THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2017-000134

Lower Court Case No. 2016-CP-40-07353

Richardson Construction Company, Inc. ..... Appellant,

v.

Richland County, a political subdivision, and
McClam & Associates, Inc., ... Respondents.

MOTION TO STRIKE MATERIAL DESIGNATED FOR RECORD ON APPEAL

Richland County respectfully moves, pursuant to Rules 240(a), 203(e), 209, and 210(c), SCACR, to strike five documents included in Richardson Construction Company's ("RCC") Designation of Matter to Be Included in the Record on Appeal.

Introduction

It is axiomatic that an appellate court is limited to reviewing only those matters that were raised to and ruled upon by the trial court. Here, this appeal should be about only the trial court's December 22 order, in which it denied RCC's request for a temporary restraining order. at the most, it is about that order and a February 6 order denying a motion to alter or amend the December 22 order.

Despite the limited focus of this appeal, RCC seeks to include five documents in the Record on Appeal that are logically irrelevant to any review of the December 22 order and that were not—and indeed could not—have been raised to and ruled upon by the trial court before the trial court issued the December 22 order. Three of those documents fail to meet this standard, even if the February 6 order is properly before this Court. Therefore, these documents should not be included in the Record on Appeal.

Background

RCC lost its bid for a road-construction project in Richland County, and then it sued the County, claiming that it should have been awarded that project. In its complaint, RCC sought a temporary restraining order and temporary injunction to prohibit the County from executing the contract with another company. The trial court denied RCC's motion for temporary injunction on December 22, 2016 in a ten-page written order.

RCC then asked the trial court to alter or amend that order on January 3, 2017. In addition to pointing out a scrivener's error in the December 22 order, the motion to alter or amend challenged the merits of the trial court's decision to deny a temporary restraining order and temporary injunction. While that motion to alter or amend *was pending*, RCC filed a notice of appeal on January 23. That notice of appeal specifically—and only—appealed the December 22 order.

After the notice of appeal was filed, the trial court denied the January 3 motion to alter or amend on February 6. RCC then filed an amended notice of appeal, challenging the February 6 order, as well as the December 22 order. After filing this amended notice of appeal, RCC moved again to alter or amend, this time on February 22, asking the trial court to change its order denying the first motion to alter or amend to indicate that that order did not end the case. The

trial court granted that motion on March 21, but it reiterated that it denied the January 3 motion to alter or amend.

RCC's Designation of Matter to Be Included in the Record on Appeal includes eleven documents. Only the last five of these are the subject of this motion. These five documents include: (1) the January 3 motion to alter or amend; (2) the February 6 order denying the January 3 motion; (3) the February 22 motion to alter or amend; (4) the March 21 order responding to the February 22 motion; and (5) a January 19 amended complaint.

Argument

The proper contents of the Record on Appeal here should be easy to identify, and RCC's designation of material goes far beyond what rightly belongs in the Record on Appeal in this case. RCC's designated material that does not properly belong in the Record on Appeal should be struck from its Rule 209 designation, and the Record on Appeal should be limited to only those material that falls within the parameters of Rule 210(c), based on the particular orders that RCC has appealed.

An appeal is triggered by a timely filed notice of appeal. *See* Rule 203, SCACR. For an appeal from the circuit court, the notice of appeal must include the specific order that a party is appealing. *See* Rule 203(e)(1)(C), SCACR.

Once an appeal has been properly noticed, parties designate material to include in a record on appeal pursuant to Rule 209, SCACR. What parties are allowed to designate properly for the record on appeal is governed by Rule 210(c), SCACR. That rule specifically provides that the record "shall not . . . include matter which was not presented to the lower court or tribunal." Rule 210(c), SCACR. This part of Rule 210 stems from the long-held "necessity of ensuring that all issues and arguments are presented to the lower court" and the rule that issues

and arguments are preserved on appeal only if they were "they are raised to and ruled on by the lower court." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779–80 (2004).

I. All Five Documents Filed with the Trial Court After the December 22 Order Should Not Be Included in the Record on Appeal.

The filing of a "notice of intent to appeal divests the lower court of jurisdiction over the order appealed." *Andrick Dev. Corp. v. Maccaro*, 280 S.C. 103, 105, 311 S.E.2d 95, 97 (Ct. App. 1984); *see also* S.C. Civil Procedure § 72.B. An order denying an injunction is subject to an interlocutory appeal. *See* S.C. Code § 14-3-330(4). Although an interlocutory appeal from such an order does not stay the case below in "in other respects," it does stay the case as to the order regarding the injunction. *Id.* § 14-3-450.

Applying these rules here makes clear that the trial court did not have jurisdiction to rule on the first motion to alter or amend. When RCC filed its first notice of appeal on January 23, the trial court was divested of jurisdiction over its December 22 order. Therefore, the trial court had no jurisdiction to issue any further rulings on its December 22 order denying the motion for a temporary restraining order and temporary injunction. Had RCC wanted to have the trial court rule on the motion to alter or amend, it should have waited on that decision and then filed its notice of appeal. *See* Rule 203(b)(1), SCACR (providing that the time for a notice of appeal does not begin to run when a timely motion under Rule 59 has been filed until after a party has received written notice of an order granting or denying that motion); *see also Elam*, 361 S.C. at 14–26, 602 S.E.2d at 775–81 (explaining when a second motion to alter or amend is proper and will stay the running of the time to appeal).[1] It did not wait, however, and by filing the notice of

[1] Here, the second motion to alter or amend requested that the trial court clarify that its February 6 Form 4 order did not end the case. Because this motion challenged something that was altered as a result of the first motion to alter or amend, the time to appeal would have also been stayed pending the trial court's decision on this second motion.

appeal *before* the trial court ruled on its motion to alter or amend, it divested the trial court of jurisdiction to rule on that motion.

The only order therefore that was properly entered and thus appealable is the December 22 order. Nothing filed after that order should be included here. None of it was presented to *and* ruled upon by the trial court, which is a requirement for any issue being preserved on appeal. *See Elam*, 361 S.C. at 23, 602 S.E.2d at 779–80.

II. At the Very Least, the Last Three Documents in RCC's Designation Should Not Be Included in the Record on Appeal.

Even if the trial court had jurisdiction to enter the February 6 order, the last three documents in RCC's Designation were not ruled upon by the trial court. Accordingly, these documents should not be included in the Record on Appeal in this case.

A. RCC Appealed Only the December 22 and February 6 Orders.

This appeal is about *only* the December 22 and February 6 orders denying RCC's request for a temporary restraining order and temporary injunction. Indeed, in its amended notice of appeal, RCC's explicitly identified these orders by their dates. *Cf.* Rule 203(e)(1)(C), SCACR. Or put another way, anything that happened in the trial court other than the denial of the temporary restraining order and temporary injunction in the December 22 order and denial of the motion to alter or amend in the February 6 order is not the subject of this appeal.

The purpose of the notice of appeal is to provide fair notice to the appellee about the subject of an appeal. *See Pittman v. Stevens*, 364 S.C. 337, 342, 613 S.E.2d 378, 380 (2005). Here, the only orders of which RCC has given any notice of appealing are the December 22 and February 6 orders. Had RCC also wanted to include any ruling on its second motion to alter or amend on appeal, it could have done so by waiting for the trial court to rule on that motion and then including that order in its notice of appeal. But RCC did not wait, and instead, it jumped the

gun and filed its notice of appeal before the trial court ruled on its second motion to alter or amend. Thus, the only orders that RCC could appeal were the orders that it did appeal: the December 22 and February 6 orders.

B. No Document Filed with the Trial Court After February 6 Is Relevant to RCC's Appeal of the December 22 and February 6 Orders.

Because this appeal is limited to the December 22 and February 6 orders, the Record on Appeal should include only that material that was presented to and ruled upon by the trial court in issuing those two orders. *See* Rule 210(c), SCACR. Logically, anything filed with the trial court after February 6 could not have been presented to and ruled upon by that court as part of its December 22 and February 6 decisions to deny the temporary restraining order and temporary injunction. Therefore, the second motion to alter or amend (filed on February 22) and the order on that motion (entered March 21) were not presented to or ruled upon by the trial court in deciding the orders on appeal here.

Similarly, the amended complaint should not be included in the Record on Appeal. Although it was filed on January 19, nothing in it was presented to or ruled upon by the trial court in the process of that court issuing its December 22 and February 6 decisions.

Nothing about this result should be surprising or objectionable. As our supreme court has noted, the requirement that issues and arguments on appeal be presented to and ruled upon by the lower court has been a bedrock rule in this State "for at least four generations." *Elam*, 361 S.C. at 22, 602 S.E.2d at 779. Here, the three documents that are (9) through (11) in RCC's Designation of Matter to Be Included in the Record on Appeal are necessarily matters that were not raised to and ruled upon by the trial court in deciding its December 22 and February 6 orders that are on appeal here.

Conclusion

Documents that are (7) through (11) in RCC's Designation of Matter to Be Included in the Record on Appeal should be struck from that designation and should not be included in the Record on Appeal.

The below undersigned certifies that he consulted with opposing counsel on the matter encompassed by this Motion unsuccessfully.

Respectfully Submitted,

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June 19, 2017
Columbia, South Carolina

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CERTIFICATE OF SERVICE

I certify that on June 19, 2017 I caused this Motion to Strike to be served upon the following via METHOD OF SERVICE:

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CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of McNair Law Firm, certify that I served the following documents by placing true and correct copies in the U.S. Mail, sufficient postage pre-paid to counsel of record at the addresses shown below, on June 19, 2017:

1. Respondent's Initial Brief;
2. Respondent's Designation of Matter to Be Included in Record on Appeal; and
3. Motion to Strike Material Designated for Record on Appeal

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Re: Richardson Construction Company, Inc. v. Richland County, a political subdivision, and McClam & Associates, Inc.
Appellate Case No.: 2017-000134

Dear Madam Clerk:

Enclosed for filing, please find the original and one copy each of the ***Respondent's Initial Brief*** and ***Respondent Richland County's Designation of Matter to Be Included in the Record on Appeal***. Also enclosed are the original and seven copies of Respondent's ***Motion to Strike Material Designated for Record on Appeal***.

Please file the original of each in your office and return the file stamped extra copies to me in the return envelope provided. By copy of this letter we are serving counsel of record with copies of same.

Very truly yours,

McNAIR LAW FIRM, P.A.

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BEN,V:as
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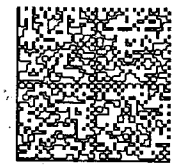

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