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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Presiding Judge

Case Number: 2013-CP-23-1833
Appellate Case No. 2013-001645

D&C Builders, Inc.....Appellant,

v.

Richard M. Buckley and Wells Fargo National Association, Defendants,
And Richard M. Buckley, Third-Party Plaintiff,

v.
Scott Dodenhoff, Third-Party Defendant

of whom:

Richard M. Buckley Respondent,

**MEMORANDUM OF APPELLANT IN SUPPORT OF
APPELLANT'S MOTION TO STRIKE MATTER FROM RESPONDENT'S
DESIGNATION AND BRIEF, OR IN THE ALTERNATIVE, ORDER OFFICE OF
DISCIPLINARY COUNSEL TO RELEASE ENTIRE FILE ON APPELLANT'S
ETHICS COMMISSION COMPLAINT FILED JULY 26, 2013**

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TABLE OF CONTENTS

Table of Authorities ii

Statement of the Facts 1

Standard of Review 2

Argument 3

Conclusion 6

TABLE OF AUTHORITIES

Cases

<u>Armstrong v. Collins</u> , 366 S.C. 204, 225, 621 S.E.2d 368, 378 (Ct.App.2005)...	2, 5
<u>Busillo v. City of North Charleston</u> , 745 S.E.2d 142, 404 S.C. 604 (S.C.App. 2013).....	2, 5
<u>Elam v. South Carolina Dept. of Transp.</u> , 602 S.E.2d 772, 361 S.C. 9 (S.C. 2004).....	2, 4
<u>In the Interest of Michael H.</u> , 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) ..	2, 5
<u>State v. White</u> , 642 S.E.2d 607, 372 S.C. 364 (S.C.App. 2007).....	2, 4
<u>Townsend v. Townsend</u> , 323 323 S.C. 309, 474 S.E.2d 424 (S.C. 1996)	1
<u>Ulmer v. Ulmer</u> , 632 S.E.2d 858, 369 S.C. 486 (S.C. 2006)	2, 5
<u>Wilder Corp. v. Wilke</u> , 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)	2, 5

Statutes & Rules

Rule 1.9, RPC, Rule 407, SCACR.....	1, 5
Rule 210(c), SCACR	2

STATEMENT OF FACTS

For a thorough examination of the Facts, Appellant would refer the Court to the Statement of Case (p. 2-4) and Statement of Facts (p. 4-13) contained in Appellant's initial brief already filed with the Court in this matter as well as the summary of facts contained in Appellant's previously filed memorandum in opposition to Respondent's Motion to Dismiss and the exhibits thereto. However, by way of a brief summary, Appellant would present the following.

Appellant filed a motion to disqualify Respondent's counsel in this matter due to a conflict of interest under Rule 1.9 of the Rules of Professional Conduct, comment 3 thereto, and the Supreme Court decision in *Townsend v. Townsend*, 323 S.C. 309, 474 S.E.2d 424 (S.C. 1996). Respondent contested the disqualification on the basis that Respondent's counsel was not aware of any confidential information obtained from Appellant in the first case that would be relevant in the current case and that Appellant had not provided any specific information to prove they were in possession of such information.

The Circuit Court refused to determine the issue of disqualification until specific information was received and counsel for Respondent had an opportunity to respond. The Court therefore ordered Appellant to submit the information claimed to be confidential to both the Circuit Court and the Kenison Firm for review by written order of July 16, 2013. Appellant thereafter filed a motion to reconsider, clarify and amend order to issue an injunction, which was denied by the Circuit Court after a brief hearing on July 23, 2013 by written order filed July 25, 2013.

Appellant filed its Notice of Appeal with this Court on July 26, 2013.

STANDARD OF REVIEW

Rule 210(c), SCACR requires that the record on appeal shall not include matter which was not presented to lower court. Elam v. South Carolina Dept. of Transp., 602 S.E.2d 772, 361 S.C. 9 (S.C. 2004), State v. White, 642 S.E.2d 607, 372 S.C. 364 (S.C.App. 2007).

An appellate court will not consider issues on appeal which have not been preserved for appellate review. Ulmer v. Ulmer, 632 S.E.2d 858, 369 S.C. 486 (S.C. 2006) citing, In the Interest of Michael H., 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) (holding that issues must be raised and ruled upon in the trial court to be preserved for appellate review); See also Busillo v. City of North Charleston, 745 S.E.2d 142, 404 S.C. 604 (S.C.App. 2013) citing Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (stating " an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review") and Armstrong v. Collins, 366 S.C. 204, 225, 621 S.E.2d 368, 378 (Ct.App.2005) (stating " [b]ecause this argument was not presented to the trial court.... the matter is not preserved and we decline to address it").

ARGUMENT

Respondent filed its Designation of Matter to be Included in the Record on Appeal (“Designation”) and its Initial Brief (“Brief”) on or about June 23, 2014. The Designation contains the following items (numbered as in the Designation) that were not presented to the lower court at any time:

5. June 19, 2013 email
18. August 1, 2013 Email (emphasis added)
20. Appellant’s Ethics Commission Complaint filed July 26, 2013
21. SC Supreme Court’s Office of Disciplinary Counsel Ruling dated November 22, 2013
22. SC Supreme Court’s Office of Disciplinary Counsel Ruling dated December 27, 2013
30. Appellants’ Returns to Appellate Motions Filed by Respondent
31. April 8, 2014; June 9 and 10, 2014 email chain
32. Respondent’s Motion for Partial Relief dated April 10, 2014
34. Appellant’s email dated August 1, 2013
35. Initial Brief of Appellant dated November 8, 2013
40. All Appellate Filings of Appellant

Item number five (5) was a communication between counsel only regarding the substitution of counsel, and the remaining items all occurred subsequent to the filing of the Notice of Appeal with this Court on July 26, 2013 and did not include any involvement or action by the lower court.

Although not presented to the lower court, Respondent's Brief utilizes these items as support in his Statement of the Case, Statement of Facts and Arguments presented therein.

Rule 210(c), SCACR requires that the record on appeal shall not include matter which was not presented to lower court. Elam v. South Carolina Dept. of Transp., 602 S.E.2d 772, 361 S.C. 9 (S.C. 2004), State v. White, 642 S.E.2d 607, 372 S.C. 364 (S.C.App. 2007).

Since none of the items referenced above that were included in Respondent's Designation were presented to the lower court, this Court must strike those items from Respondent's Designation so that the Record on Appeal to be prepared by Appellants Counsel reflects those items that are in compliance with Rule 210(c) of the South Carolina Rules of Appellate Procedure.

In the alternative to striking these items, particularly if the Court does not strike items numbered twenty (20), twenty-one (21) and twenty-two (22), Appellant moves for the Court to Order the Office of Disciplinary Counsel (ODC) to release its entire file of the investigation into Appellant's Ethics Complaint filed July 26, 2013 to the Appellant for inclusion in the Record in its entirety.

Respondent uses these particular items designated to support argument on pages 23-28 of his Brief that the determinations of the ODC not to pursue any action against Counsel for Respondent should be taken as conclusive that there is no basis for disqualification as Appellant requested and that the two cases handled by Counsel for Respondent are therefore not "substantially related."

First of all, this argument was never presented to the lower court. The decisions of the ODC to which Respondent refers were not even made until approximately four months after this Court obtained jurisdiction. An appellate court will not consider issues on appeal which have not been preserved for appellate review. Ulmer v. Ulmer, 632 S.E.2d 858, 369 S.C. 486 (S.C. 2006) (citing, In the Interest of Michael H., 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) (holding that issues must be raised and ruled upon in the trial court to be preserved for appellate review); See also Busillo v. City of North Charleston, 745 S.E.2d 142, 404 S.C. 604 (S.C.App. 2013) citing Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (stating " an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review") and Armstrong v. Collins, 366 S.C. 204, 225, 621 S.E.2d 368, 378 (Ct.App.2005) (stating " [b]ecause this argument was not presented to the trial court.... the matter is not preserved and we decline to address it").

Secondly, undersigned counsel for Appellant did not represent Appellant in the filing of the Ethics Complaint referenced by the Respondent; such filing was undertaken by Appellant pro se. Undersigned counsel is therefore not privy to what information, exhibits, responses, interviews or other actions were undertaken by the ODC or was provided to the ODC by Respondent's counsel and certainly was not privy to the basis for their decision, which admittedly seems directly opposite of the explicit directive contained in Rule 1.9 that is the subject of this appeal.

Although Respondent's argument and the designated support are indicative of the necessity of the clarification of the applicability of Rule 1.9 as requested in Appellant's Brief, the designated matter and arguments were not presented to the lower court and are

not proper to be included in the Record on Appeal or Respondent's Brief. Those matters designated and the arguments supported by such matter must be stricken.

In the event the Court deems it prudent and justified to more thoroughly examine the Ethics Complaint and decisions of the ODC referenced by Respondent, the Court cannot simply accept Respondent's assertion that the only possible basis was that the matters weren't "substantially related." It is just as likely that the ODC could have reached their decision based on their interpretation of the circuit court's ruling and a lack of authority to overrule the circuit court's order that brought about this appeal. Regardless of the possible reasons, if the Court wishes to consider the ODC's rulings in evaluating this appeal, it must examine all of the contents of the ODC file to determine the actual basis for such a determination in light of the clear direction of Rule 1.9. Appellant must also be afforded the opportunity to review this information and respond to the argument by Respondent.

Therefore, should the Court deny the Motion to Strike as it applies to Respondent's designated items regarding the Ethics Complaint filed July 26, 2013 or the rulings of the ODC, Appellant must be afforded the opportunity to examine the full contents of the ODC file to respond accordingly in its Reply Brief. Therefore, this Court should issue an Order to the ODC to release such information.

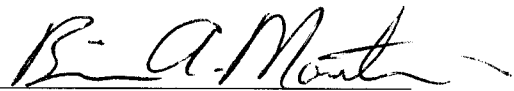
CONCLUSION

For the reasons stated above, together with the Notice of Appeal, Appellant's initial brief, and all other filings in this matter, Appellant's Motion to Strike should be granted and the specifically referenced items contained in Respondent's Designation

should be stricken as well as any references, support or argument based on such matters in Respondent's Brief. In the alternative to striking items 20, 21 and 22, the Court should issue an Order to the ODC to release the entire contents of its investigation file on Appellant's Ethics Complaint to the Appellant.

Respectfully submitted,

BRIAN A. MARTIN, LLC

A handwritten signature in black ink that reads "B. A. Martin". The signature is written in a cursive style with a horizontal line underneath it.

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