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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

SEP 15 2014

Edward W. Miller, Presiding Judge

SC Court of Appeals

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.

RESPONDENT'S MOTION TO STRIKE MATTER FROM APPELLANT'S
DESIGNATION AND BRIEF

Respondent, Richard M. Buckley, by and through its undersigned attorney and pursuant to Rule 240, SCACR, respectfully moves the Court for an Order striking certain matter from Respondent's Designation of Matter and any references, provisions or arguments supported by such matters in Appellant's Initial Brief. This motion is based in part on Rule 210(c) of the South Carolina Rules of Appellate Procedure as being matters not presented to the lower court, and in part on Rule 209(b) as matters not properly included in the Record because they were not preserved for appeal.

None of the following items contained in Appellant's Designation of Matter and argued in Appellant's Brief were ever presented to the lower court prior to the filing of the Notice of Appeal on July 26, 2013 and were not otherwise introduced and made a part of the record in the same manner as other evidence:

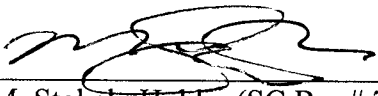
23. Entire contents of Spartanburg County Court File of D&C Builders, Inc. v TMKG, Inc., 2011-CP-42-04141

The above improperly designated matter is a case out of an entirely different proceeding in an entirely different jurisdiction at an entirely different time, none of the 'entire contents' of which were ever made a part of the record in this matter. It is well established in this State that records from another proceeding cannot be considered by an appellate court unless they were introduced and made a part of the record in the same manner as other evidence.

As a result, counsel respectfully requests an Order striking the herein referenced item from Appellant's Designation of Matter and striking all corresponding references, provisions and arguments supported by such stricken matter contained in Appellant's Initial Brief.

Respectfully Submitted,

September 11, 2014



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Of whom Richard M. Buckley is theRespondent.

MEMORANDUM OF RESPONDENT IN SUPPORT OF RESPONDENT'S
MOTION TO STRIKE MATTER FROM APPELLANT'S DESIGNATION AND
BRIEF

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STATUTES AND RULES

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COMES NOW, Respondent, Richard M. Buckley (“Buckley”), by and through his undersigned attorney, and files this Memorandum in Support of its Motion to Strike Matter from Appellant’s Designation and Brief.

I. STATEMENT OF FACTS

For a thorough examination of the Facts, Respondent would refer the Court to the Statement of Case and Statement of Facts contained in Respondent’s initial brief already filed with the Court in this matter as well as the summary of facts contained in Respondent’s previously filed memorandums with the Court. However, by way of a brief summary, Respondent would present the following.

Appellant filed a Motion to Disqualify Respondent’s counsel in this matter due to an alleged conflict of interest under Rule 1.9 of the Rules of Professional Conduct, which the Appellant claims arose by virtue of Respondent’s law firm’s representation of Appellant in an entirely separate and distinct matter years prior in an entirely separate jurisdiction (the separate matter being a case filed in the Spartanburg County Court of Common Pleas titled D&C Builders, Inc. v. TMKG, Inc., 2011-CP-42-04141 (the “TMKG Matter”). The Circuit Court held the Motion in abeyance until the Appellant provided the lower court with specific information in support of its allegations. Without providing any substantive information, the Appellant thereafter filed a motion to reconsider, clarify and amend order to issue an injunction, which was denied by the lower 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. At no point in time did the Appellant ever introduce and make a part of the record in the lower court a single solitary document or record from the TMKG Matter.

II. STANDARD OF REVIEW

The Appellant has the burden of showing that the lower court erred in some respect; to do this, the appellant must place in the Record on Appeal evidence sufficient to support his argument. Conran v. Joe Jenkins Realty, Inc., 263 S.C. 332, 210 S.E.2d 309 (1974). “[R]ecords in another proceeding cannot be considered by an appellate court unless they were introduced and made a part of the Record in the same manner as other evidence” Beall v. Doe, 281 S.C. 363, 315 S.E. 2d 186 (Ct. App. 1984); Betsill v. Betsill, 187 S.C. 50, 196 S.E. 381 (1938).

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). The appellate court is confined to the record in deciding issues on appeal. Richland County v. Carolina Chloride, Inc., 382 S.C. 634, 677 S.E.2d 892 (Ct.App. 2009).

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).

III. ARGUMENT

Appellant filed its Designation of Matter to be Included in the Record on Appeal (“Designation”) and its Initial Brief (“Brief”) on or about November 8, 2013. The Designation contains the following items (numbered as in the Designation) that were not presented to the lower court at any time:

23. Entire contents of Spartanburg County Court File of D&C Builders, Inc. v. TMKG, Inc., 2011-CP-42-04141

Although not one shred of any of the “entire contents” of the above referenced TMKG Matter was made a part of the Record with the lower court by Appellant, Appellant’s Brief utilizes these items as support in its Statement of the Case, Statement of Facts and Arguments presented therein.

“[R]ecords in another proceeding cannot be considered by an appellate court unless they were introduced and made a part of the Record in the same manner as other evidence” Beall v. Doe, 281 S.C. 363, 315 S.E. 2d 186 (Ct. App. 1984); Betsill v. Betsill, 187 S.C. 50, 196 S.E. 381 (1938). 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 Appellant's Designation were made a part of the record in the lower court, this Court must strike those items from Appellant's Designation so that the Record on Appeal to be prepared by Appellant's Counsel reflects those items that are in compliance with Rule 210(c) of the South Carolina Rules of Appellate Procedure.

IV. CONCLUSION

For the reasons stated above, Respondent's Motion to Strike should be granted and the specifically referenced items contained in Appellant's Designation should be stricken as well as any references, support or argument based on such matters in Appellant's Brief.

Respectfully Requested,

September 11, 2014



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Attorney for Respondent

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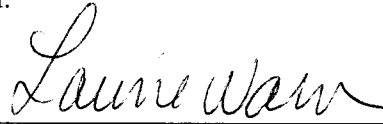
PROOF OF SERVICE

The undersigned hereby certifies that a true copy of the Respondent's Motion to Strike Matter from Appellant's Designation and Brief and Memorandum in Support of Respondent's Motion to Strike Matter from Appellant's Designation and Brief 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 11th day of September, 2014, addressed as follows:

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Co-Counsel for Appellant

Thomas A. Shook, Esq.
Finkel Law Firm, LLC
PO Box 71727
North Charleston, SC 29415
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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September 11, 2014

Hon. Jenny Abbott Kitchings
Clerk of Court of Appeals
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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*

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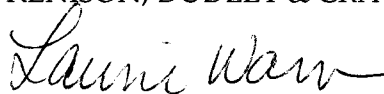
To Whom It May Concern:

Please find enclosed the original and six (6) copies of Respondent's Motion to Strike Matter from Appellant's Designation and Brief and Memorandum of Respondent in Support of Respondent's Motion to Strike Matter from Appellant's Designation and Brief, with Proof of Service in the above referenced matter. Also enclosed is our check in the sum of \$25.00 as and for the filing fee. 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.
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