

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Presiding Judge

Case No. 2013-CP-23-1833

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 is theRespondent.

RESPONDENT'S RETURN TO 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 ON JULY 26, 2013

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Attorney for Respondent

Other Counsel of Record:
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SC Court of Appeals

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT

 APPELLATE PRESERVATION1

 ETHICS COMMISSION FILE4

TABLE OF AUTHORITIES

CASES

Armstrong v. Collins, 366 S.C. 204, 225, 621 S.E.2d 368, 378-379 (Ct.App. 2005)3

Busillo, 404 SC 604, 745 S.E.2d 142 (Ct.App. 2013).....3

Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004)2

Michael H., 360 S.C. 540, 546, 602 S.E.2d 729, 732 (Ct.App. 2002).....3

Ulmer v. Ulmer, 369 S.C. 486, 632 S.E.2d 858 (2006).....3

Wilder Corp., 330 S.C. 71, 497 S.E.2d 7313

OTHER AUTHORITIES

Rule 413 SCACR.....4

Respondent, Richard M. Buckley, by and through its undersigned counsel hereby submits this Return to Appellant's Motion to Strike Matter from Respondent's Designation and Brief, or in the alternative, to Release Entire File on Appellant's Ethics Commission Complaint Filed July 26, 2013 (the "Motion to Strike"), and requests the Court to deny same.

Appellate Preservation

In Appellant's Motion to Strike, it seeks to strike from the Record on Appeal, including the Respondent's Initial Brief and Designation, all references to, and argument regarding, the Ethics Complaint filed by Appellant. The basis for this Motion to Strike is that such matters were allegedly not presented to the lower court at all, and were allegedly not preserved for appeal.

The Appellant's Motion to Strike should be denied because the Appellant is the party who raised the precise issue of the involvement of the Ethics Commission in this dispute. Notably, the Appellant raised this precise issue to the lower court in a writing addressed to the lower court on July 18, 2013 in support of its Motion to Reconsider. The Appellant explained to the lower court in support of its previously filed Motion to Reconsider that an opinion from the Ethics Commission would provide "guidance in light of the ethical complexities [at issue]" and that such an opinion "would be very beneficial". **App. Email 7.18.13.** The Judge denied the Appellant's Motion to Reconsider at a hearing on July 23, 2013. **Lower Ct. Order 7.25.13.** On July 26, 2013, the Appellant initiated this appeal. **Notice of App.** Also on July 26, 2013, the Appellant filed its Ethics Complaint. **Ethics Comp.**

On November 8, 2013, the Appellant filed its Initial Brief wherein the Appellant

made voluminous arguments about the ethical nature of this issue on appeal. **App. Init. Brief.** The Ethics Commission dismissed the Appellant's complaint on November 22, 2013. **Ethics Comm. 11.22.13.** Notably, the Appellant chose not to appeal that decision. Yet, the Appellant further referenced the ethical nature of this dispute in its subsequent filings with this Court¹, to include, without limitation, a direct reference to the Ethics Commission's finding in favor of the Respondent- and how that supported Appellant's appeal because, as Appellant asserts, the Ethics Commission, together with the lower court, need guidance from this Court on the issue. **App.'s Return 4.29.14, pp. 12-14; App. Email 7.18.13.** In Appellant's April 24, 2014 filings with this Court, the Appellant actually attached the Ethics Commission's rulings as exhibits and then referenced them in numerous paragraphs worth of argument to this Court about how the Commission and the lower court were both in error. **Id.**

Therefore, contrary to the Appellant's representations, the issues were presented to the lower court, included in the Record on Appeal, and preserved for appeal – all by Appellant himself.

The Appellant cites the case of Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004), in support of its contention that the record on appeal shall not include matter which was not presented to the lower court. However, here, the Appellant himself presented this issue regarding the Ethics Commission to the lower court in support of his own Motion to Reconsider, which the lower court denied. **App. Email 7.18.13; Lower Ct. Order.7.25.13.**

¹ See Appellant's April 29, 2014 'Return to Respondent's Motion for Order Granting Partial Relief and Motion to Dismiss Appellant's Remaining Issue on Appeal'. See also Appellant's December 9, 2013 Return to Motion to Dismiss ("Respondent's Motion to Dismiss seeks to mischaracterize Appellant's refusal to provide the ordered privilege log as a 'procedural' issue rather than an 'ethical' issue so as to avoid having to justify the clear violation of Rule 1.9 of the Rules of Professional Conduct to this Court.")

In the 2006 Ulmer v. Ulmer case cited by Appellant in its Motion to Strike, the South Carolina Supreme Court dealt with the proper post-trial procedure for perfecting an appeal, which is not at issue here. Ulmer v. Ulmer, 369 S.C. 486, 632 S.E.2d 858 (2006).

In the 2005 Armstrong v. Collins case cited by Appellant in its Motion to Strike, this Court stated (in response to the standard respondent's contention of failure to preserve) that the Appellant never raised the argument at issue before the lower court. Armstrong v. Collins, 366 S.C. 204, 225, 621 S.E.2d 368, 378-379 (Ct.App. 2005). However, here, the argument was raised before the lower court- by Appellant.

In the 2002 In re Michael H. case cited by Appellant in its Motion to Strike, this Court stated in its opinion (in denying the standard respondent's contention of failure to preserve) that the "trial court must be given an opportunity to resolve the issue before it is presented to the lower court". In re Michael H., 360 S.C. 540, 546, 602 S.E.2d 729, 732 (Ct.App. 2002). It is undisputed here that the Appellant raised the issue before the lower court² in its argument in support of its Motion to Reconsider, giving the lower court the opportunity to resolve the issue in accordance with the dictates of In re Michael H.. The lower court denied the Appellant's Motion to Reconsider.

Both the Busillo v. City of North Charleston case and the Wilder Corp. v. Wilke case cited by the Appellant each deal specifically with the preservation of an Appellant's objection for appellate review and the adequateness of Appellant presenting an objection to the lower court. Busillo, 404 SC 604, 745 S.E.2d 142 (Ct.App. 2013); Wilder Corp., 330 S.C. 71, 497 S.E.2d 731. That is not an issue on this appeal.

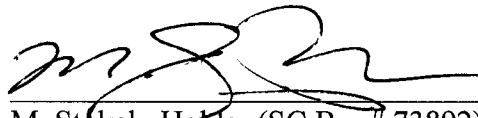
For the foregoing reasons, the Appellant's Motion to Strike should be denied.

² Whether the lower court ruled on the ultimate issue of disqualification is the basis of Respondent's argument regarding the appellate ripeness of the issue.

Ethics Commission File

In accordance with Rule 413, SCACR, and as such is strictly prohibited thereby, the Appellant's request for an Order to release the entire Ethics Commission file should be denied by this Court.

Respectfully Requested,



July 22, 2014

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Presiding Judge

Appellate Case No. 2013-001645
(Trial Court Case No. 2013-CP-23-1833)

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 is theRespondent.

PROOF OF SERVICE

The undersigned hereby certifies that a true copy of the Respondent's Return to Appellant's Motion to Strike Matter from Respondent's Designation of Matter and Brief, or in the alternative, Order Office of Disciplinary Counsel to Release Entire File on Appellant's Ethics Commission Complaint filed on July 26, 2013 in the above-referenced case has been served on all parties of record by mailing a copy of same in the United States mail, first-class postage prepaid this 22 day of July, 2014, addressed as follows:

Brian A. Martin, Esquire
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Greer, SC 29651
Attorney for Appellant

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SC Court of Appeals

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Co-Counsel for Appellant

Thomas A. Shook, Esq.
Finkel Law Firm, LLC
PO Box 71727
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Attorney for Defendant Wells Fargo, N.A.

A handwritten signature in cursive script that reads "Laurie Warren". The signature is written in black ink and is positioned above a horizontal line.

Laurie Warren, Legal Assistant
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July 22, 2014

Hon. Jenny Abbott Kitchings
Clerk of Court of Appeals
PO Box 11629
Columbia, SC 29211

**Re: *D&C Builders, Inc. v. Richard M. Buckley, et al.*
 Of Whom Richard M. Buckley is the Respondent
 Appeal from Greenville County
 C.A. No.: 2013-CP-23-1833
 *Appellate Case No.: 2013-001645***

To Whom It May Concern:

Please find enclosed the original and six (6) copies of Respondent's Return to 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 on July 26, 2013, with Proof of Service in the above referenced matter. By copy of this letter, we are serving one copy of each upon all counsel of record.

Thank you for your assistance in this matter and please do not hesitate to contact our office if you have any questions.

Very truly yours,

KENISON, DUDLEY & CRAWFORD, LLC



Laurie Warren
Legal Assistant

/lkw

Enclosures

cc: Brian A. Martin, Esq.
 H. Stewart James, Esq.
 Thomas A. Shook, Esq.
 Richard M. Buckley

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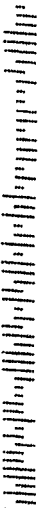
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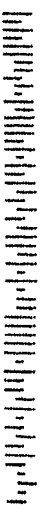
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