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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

RECEIVED

JUN 11 2015

SC Court of Appeals

Case No.: 2009-CP-42-00781

Ray and Mary LongAppellants.
v.
Tuck and Howell, Inc.....Respondent.

RESPONDENT TUCK AND HOWELL, INC.'S MOTION TO STRIKE
APPELLANTS' DESIGNATION OF MATTER TO BE INCLUDED IN THE
RECORD ON APPEAL

Respondent Tuck and Howell, Inc. ("Moving Respondent") hereby respectfully moves this Court for an Order striking the matters designated by Appellants for inclusion in the Record on Appeal. As discussed below, none of the matters designated by Appellants were introduced into evidence, proffered to the trial court, or considered by the jury in rendering its verdict.

Pursuant to Appellate Court Rule 209(b), a party "may only propose to include portions of the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal. A party shall not include any matter in his Designation which is not relevant to the appeal." Appellate Court Rule 209(c) further requires that a party provide "a certificate

signed by the party's counsel of record that the Designation contains no matter which is irrelevant to the appeal."

The Appellants' Designation of Matter to be Included in the Record on Appeal does not designate any portions of the transcript, pleadings, orders, or exhibits. See Appellants' Designation of Matter to be Included in the Record on Appeal, pp. 1-2. The Appellants seek to admit testimony which was not offered at trial. They state: "The following witnesses need to be subpoenaed to testify . . . to correct false statements/comments that were made by several of the defendant's witnesses. Mr. Bannister [Appellant's trial counsel] made no objections to these statements *nor did he provide evidence that we had* showing the statements were untrue." Id. at 2 (Italics added). Significantly, the Appellants admit that the matters they seek to designate are matters outside the record. They state: "With only 5 exhibits being registered with the court by Mr. Bannister, most of our evidence was not even presented to the Court. Therefore every single piece of evidence *needs to be presented.*" Id. at 2 (Italics added)

The matters designated by the Appellants are not properly before this court. "It is axiomatic that 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." Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. 24, 36, 491 S.E.2d 571, 577 (1997). See also Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Moreover, an objection must be sufficiently specific to inform the trial court of the point being urged by the objector. Broom v. Southeastern Highway Contracting Co., 291 S.C. 93, 352

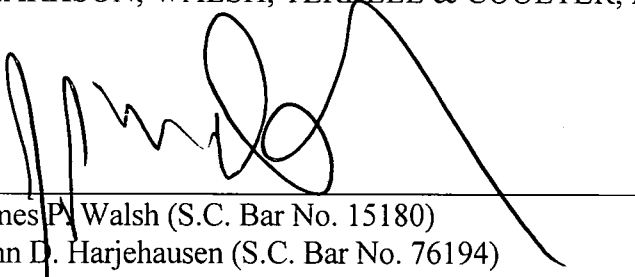
S.E.2d 302 (Ct.App.1986). Matters not included in the record cannot be considered on appeal. See Cobb v. Benjamin, 325 S.C. 573, 482 S.E.2d 589 S.C.App.,1997 (recognizing that “[t]his court may not consider a fact which does not appear in the record on appeal [and] ... where there is no stipulation, a representation of fact by counsel in written briefs, memoranda or made during oral argument, may not be considered by the court where it is unsupported by the record”).

Significantly, the Appellants have not filed or timely served a reply brief or filed a Designation of Matter to be Included in the Record on Appeal with such a reply brief. Appellate Court Rule 208(a)(3) requires that any reply brief be filed within ten days after service of the respondent’s brief. The Initial Brief of Respondent was served on Appellant on March 18, 2015. Accordingly, if the Appellants were going to designate any additional materials to be included in the record on appeal they were required to do so at the time a reply brief was due on March 28, 2015. Appellate Court Rule 209(a) states: “At the time a party serves his initial brief(s) under Rule 208, *to include a reply brief*, he shall also serve on all parties to the appeal a Designation of Matter to be Included in the Record on Appeal.” (Italics added). Here, the Appellants have not designated any portion of the transcript pertaining to the rulings of the trial court, testimony of the witnesses at trial, evidence proffered, or exhibits admitted at the trial with their initial brief and they did not file or serve a reply brief of supplemental designation of matters to be included in the record on appeal.

The Appellants cannot create a new Record on Appeal consisting of matters neither considered by the trial court or the jury. This case is analogous to In re Value-Added Communications, Inc., 224 B.R. 354 (N.D.Tex. 1998). In that case, the appellant sought to strike the appellee's designation of a motion for summary judgment and attached evidence into the record on appeal when it was not considered by the Bankruptcy Court. In striking the documents, the court stated: "An appellate court is to review what happened in the court below; an appeal does not present a party with 'a license to build a new record.' Absent any indication that the Bankruptcy Court considered either appellee's motion for summary judgment or Memorandum of Law, the Court concludes that appellee's designation of record on appeal should be stricken. 224 B.R. at 357 (citing Anthony v. United States, 667 F.2d 870, 875 (10th Cir.1981). See also In re National Century Financial Enterprises, Inc., 334 B.R. 907 (Bkrcty.S.D.Ohio 2005) (granting motion to strike portion of Record on Appeal and holding that evidence regarding summary judgment which was presented by the nonmoving party after a district court's grant of a summary judgment motion is not considered by the Court of Appeals in reviewing the grant of summary judgment). Since none of the matters designated by the Appellants were offered at trial, admitted into evidence, or considered by the trial court or jury, Respondent respectfully requests that the court grant its motion to strike the entirety of Appellants' Designation of Matter to be Included in the Record on Appeal.

Dated this 8th day of June, 2015.

CLARKSON, WALSH, TERRELL & COULTER, P.A.

A handwritten signature in black ink, appearing to read 'James P. Walsh', is written over a horizontal line. The signature is stylized and cursive.

James P. Walsh (S.C. Bar No. 15180)

John D. Harjehausen (S.C. Bar No. 76194)

CLARKSON, WALSH, TERRELL & COULTER, P.A.

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ATTORNEYS FOR RESPONDENT

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Case No.: 2009-CP-42-00781
Appellate Case No.: 2013-002439

Ray and Mary LongAppellants.
v.
Tuck and Howell, Inc.....Respondent.

PROOF OF SERVICE

I certify that I have served the Respondent Tuck and Howell, Inc.'s Motion to Strike Appellants' Designation of Matter to be Included in the Record on Appeal and Proof of Service, by mailing a copy, postage prepaid, to appellants Ray and Mary Long, at 131 Taylor Road, Greer, South Carolina, 29651, on June 8, 2015.

CLARKSON, WALSH, TERRELL & COULTER, P.A.

James P. Walsh (S.C. Bar No. 15180)

John D. Harjehausen (S.C. Bar No. 76194)

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ATTORNEYS FOR RESPONDENT

CLARKSON, WALSH, TERRELL & COULTER, P.A.

ATTORNEYS AT LAW

June 8, 2015

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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Ray and Mary Long, Appellants v. Tuck and Howell, Inc., Respondent
Case No. 2009-CP-42-00781

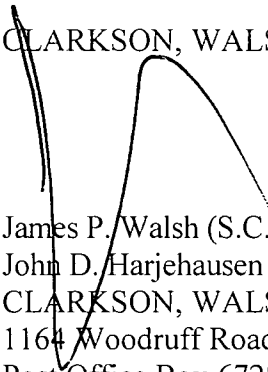
Dear Ms. Kitchings:

Enclosed for filing are an original and six (6) copies of the Respondent Tuck and Howell, Inc.'s Motion to Strike Appellants' Designation of Matter to be Included in the Record on Appeal and Proof of Service. Also enclosed is a check in the amount of \$25.00 for the filing fee.

Thank you for your kind consideration and assistance. Please feel free to call if you should have any questions regarding this matter.

Yours very truly,

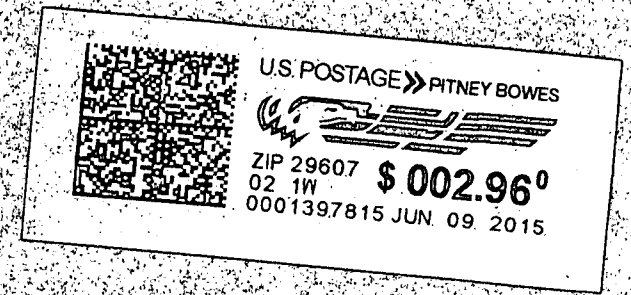
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JPW/jdh

Enclosure(s)

cc: Ray and Mary Long



CLARKSON, WALSH, TERRELL & COULTER, P.A.

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