

**IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

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Jan 19 2021

SC Court of Appeals

**APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas**

The Honorable Perry H. Gravely Circuit Court Judge

**Case No. 2020-CP-23-00631
Appellate Case No. 2020-000904**

MARY EARLE

Respondent,

vs.

BOULDER LP

Appellant.

**RESPONSE TO RESPONDENT'S MOTION TO INCLUDE RESPONDENT'S
DESIGNATED MATTER IN RECORD ON APPEAL**

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ARGUMENT

On January 15, 2021, Respondent filed a Motion to include certain documents and material in the Record on Appeal. Appellant objects to the inclusion of this material as it was not presented to either the magistrate court or circuit court and, therefore, would be improper to include and for the Court of Appeals to consider in the first instance.

Respondent acknowledges that the documents “were not physically presented as exhibits.” As such, they were not considered by either the magistrate court or the circuit court. Without being a part of these hearings or included as exhibits in briefing, neither lower court had the opportunity to review such information and consider it. As such, these documents are improper to be included in the Record on Appeal.

Respondent seems to argue that the word “matter” should be read as “topics” rather than “documents.” This is an incorrect and tortured reading of the *South Carolina Appellate Court Rules*. Rule 209(b) states that the Designation of Matter to be Included in the Record on Appeal “must clearly identify what the party desires to have included in the Record on Appeal, and the Designation 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 [See Rule 210(c)].” Rule 210(c) states that the “Record shall not, however, include matter which was not presented to the lower court or tribunal. Matter contained in the Record on Appeal shall be arranged in the following order: the title page, index, orders, judgments, decrees, decisions, pleadings, transcript, charges, exhibits and other materials or documents, and a certificate by appellant.” This makes clear the intention of the Record on Appeal is to include all of the documents that were presented to the lower courts.

As further support for this clear interpretation, subsection (e) discusses the creation of an Index for the Record on Appeal, stating that “[e]very Record on Appeal shall contain an index to the principal matters therein to include orders, judgments, decisions, pleadings, pretrial matters, opening statements, testimony, motions, closing arguments, jury charges, post-trial motions and exhibits. For witness testimony, the index shall show the pages on which direct, cross, redirect and recross examination begins.”

It is clear from the plain language of the rules that “matter” refers to documents, exhibits, and other tangible items that were brought before a lower court for its own consideration. The documents listed by Respondent in her Motion were not presented to the magistrate court or circuit court. While the topics of such documents may have been orally mentioned, this is not the same being provided to the court for its review and consideration. If a document is not presented to the lower court, for its review, it should not be included in the Record on Appeal. *See Fountain v. Fred’s Inc.*, 429 S.C. 533, 554 n.18, 839 S.E.2d 475, 486 n.18 (Ct. App. 2020).

Appellant has not suggested that any Respondent’s discussion of topics that were discussed at the hearing be struck from the briefing, but rather that documents themselves that were not provided to either lower court should not be presented, for the first time, to the Court of Appeals.

CONCLUSION

Based on the language of the *South Carolina Appellate Court Rules*, the documents proposed to be included by Respondent in her Motion should not be part of the Record on Appeal. These documents were not presented to or considered by either the magistrate court or the circuit court, and such information cannot be presented to the Court of Appeals for the first time.

Therefore, Appellant respectfully requests this Court deny Respondent’s Motion to Include Respondent’s Designated Matter in Record on Appeal.

Respectfully submitted,

/s/ Emily I. Bridges

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Dated: January 19, 2021

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PROOF OF SERVICE

The undersigned employee of the law offices of Fox Rothschild LLP, attorneys for Appellant, do hereby certify that service of the RESPONSE TO RESPONDENT'S MOTION TO INCLUDE RESPONDENT'S DESIGNATED MATTER IN RECORD ON APPEAL was made on all counsel of record, specified below, by sending same via e-mail and mailing a copy of the same by United States Mail, postage prepaid, to the following addresses on January 19, 2021:

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Sent via E-mail (ctappfilings@sccourts.org) & US Mail
The Honorable Jenny Abbot Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
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RE: *Mary Earle v. Boulder LP*
Case No. 2020-CP-23-00631
Appellate Case No. 2020-000904

Dear Ms. Kitchings:

Enclosed is our Response to Respondent's Motion to Include Respondent's Designated Matter in Record on Appeal and Proof of Service. These same documents are being both mailed and e-mailed to Clerk's office and counsel for Respondent.

Thank you for your assistance in this matter.

Sincerely,

FOX ROTHSCHILD LLP

/s/ Emily I. Bridges

Emily I. Bridges

EIB/ela

Enclosures

cc: Vanessa Cason, Esquire (via e-mail-vanessa@vcasonlaw.com & US Mail)

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