

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APR 22 2019

SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

IN CASE NO. 15-CP-10-6684, THE HONORABLE KRISTI LEA HARRINGTON

Case No. 2018-000692

Zurich American Insurance Company of Illinois,Respondent,

v.

Palmetto Contract Services, Inc.,Appellant.

**APPELLANT’S REPLY TO RESPONDENT’S RETURN
TO APPELLANT’S MOTION TO EXCLUDE
CERTAIN DOCUMENTS IN
RESPONDENT’S DESIGNATION OF MATTERS**

Respondent, Zurich American Insurance Company of Illinois (hereinafter “Zurich”), simply ignores Rule 210(c). Zurich does not even contend the three (3) documents it is trying to include in the Record on Appeal were presented to or considered by the trial judge.

The cases interpreting Rule 210 make it clear that documents and testimony not presented to the trial court cannot be considered by the appellate court or included in the record on appeal. The Supreme Court has “emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration. Issues and arguments are preserved for appellate review only when they are

raised to and ruled on by the lower court.” Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 23-24, 602 S.E.2d 772, 779-80 (2004). In so doing, the Supreme Court noted that Rule 210(c), SCACR, provides the “record on appeal shall not include matter which was not presented to lower court.” Id. In State v. White, the Court of Appeals held that under Rule 210(c) a witness’s statement that was not presented to the lower court could not be properly included in the record on appeal. State v. White, 372 S.C. 364, 387, 642 S.E.2d 607, 619 (Ct. App. 2007), aff’d but criticized on other grounds, 382 S.C. 265, 676 S.E.2d 684 (2009). Similarly, in a recent 2019 case, Justice Hearn stated in a dissenting opinion that an amended complaint that was never submitted to the trial court should not have been included in the record on appeal. Skydive Myrtle Beach, Inc. v. Horry County, No. 2017-001382, ___ S.E.2d ___, 2019 WL 1146068, at *8 (2019) (Hearn, J., dissenting).

Zurich simply ignores the law.

- 1. Transcript of Hearing on Defendant Palmetto’s Motion to Amend Answer and Assert a Counterclaim, dated January 5, 2017, before The Honorable W. Jeffrey Young. (Respondent’s Designation No. 12).**

Zurich contends the transcript of the hearing before Judge W. Jeffrey Young reveals incompatible positions taken by Palmetto. However, Zurich ignores the fact that there was no mention of the hearing before Judge Young during the hearing before Judge Harrington on the motion at issue in this appeal. The transcript of the hearing was not presented to Judge Harrington, and there is nothing to suggest it was ever filed with the court. The first time the transcript appeared is when Zurich designated it as part of the Record on Appeal in this case. Under these undisputed facts, the transcript was not presented to the trial court and could not have been considered by Judge Harrington. Accordingly, it cannot be included in the Record on Appeal.

2. Letter dated August 24, 2017 from William A. Scott, Attorney for Defendant Palmetto to The Honorable Roger M. Young, Sr. [sic] and Defendant Palmetto's proposed Order to Amend Answer and Assert Counterclaim. (Respondent's Designation No. 14).

Zurich does not explain why the letter to Judge Young is relevant or should be included in the record. The proposed order attached to the letter was never signed, never presented to Judge Harrington for review, and never became a part of the record. The proposed order is very similar to the Order actually signed by Judge Nicholson that is part of the record.

Since the letter and attached proposed order were never presented to Judge Harrington, never discussed during the hearing, and could not have been considered by Judge Harrington, the letter and proposed order cannot be properly included in the Record on Appeal.

3. Transcript of Hearing on Defendant Palmetto's Motion to Amend Answer and Assert a Counterclaim, dated September 19, 2017, before the Honorable J. C. Nicholson, Jr. (Respondent's Designation No. 16).

Again, Zurich provides no argument or legal basis for including the transcript of the hearing before Judge Nicholson as part of the Record on Appeal. There is no doubt that during the hearing before Judge Harrington both Palmetto and Zurich referred to the hearing before Judge Nicholson that dealt with Palmetto's Motion to Amend. What was said during the hearing before Judge Harrington is clearly relevant and the transcript of that hearing is appropriately included in the Record on Appeal. Similarly, the Order that Judge Nicholson actually signed is relevant and part of the Record on Appeal. However, the transcript of the hearing before Judge Nicholson was not presented to Judge Harrington during the hearing on the Motion to Strike, and could not have been considered. While Zurich may contend the transcript may support or controvert the parties' arguments, those

issues had to be brought up by Zurich during the hearing before Judge Harrington to be considered. If Zurich failed to argue any such issues during the hearing, Judge Harrington clearly could not have considered them and they cannot now be brought up for the first time during this appeal. Zurich's position is no different than trying to introduce a witness's statement after the fact in lieu of the arguments made during the actual trial, specifically what the Court of Appeals held to be inappropriate in State v. White, 372 S.C. 364, 387, 642 S.E.2d 607, 619 (Ct. App. 2007).¹

Since the transcript of the hearing in front of Judge Nicholson was not presented to Judge Harrington during the hearing on Zurich's Motion to Strike, the transcript cannot be included in the Record on Appeal.

Conclusion

Because there is no dispute that the three (3) documents were not presented to the trial judge, they cannot be included in the Record on Appeal. Zurich provides no legal support for its position that the documents somehow meet the requirements of the Rule. Under these undisputed facts, the documents must be excluded from the Record on Appeal.

[SIGNATURE ON NEXT PAGE]

¹ Zurich's argument that the transcript should be included because Palmetto referred to the hearing in front of Nicholson in its Initial and Reply Briefs is misplaced. Palmetto referred to the hearing in front of Judge Nicholson in the Statement of the Case, giving the procedural history; what Zurich argued in its Memorandum in Opposition to Palmetto's Motion to Amend; and what Zurich's attorneys argued in front of Judge Harrington about the hearing in front of Judge Nicholson. There is no legal basis to include the transcript, particularly since it was not presented to Judge Harrington and she could not have relied on it to issue the order at issue in this appeal.

Respectfully submitted,

PEDERSEN & SCOTT, P.C.



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Attorney for Appellant

Dated this 19th day of April, 2019

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**APPEAL FROM CHARLESTON COUNTY
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Case No. 2018-000692

Zurich American Insurance Company of Illinois,Respondent,

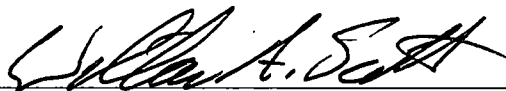
v.

Palmetto Contract Services, Inc.,Appellant.

CERTIFICATE OF SERVICE

I certify that I have served the **Appellant's Reply to Respondent's Return to Motion to Exclude Certain Documents in Respondent's Designation of Matters**, by depositing a copy of it in the United States Mail, postage prepaid, on April 19, 2019, addressed to Larry D. Cohen, Esq., Larry D. Cohen, LLC, P.O. Box 30547, Charleston, SC 29417 and Carolyn H. Blue, Esq., P.O. Box 30845, Charleston, SC 29417.

PEDERSEN & SCOTT, P.C.



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Attorney for Appellant

Dated this 19th day of April, 2019

PEDERSEN & SCOTT, P.C.
ATTORNEYS AT LAW

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April 19, 2019

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

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Re: **Zurich American Insurance Company of Illinois, Respondent**
v. Palmetto Contract Services, Inc., Appellant
Appellate Case No.: 2018-000692/Case No. 15-CP-10-6684

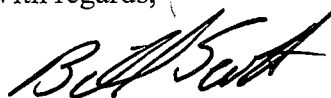
Dear Ms. Kitchings:

Enclosed with respect to the above-referenced matter, please find an original and seven (7) copies of the *Appellant's Reply to Respondent's Return to Appellant's Motion to Exclude Certain Documents in Respondent's Designation of Matters*, with attached Certificate of Service.

Kindly file the documents and return a stamped copy in the return addressed stamped envelope.

If you have any questions, please do not hesitate to contact me.

With regards,



William A. Scott

WAS/teb
Enclosures
Counsel of Record (w/enc.):
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Carolyn H. Blue, Esq.

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