. Dist. of Pickens Cnty., 2014-001282, 2016 WL 1367066 (S.C. Ct. App. Apr. 6, 2016), is immaterial because "unpublished orders have no precedential value and *should not be cited* except in proceedings in which they are directly involved." Rule 268(d)(2), SCACR (emphasis supplied). Even so, in Noorai the portions of testimony not specifically cited to the circuit court were included in the Record on Appeal; that is the only way the appellate court could decline to consider them. (See Noorai, 2016 WL 1367066; Resps.' Mot. ¶ 2.) In sum, Respondents' argument that only those portions of deposition testimony specifically cited to the court below may be designated for the Record on Appeal is not well-supported.

In fact, the contrary is true: the "court may consider unfiled depositions when portions of the deposition were presented at the hearing." Alston v. Blue Ridge Transfer Co., 308 S.C. 292, 294–95, 417 S.E.2d 631, 633 (Ct. App. 1992). Here, portions of the parties' depositions were

attached to the parties' briefs and were presented at the hearing. Under the authority of Alston, the depositions may be considered and included in the Designation of Matter and Record on Appeal.

At bottom, Respondents' motion is a hyper-technical attempt to limit review of the available evidence. In ruling on summary judgment "the evidence and all inferences that reasonably can be drawn from the evidence must be viewed in the light most favorable to the nonmoving party." Argoe v. Three Rivers Behav. Ctr. & Psychiatric Sols., 388 S.C. 394, 400, 697 S.E.2d 551, 554 (2010). Respondents' motion seeks to prevent the testimony at issue—which Appellant cites in support of its position—from being considered at all, much less in the light most favorable to Appellant.

And, in ruling on summary judgment, courts "must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts." Bloom v. Ravoira, 339 S.C. 417, 423, 529 S.E.2d 710, 713 (2000). Here, excluding testimony from the record on appeal would needlessly prevent this court from determining whether a verdict for Appellant would be possible, because the evidence would be incomplete. And an appellate court is "bound by the record established ***at trial***." Argabright v. Argabright, 398 S.C. 176, 179 n.3, 727 S.E.2d 748, 750 (2012) (emphasis supplied). To determine whether jury issues exist, this Court must be able to consider all the evidence the jury could consider—which includes all the testimony of Appellant and Respondent Sayed.

Perversely, Respondents ask this Court to determine that no jury issues exist based on a record that does not include all the evidence that could be presented to the jury. Respondents' motion should be denied. Though Respondents may argue that this Court should not consider the testimony at issue for the reasons cited in their motion, the Court should not strike this relevant material from the record in the first instance.

In sum, testimony from Appellant MECO's corporate representative and Respondent Sayed was matter presented to the trial court. Appellant's designation of other passages from those depositions was not improper. Respondents' motion to strike should be denied. As noted in counsel's email to the Court, Appellant does not oppose Respondents' request for an extension of time to file their Initial Brief until after resolution of this Motion, which should be denied for the reasons stated above.[1]

Respectfully submitted,

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Attorneys for Appellant MECO, Inc. of Augusta

February 21, 2024

[1] If Appellant is ordered to revise its Designation of Matter and Initial Brief, it should be given at least 20 days to do so, as other evidence may be cited for some of the propositions supported by the testimony at issue here.

1 Moving forward, though, I want to address a -- a few
2 things Mr. Bach stated. Mr. Alex Sayed, or Mr. Sayed, or one
3 of his companies have made payments since February, 2019.
4 They made payments on other work that Meco was still doing at
5 Mr. Sayed's gas station, the We Star Travel Plaza. The
6 defendant's worth other work, I mean by other is outside of
7 the scope of the original contract.
8 And Mr. Bach stated, I believe that, you know, we
9 presented contradictions in our client's own testimony and
10 that -- that doesn't create a general issue of material fact,
11 not any stands for the exact opposite proposition. It the
12 court appeal reversed grant, a summary judgment where a party
13 in their deposition contradicted themselves giving three
14 different dates as to when they discovered mold. What we
15 presented is, yes, Mr. Burke the CEO of Meco's testimony
16 that, you know, in early August he was ready to move.
17 He also submitted an affidavit along with that lien in
18 December of 2019 stating that the last date of work at West
19 Travel Plaza was September 21st. It's, you know, it's --
20 it's testimony that it's sworn and it's contained in an
21 affidavit, but it's not something that was generated. It's
22 not -- it's not something that Mr. Burke or Meco had put
23 together over the last couple weeks since defendant's motion
24 was filed. It's something that existed. And Mr. Burke, you
25 know you know, he -- he contradicted it in his own deposition

EXHIBIT 1

1 testimony.
2 But (inaudible) stands for the proposition that summary
3 judgment is not proper, whether is conflicting evidence on
4 the issue of material fact clearly, when Meco knew or should
5 have known, whether -- whether they had a cause of action
6 against the defendants is the issue of material fact. And
7 there's contradictory evidence on that directly.
8 Moving to whether the UCC statute of limitations should
9 apply Mr. Buck did not recognize that, you know, over 72% of
10 the contract price, it's for equipment and a word search.
11 The contract for the word equipment yields 34 results. There
12 -- there are three factors in that Grimes test, which is, you
13 know, developed under the Bone Break thrust test from the 8th
14 Circuit. And we submit that you know, this contract goes the
15 other way.
16 And if the court doesn't see that, it goes the other
17 way. There's at least an issue of material fact as to
18 whether the six-year statute of limitation should apply. We
19 start hired (inaudible) to replace its equipment, like the
20 (inaudible) break had a fire that destroyed some of his lane,
21 most of his lanes. He hired somebody to come out there and
22 replace the materials, the equipment needed to run the
23 bowling alley. The things that we started hired Meco to
24 replace were the payment and communication systems, which
25 Mecca held in its warehouse. The old tanks, the DEF tank

1 Meco provided to Westar was the area item that they did not
2 hold in the warehouse gas dispensers that, that Mrs had and
3 Westar needed replaced, held in Meco's warehouse. And like I
4 said, the small DEF tank was the only thing that was not in
5 Meco's Warehouse when they were hired to do this work.
6 And so we submit that this contract is, it's not like,
7 you know, floor installation services and Ranger Construction
8 because Meco held all of its equipment except for the DEF
9 tank and its warehouses, which the court there have found as
10 a very important factor. The -- the other factors, you, you
11 know, the, that those can be weighed. And so we submit that,
12 you know, the -- the ratio of equipment under the contract,
13 which appears that phrase appears 34 times throughout is over
14 72%. And we also submit that because Meco was holding the
15 equipment in its warehouse, it's much more comparable to the
16 supplier of goods than Mr. Bach would -- would have the court
17 perceive.
18 Moving to the discovery issue again, there's
19 conflicting evidence and under (inaudible) that creates a
20 genuine issue of material fact precluding summary judgment.
21 Mr. Burke did testify that he was ready to move in early
22 August of 2019. He also signed an affidavit in the same year
23 stating that Meco was still doing work at (inaudible) until
24 September 21, 2019. There's -- there are also invoices with
25 payment due dates of September 26, 2019, indicating that Meco

EXHIBIT 1

1 was still working at, we start on August 26, 2019 as well.
2 There -- there -- there's not much more to say about
3 that. There is conflicting evidence as to when Meco knew or
4 should have known that it had a breach of contract action.
5 Mr. Brady –- Brad Brody's affidavit that was submitted along
6 with our memo, he was the -- the prior attorney for Meco. He
7 submitted that affidavit because of the difficulty that Meco
8 and him had, figuring out the actual name of Mr. Sayed. Yet
9 they -- they saw things that said Sayed like the emails Mr.
10 Bach pointed out like the invoice sent to his home address.
11 But they also found things like a judgment against Alex Sed
12 Tol with T-O-L on the end of his last name. They also found
13 a mortgage to the property to NEPA Ventures. That was sound
14 that was signed by an Sayed, not Ashed.
15 The -- the process server. I believe it was the
16 process server who, who served the lien on Mr. Sayed in
17 December 21, 2019. The person who received service there
18 signed his name as his name, that was Alex Sayed. And so
19 that's four different names already that Meco who could have
20 been, might be, or maybe none of these are actually his name.
21 They couldn't confirm that. And that -- that is one of the
22 issues that goes toward our argument that -- that statute of
23 limitations. If -- if the court doesn't see if there's
24 issues precluding summary judgment, otherwise, then they
25 should, it -- it should at least be told for these slightly

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MECO, Inc. of Augusta. ....
Plaintiff,

v.

Alex Sayed a/k/a Arshad M. Sayed a/k/a Arshed Sayed; NEPA Ventures LLC; NEPA Trading & Investments, LLC...
Defendants,

OF WHOM

MECO, Inc. of Augusta is..
Appellant, and

Alex Sayed a/k/a Arshad M. Sayed a/k/a Arshed Sayed; NEPA Ventures LLC; NEPA Trading & Investments, LLC...
Respondents.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that MECO, Inc. of Augusta's Response to Motion to Strike was served on the following counsel of record by e-mail pursuant to Rules 613 & 262(c)(3), SCACR on February 21, 2024:

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Samantha J. Adcox

From:	Samantha J. Adcox
Sent:	Wednesday, February 21, 2024 5:07 PM
To:	Adam Bach; Zac Turner; Melanie Mausser-Shaluly
Cc:	Kyle Waddell; Scott Kelly; Beth Kimbrough; Ginnelys B. Reyes
Subject:	RE: Appellate case no. 2023-001752 (MECO, Inc. of Augusta v. Alex Sayed a/k/a Arshad M. Sayed a/k/a Arshed Sayed, et al) [IMAN-ACTIVE.FID55407]
Attachments:	240221 MECO resp to Mot to Strike (2).pdf; 230221 Certificate of Service - Response to Motion to Strike (1).pdf

Good afternoon,

Please find the updated service copies of the response to motion to strike with exhibit, as well as the certificate of service. I will copy you on my email to the court of appeals for filing.

Thank you.

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From: Samantha J. Adcox
Sent: Wednesday, February 21, 2024 4:35 PM
To: Adam Bach <abach@tonnsenbach.com>; Zac Turner <zturner@tonnsenbach.com>; Melanie Mausser-Shaluly <mshaluly@tonnsenbach.com>
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Subject: Appellate case no. 2023-001752 (MECO, Inc. of Augusta v. Alex Sayed a/k/a Arshad M. Sayed a/k/a Arshed Sayed, et al) [IMAN-ACTIVE.FID55407]

Good afternoon:

In connection with the above-referenced matter, please find the attached service copies of the response to motion to strike and certificate of service. I will copy you on my email to the court of appeals for filing.

Thank you.

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