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.

REPLY IN SUPPORT OF
MOTION TO STRIKE MATERIAL DESIGNATED FOR RECORD ON APPEAL

Richland County respectfully submits this reply in support of its Motion to Strike Material Designated for the Record on Appeal.

Introduction

Richardson Construction Company ("RCC") has voluntarily withdrawn from its material designated for the Record on Appeal three of the five documents that the County moved to strike. As for the remaining two documents—the January 3 motion to alter or amend (Item 7) and the February 6 order denying that motion (Item 8)—they should not be included in the Record on Appeal because *Hudson v. Hudson*, 290 S.C. 215, 349 S.E.2d 341 (1986), does not apply to the

facts here and because RCC failed to follow the proper procedure after it had filed both a Rule 59 motion and a notice of appeal.

Argument

RCC hangs its proverbial hat on *Hudson*, contending that the filing of a notice of appeal does not deprive the trial court of jurisdiction to hear a Rule 59 motion. That argument, however, cannot keep the January 3 motion and the February 6 order in the Record on Appeal.

I. *Hudson* Does Not Apply Here.

RCC treats the Motion to Strike as a simple matter governed by *Hudson*. But RCC is mistaken: *Hudson* does not apply to this case.

In *Hudson*, the supreme court "h[e]ld that the service and filing of a Notice of Appeal before the filing of timely post-trial motions under Rule 59 by any party does not deprive the lower court of jurisdiction to consider the motions." *Id.* at 216, 349 S.E.2d at 341. There, the notice of appeal was filed three days *before* the Rule 59 motion was filed. *See id.* at 215, 349 S.E.2d at 341.

The order of filings in this case stand in stark contrast to the order of the filings in *Hudson*. Here, RCC filed a Rule 59 motion first, on January 3. Then, almost three weeks later, RCC filed its notice of appeal, before the trial court decided its Rule 59 motion. *Hudson*'s rule that a notice of appeal may be filed before a post-trial motion without depriving the trial court of jurisdiction to hear that motion is thus inapplicable to RCC's situation. When RCC filed the notice of appeal about the December 22 order before giving the trial court the opportunity to rule on its January 3 Rule 59 motion, RCC deprived the trial court of jurisdiction to decide that motion. Therefore, the documents related to that motion are irrelevant to this appeal and should not be included in the Record on Appeal.

The other case on which RCC relies—*Holmes v. East Cooper Community Hospital, Inc.*, 408 S.C. 138, 758 S.E.2d 483 (2014)—is similarly of no help. There, Holmes initially appealed the trial court's grant of summary judgment for the defendants. *See id.* at 148, 758 S.E.2d at 489. Then, the defendants sought sanctions, claiming that the claims were frivolous. *See id.* at 149, 758 S.E.2d at 489. The trial court granted that motion, and Holmes moved to reconsider. *See id.* at 149–50, 758 S.E.2d at 489. A day before the motion to reconsider was denied, Holmes appealed the sanctions order. *See id.* at 150, 758 S.E.2d at 489–90.

In its discussion of the timing of Holmes's filings, the supreme court was focused on whether the fact that Holmes appealed the order granting summary judgment deprived the trial court of jurisdiction to rule on the motion for sanctions. *See id.* at 160, 758 S.E.2d at 495. The court did not address the specific question of whether Holmes properly appealed the sanctions order while the motion to reconsider that order was pending. RCC thus overreads *Holmes*. Carefully studied, the court there did not hold that the *Hudson* rule should be expanded to allow a party to notice an appeal while a motion to reconsider is pending.

II. Items 7 and 8 Should Not Be Included in the Record on Appeal Because RCC Failed to Follow the Proper Procedure.

Even if RCC did not divest the trial court of jurisdiction to decide its January 3 motion to alter or amend by filing the notice of appeal before the trial court decided that motion, this Court still should not allow the January 3 motion and the February 6 order to be included in the Record on Appeal because of RCC's failure to comply with the correct procedure for challenging a trial court's order.

A. RCC Wrongly Filed Both a Rule 59 Motion and a Notice of Appeal.

RCC's first mistake was filing both its motion to alter or amend and its notice of appeal. The South Carolina Supreme Court has made clear a party should file one of these, not both.

Almost two decades after *Hudson*, the South Carolina Supreme Court took up the issue of post-trial motions again in *Elam v. S.C. Department of Transportation*, 361 S.C. 9, 602 S.E.2d 772 (2004). There, the court observed that "a party may attempt to file both a Rule 59 motion and a notice of appeal." *Id.* at 20 n.2, 602 S.E.2d at 778. In that situation, "one or the other will be inappropriate depending on whether the motion is both timely under Rule 59 and permissible under [*Elam*]." *Id.* The court then warned that it is "the party's responsibility to determine whether a Rule 59 motion or notice of appeal is appropriate under the facts of the case, and [the South Carolina Supreme Court] caution[ed] parties not to attempt to avoid this responsibility by the simple expedient of filing both." *Id.*

But RCC did exactly what the supreme court said a party should not do: file both a notice of appeal and a Rule 59 motion. This Court should not condone RCC's flagrant disregard for our supreme court's instruction.

B. RCC Did Not Properly Inform This Court of the Pending Rule 59 Motion.

In addition to its mistake of filing both the notice of the appeal and the Rule 59 motion, RCC committed another error when it did not inform this Court that the Rule 59 motion was pending in the trial court, either in its notice of appeal or by letter. As this Court has explained, RCC had two options under *Elam* and *Hudson*. The first was to "notify the appellate court of the pending post-trial motion in writing," in which case "the clerk will dismiss the case with prejudice."[1] *Simpson v. Simpson*, No. 2007-UP-147, 2007 S.C. App. Unpub. LEXIS 321, at *8

[1] Really, RCC never should have noticed this appeal while the January 3 motion was pending. *Cf. Elam*, 361 S.C. at 14–26, 602 S.E.2d at 775–81 (discussing Rule 59 motions).

(S.C. Ct. App. Apr. 4, 2007).[2] Alternatively, RCC could have "mov[ed] the appellate court to lift the automatic stay of the lower court proceedings so that the post trial motion may be heard." *Id.*

RCC, of course, did neither. Instead, it simply let this case proceed in both the trial court and this Court, and after losing its motion to alter or amend in the trial court, it filed an amended notice of appeal. This failure to choose one of these options left this case in the awkward position of having both this Court and the trial court reviewing the December 22 order at the same time. Thankfully, the timing of events did not create a situation in which both courts simultaneously issued opinions addressing that order. But that could have happened as a result of RCC's failure to inform this Court about the pending motion to alter or amend, and that is why a party in RCC's position is required to inform the appellate court of the pending Rule 59 motion. Items 7 and 8 from RCC's designation of material for the record should be struck, in light of its failure to comply with the proper procedures.

Conclusion

Items 7 and 8 should not be included in the Record on Appeal.

Respectfully Submitted,

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[2] Although this opinion is not binding precedent, *see* Rule 268(d)(2), SCACR, the logic of this opinion about what options RCC had in this situation is compelling.

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July 6, 2017
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CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of McNair Law Firm, certify that I served the Respondent Richland County's Reply in Support of Motion to Strike Material Designated for Record on Appeal by placing a true and correct copy in the U.S. Mail, sufficient postage pre-paid to counsel of record at the addresses shown below, on July 6, 2017:

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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 seven copies of the Respondent Richland County's ***Reply in Support of Motion to Strike Material Designated for Record on Appeal*** along with the original and one copy of the Certificate of Service. 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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